

October 19, 2026

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Regulation Crypto Assets (Release Nos. 33-11434; 34-106150; File No. S7-2026-27)

Dear Ms. Countryman:

Hyperliquid Policy Center (“HPC”) appreciates the opportunity to respond to the request of the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) for comment on its proposed Regulation Crypto Assets.¹ HPC is an independent research and advocacy organization dedicated to advancing a clear, regulated path for Americans to access onchain markets, including those available on Hyperliquid.²

The Proposal would establish a startup exemption permitting offerings up to \$5 million during a four-year period (Rule 200), a fundraising exemption permitting offerings up to \$75 million per twelve-month period (Rule 300), a conditional investment contract safe harbor (Rule 400) and a “qualified purchaser” definition preempting State registration and qualification requirements (Rule 500). We commend the Commission for proposing a fit-for-purpose framework that expands upon the guidance set forth under the Commission’s March 2026 crypto interpretation.³ The Proposal represents a significant and constructive step toward accommodating crypto asset innovation and entrepreneurship under the existing statutory framework. We generally support the Proposal and urge its prompt adoption. At the same time, several features of the Proposal, as drafted, will not deliver the certainty the Commission intends.

This letter accordingly makes the following five recommendations:

- **First**, the Commission should codify and expand upon the Interpretation’s airdrop analysis in final rule text, anchored to a requirement that an investor furnish definable, tangible consideration.

¹ SEC, *Regulation Crypto Assets*, 91 Fed. Reg. 54510 (Aug. 21, 2026), <https://www.govinfo.gov/content/pkg/FR-2026-08-21/pdf/2026-17183.pdf> (the “Proposal”).

² See Hyperliquid Policy Center, *About*, <https://hyperliquidpolicy.org/about>.

³ SEC, *Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets*, Release Nos. 33-11412; 34-105020, 91 Fed. Reg. 13714, 13721-23 (Mar. 23, 2026), <https://www.govinfo.gov/content/pkg/FR-2026-03-23/pdf/2026-05635.pdf> (the “Interpretation”).

- **Second**, the Commission should address secondary market transactions and intermediary status directly, so that assets distributed in reliance on the exemptions can trade immediately and outside the registrant framework.
- **Third**, the Commission should make the safe harbor usable without a tacit admission of prior investment-contract or issuer status—and should extend protection while essential managerial efforts remain ongoing, rather than only after they have ceased.
- **Fourth**, the Commission should incorporate the Division of Corporation Finance’s recent buyback guidance into the final rule text or a statement in the adopting release, harmonize the “central party” concept and distinguish programmatic from discretionary buybacks.⁴
- **Fifth**, the Commission should make preemption durable, rather than a reward for delay.

I. Airdrops

The Interpretation correctly states that an airdrop of a non-security crypto asset to recipients who provide no money, goods, services or other consideration in exchange for the asset does not give rise to an investment contract due to the lack of an “investment of money.”⁵ As discussed below, we recommend that the Commission codify the Interpretation’s airdrop guidance through rule text in Regulation Crypto Assets—and expand it to capture certain additional categories of airdrops that were not addressed by the Interpretation.

A. *The Commission should codify and expand upon the airdrop analysis in final rule text, not merely restate it in the adopting release.*

We believe that the Commission should codify the Interpretation’s airdrop analysis in the final rule to provide issuers with clarity and reliable certainty to make informed decisions regarding such activities.⁶ The Commission should also expand upon the Interpretation’s analysis to make clear in rule text that this treatment is not limited solely to airdrops in which dissemination of the non-security crypto asset occurs prior to announcement.⁷ The essential question is whether an airdrop is funded by, or conditioned upon, the recipient’s contribution of tangible and definable consideration in return for a financial interest with the characteristics of a security—not the timing of the airdrop announcement.

For example, we recommend that the Commission confirm in the final Regulation Crypto Assets rule text that an airdrop of a non-security crypto asset does not involve an “investment of money” for purposes of the *Howey* analysis, and therefore is not made pursuant to an investment contract, where (i) the distribution is made on or after the date the associated crypto system is

⁴ SEC Div. of Corp. Fin., *Frequently Asked Questions About the Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets* (updated Sept. 28, 2026), <https://www.sec.gov/about/divisions-offices/division-corporation-finance/faqs-crypto-assets> (the “FAQs”).

⁵ Interpretation at 13730–31.

⁶ Proposal at 54531.

⁷ The categories of airdrops addressed under the Interpretation were expressly limited to scenarios in which the issuer does not announce the airdrops prior to disseminating the non-security crypto asset. *See* Interpretation at 13731.

functional, (ii) eligibility is based on the recipient's own efforts or contributions to such crypto system and (iii) the distribution is not a capital-raising transaction. The final rule text should also make clear that the timing of an issuer's announcement(s) should not affect the analysis of airdrops satisfying these conditions, which may be recurring or programmatic.

B. Definable, tangible consideration is the sine qua non of an "investment of money."

Under *Howey*, an investment contract requires, among other elements, an "investment of money."⁸ In the Interpretation discussion concerning airdrops, the Commission correctly observed that "[a]pplicable Federal case law since *Howey* explains that there is no investment of money where the recipient does not provide consideration for the acquired asset."⁹ As support for this statement, the Commission cited *Int'l Bhd. of Teamsters v. Daniel*:

In every case [where courts have found an investment contract exists] the purchaser gave up some **tangible and definable consideration** in return for an interest that had substantially the characteristics of a security.¹⁰

We believe that this concept—*tangible and definable consideration*—is the *sine qua non* of *Howey*'s "investment of money" element. We recommend that the Commission state this explicitly in the final rulemaking. A recipient who receives a token for having used a network, run a validator, supplied liquidity or participated in governance has not funded the issuer's enterprise or made an investment. The relationship is one of rewards, not investment.

An "investment of money" further requires that the investor commit the consideration to the issuer's enterprise in such a manner as to subject itself to financial loss.¹¹ While airdrop recipients may contribute time and computational resources, these activities generally do not subject the recipients to a risk of financial loss. This view aligns with the recent crypto asset holding in *Moen v. SocialChain Inc.*, in which the court rejected the proposition that a commitment of time and resources could constitute sufficient consideration and granted dismissal due to the lack of an "investment of money."¹²

The fact that a token recipient's activities provide a benefit to the network does not mean there was an "investment of money." Nearly every use of a crypto system benefits the system in some way, and the question under *Daniel* remains whether the recipient gave up consideration "in return for a separable financial interest with the characteristics of a security."¹³ A recipient who

⁸ *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

⁹ Interpretation at 13731 n.145.

¹⁰ *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979) (emphasis added); see also *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 330 (S.D.N.Y. 2023) (holding that token distributions to employees and third parties as payment for services did not satisfy *Howey*'s first prong because the "recipients of the [distributions] did not pay money or 'some tangible and definable consideration' to [the issuer]").

¹¹ See *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009) ("The investment of money prong of the *Howey* test requires that the investor commit his assets to the enterprise in such a manner as to subject himself to financial loss.").

¹² *Moen v. SocialChain Inc.*, No. 25-cv-09145-NC, 2026 WL 119693 (N.D. Cal. Jan. 15, 2026) ("The Court has not located, and Plaintiff has not cited to, any authority suggesting that investments of internet data and time amount to an investment of money or how that would subject Plaintiff to a financial loss.").

¹³ *Daniel*, 439 U.S. at 558.

uses a functional network for its own purposes, or who stakes or supplies liquidity to earn the rewards the system’s design makes available, has not done so.

For these reasons, we believe that, in the specific context of airdrops of non-security crypto assets, “tangible and definable consideration” is generally lacking where the airdrop is not part of a capital-raising transaction. Accordingly, we recommend that the Commission provide further guidance in the Regulation Crypto Assets adopting release to clarify its views on how issuers should apply the “tangible and definable consideration” standard in the context of non-security crypto asset airdrops, including through a non-exhaustive illustrative list of examples of what would and would not be deemed to be sufficient consideration for *Howey* purposes.

C. Administrative, ministerial and compliance steps are neither “consideration” nor “further conditions.”

The Interpretation states that, where consideration was provided before the airdrop announcement, the Commission would not view it as consideration in exchange for the airdropped non-security crypto asset, provided recipients are not required to “fulfill **further conditions** subsequent to the announcement of the airdrop, such as . . . performing a specific task (whether or not related to a crypto asset).”¹⁴

Airdrops generally require various administrative, ministerial and/or compliance steps by the recipient to effect delivery.¹⁵ However, these are not tasks or services performed for the issuer’s benefit, and are not “consideration” or “further conditions” for purposes of evaluating whether the recipient has made an “investment of money.” Instead, these are operational and/or compliance steps commonly necessary to enable receipt or dissemination of the non-security crypto asset. Treating such activities as consideration could have the perverse effect of penalizing issuers for implementing prudent compliance processes and controls.

Accordingly, we recommend that the Commission confirm in the final Regulation Crypto Assets rule text and in further guidance in the adopting release that administrative, ministerial and compliance-driven steps taken by a recipient after announcement of a distribution do not constitute either “consideration” to the issuer or “further conditions” within the meaning of the Interpretation for purposes of determining whether the recipient has made an “investment of money” under *Howey*.

D. The Commission should confirm the treatment of qualifying airdrops.

The recommendations discussed above address situations in which recipients of an airdropped non-security crypto asset do not make an “investment of money,” as they provide no definable and tangible consideration to the issuer in exchange for the airdropped asset. As stated in the Interpretation, because the *Howey* test is conjunctive, lack of an “investment of money”

¹⁴ Interpretation at 13731 n.141 (emphasis added).

¹⁵ Examples of such administrative, ministerial and compliance steps may include connecting a wallet, signing a claim transaction, paying a network transaction fee to a third-party validator set, accepting terms of use, attesting to eligibility or completing sanctions, anti-money-laundering or geographic screening.

means that no investment contract is ever formed, and thus no registration or exemption is required.¹⁶

We recommend that the Commission accompany any further guidance in the Regulation Crypto Assets adopting release concerning the “investment of money” element with an express acknowledgment that scenarios falling within that guidance would lack an “investment of money” and that, in the absence of such element, no investment contract is formed, no registration is required and no reliance on an exemption or safe harbor would be necessary. The Commission should further clarify that, since this analysis rests on interpretations of existing law (rather than reliance on a new rule), the analysis would apply equally in connection with retrospective reviews of legacy airdrops that occurred prior to the adopting release.

II. Secondary Market Transactions

The Proposal states that, when a non-security crypto asset becomes subject to an investment contract:

[S]econdary market offers and sales of such a non-security crypto asset would constitute securities transactions that must be registered under the Securities Act or conducted pursuant to an available exemption from registration. The associated investment contract will continue to be transferred to subsequent purchasers of the non-security crypto asset in secondary market transactions until the non-security crypto asset separates from the issuer’s representations or promises.¹⁷

The Proposal’s capital-raising exemptions and proposed “qualified purchaser” definition would have the effect of exempting (or preempting) the initial offer and secondary sales of non-security crypto assets that are associated with a covered investment contract from the Federal and State securities offering registration requirements.¹⁸ However, as reflected above, the Proposal would continue to treat these sales as securities transactions until such time as the non-security crypto asset separates from the issuer’s representations or promises, such as through satisfaction of the proposed Rule 400 safe harbor. Thus, while the Proposal provides an offering pathway, it fails to provide clarity with respect to whether unregistered persons can facilitate transactions in the underlying non-security crypto assets, whether such assets are permitted to freely trade via onchain protocols and how registered intermediaries should treat such assets.

As observed by then-Commissioner Peirce, similar concerns and challenges have historically impaired liquidity with respect to crypto asset offerings under Regulation A, which in part formed Commissioner Peirce’s rationale for proposing in 2020 to exempt persons engaged in certain non-security crypto asset transactions from the requirements to register as an exchange, broker or dealer.¹⁹ The Proposal acknowledges Commissioner Peirce’s 2020

¹⁶ Interpretation at 13731.

¹⁷ Proposal at 54515.

¹⁸ *Id.* at 54518.

¹⁹ See SEC Commissioner Hester M. Peirce, *Running on Empty* (Feb. 6, 2020), <https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-blockress-2020-02-06>.

recommendation and states that the Commission will continue to consider the topic, but that such recommendation is not currently addressed under the Proposal.²⁰

The Proposal correctly recognizes that free tradability and liquidity in the underlying non-security crypto assets are essential to the participation on which crypto networks and applications depend to develop and achieve “network effects.”²¹ The Proposal also states that its proposed divergence from Regulation A to provide for state preemption for secondary transactions is designed to remove impediments to achieving such network effects.²² While this is a helpful step, it does not resolve the secondary market uncertainty that could continue to impair the Proposal’s usability. The Commission’s economic analysis acknowledges as much, observing that the magnitude of the Proposal’s benefits “would depend on the degree to which a liquid secondary market for covered investment contracts develops” and that, if such a market does not develop, those benefits “may be fairly small.”²³

To achieve the benefits of the Proposal, we recommend that the Commission further clarify in the Regulation Crypto Assets adopting release (or elsewhere) the treatment of secondary market transactions involving non-security crypto assets, including the Exchange Act definitions of “exchange,” “broker,” “dealer” and “clearing agency.” In particular, the Commission should consider exercising its authority under Section 36 of the Exchange Act to exempt persons that facilitate secondary transactions in non-security crypto assets subject to a covered investment contract, or transactions in such assets conducted on qualifying onchain protocols, from those definitions for so long as the issuer remains in compliance with the applicable exemption.²⁴ Additionally, to ensure free tradability and liquidity from the outset, we recommend that the Commission reconsider the Proposal’s current characterization of secondary market transactions. Specifically, we recommend confirmation in the text of Regulation Crypto Assets that secondary transactions in non-security crypto assets are not “securities transactions,” regardless of whether such assets were initially offered and sold subject to a covered investment contract. Such treatment would further foster network effects and is consistent with the Commission’s view that, even if an offer of a non-security crypto asset is offered subject to an investment contract, it “does not transform the non-security crypto asset itself into a security.”²⁵

III. Investment Contract Safe Harbor

²⁰ Proposal at 54529 n.192. We note that the Commission’s September 2026 “Innovation Exemption” applies only in the context of tokenized NMS stocks. *See* SEC, *Order Granting Temporary Conditional Exemptive Relief, Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934, From the Definition of “Exchange” in Section 3(a)(1) of the Exchange Act for the Use of Certain Distributed Ledger Trading Venues for Tokenized NMS Stocks and From the Definition of “Dealer” in Section 3(a)(5) of the Exchange Act for Certain Liquidity Providers for Tokenized NMS Stocks, and Request for Comment*, Release No. 34-106402, 91 Fed. Reg. 60168, 60170 (Sept. 22, 2026), <https://www.govinfo.gov/content/pkg/FR-2026-09-22/pdf/2026-19388.pdf>.

²¹ Proposal at 54581 (stating that “the ability of issuers to provide freely tradable and liquid underlying crypto assets is key for incentivizing participation in the crypto networks/applications that support the ability of those networks/applications to develop and achieve network effects.”).

²² *Id.* at 54512.

²³ Proposal at 54581.

²⁴ 15 U.S.C. § 78mm(a)(1). The Commission invoked the same authority in September to exempt certain distributed ledger trading venues and liquidity providers for tokenized NMS stocks from the definitions of “exchange” and “dealer.” *See* Release No. 34-106402, 91 Fed. Reg. at 60168.

²⁵ Interpretation at 13722.

Proposed Rule 400 would deem a covered investment contract to have ceased to exist—and the associated crypto asset not to constitute, represent or be subject to that investment contract—where the issuer has completed or permanently ceased all represented or promised essential managerial efforts, is not making, and does not intend to make, new such representations or promises and files a “transition report” on Form TR with the required certification and supporting analysis.²⁶

We support the inclusion of a safe harbor. However, as drafted, the practical utility of Rule 400 would be limited for two reasons: (i) absent Commission assurances, some parties may view the safe harbor as requiring a tacit admission that the crypto asset previously was subject to an investment contract and that the party relying on the safe harbor was the issuer for that investment contract, and (ii) as proposed, Rule 400 would be available only at the end of the development process.

A. Reliance should not require an admission.

The Commission recognizes in the Proposal that some parties may be reluctant to rely on the safe harbor because they may view doing so as requiring a tacit admission that the crypto asset was previously subject to an investment contract and that the party relying on the safe harbor was the issuer of that contract.²⁷

That concern is well-founded. A party whose legal analysis has concluded that no investment contract was ever formed, or that a prior investment contract has long ceased to exist, cannot reasonably file a certification to the contrary, particularly when doing so could be offered against it in private litigation, in State proceedings or by counterparties. Therefore, while the Proposal states that the safe harbor is open to issuers that did not rely on either of the proposed exemptions, requiring a tacit admission would likely result in the safe harbor being unusable in practice for most legacy issuers.²⁸

Accordingly, we recommend that the Commission amend its proposed Rule 400 to (i) permit a filer to certify, in the alternative, that the subject crypto asset has never been subject to an investment contract (subject to the Commission’s ability to challenge such certification), and (ii) make clear in rule text that the filing of a Form TR or reliance on Rule 400 is not an admission or evidence that an investment contract existed, that the filer was an issuer of any security or that any prior offer, sale or distribution violated the Federal securities laws and that no such filing or reliance may be used by the Commission or by any other person as evidence of those matters in any proceeding. This approach would significantly improve the usability of the safe harbor for legacy projects, which would in turn provide more certainty to the public.

B. Certification should not require a public supporting analysis.

The Proposal asks whether Form TR should require an issuer to include an analysis supporting its determination under proposed Rule 400(a), or whether the Commission should instead permit certification without an analysis.²⁹ We recommend that the Commission permit an issuer to

²⁶ Proposal at 54553-55.

²⁷ *Id.* at 54555.

²⁸ *Id.* at 54554.

²⁹ *Id.* at 54555.

certify its Rule 400(a) determination without including a supporting analysis in the public filing. If the Commission concludes that it requires such an analysis, the Commission should permit the filer to confidentially submit the analysis to the Commission staff pursuant to a non-public (and FOIA-protected) submission process.

A mandatory public analysis would function as a de facto litigation roadmap. It could require the filer to catalog, in a public filing, every statement by every founder, contributor and affiliate that might be characterized as a representation or promise of essential managerial efforts, and to explain why each has been completed or permanently abandoned.

C. Protection should extend while essential managerial efforts are ongoing, not only after they cease.

As proposed, Rule 400 would be available only at the end of the development process. This is a significant limitation because the period during which a team is actively building toward functionality and/or decentralization is the period of greatest legal uncertainty. While the proposed safe harbor would be available to legacy projects that are not relying on either capital-raising exemption, the proposed safe harbor would only apply to projects that have already satisfied its conditions, which is the very trigger that forfeits reporting obligations and preemption protections. It is unclear what purpose would be served by requiring an issuer that did not rely on either exemption to file a Form TR under Rule 400.

Accordingly, we recommend that the Commission expand the proposed safe harbor to cover projects where the essential managerial efforts are actively being carried out, subject to a defined development period, calibrated disclosures, good-faith development toward decentralization or functionality and a deadline or milestones for those efforts to cease. Such conditions would be analogous to those under the startup exemption. The DeFi Education Fund, in its April 2025 letter to the Crypto Task Force, discussed a framework of this type.³⁰

This structure would complement the Proposal. The Proposal's exemptions address initial offerings, while Rule 400 addresses termination. What is missing is a durable status for the asset during the interval between them, together with a defined path out. A framework of this type would also help address the two concerns relating to Rule 400 discussed above, as a filer that has operated within a disclosed development period and satisfied a published exit test has a factual record to point to, rather than an untenable admission to concede.

IV. Buyback Programs

The FAQs state that, where a functional crypto system has no central party, an issuer's announcement of a buyback program for a non-security crypto asset would not constitute a representation or promise to undertake essential managerial efforts.³¹ The FAQs are thoughtful and constructive but lack the legal force necessary to provide sufficient certainty to issuers. Accordingly, the Commission should incorporate the staff's buyback program guidance from Question 2.5 of the FAQs into final rule text or language in the adopting release, along with the following two additional points. Doing so would provide the type of additional guidance that the

³⁰ DeFi Education Fund, *Token Safe Harbor Guiding Principles* (Apr. 18, 2025).

³¹ FAQs at Question 2.5.

Commission asks, in Question 132, whether is required regarding the types of efforts that may be regarded as essential managerial efforts.³²

A. The Commission should harmonize the “central party” concept across the Interpretation, the Proposal and the FAQs.

The term “central party” carries substantial weight in the FAQs’ buyback analysis and throughout the functionality analysis but is not defined therein. Instead, “central party” appears to be defined only in footnote 54 of the Interpretation, as a “person, entity, or group of persons or entities having operational, economic, or voting control of a crypto system.”³³ Neither the Interpretation nor the FAQs defines what constitutes a “group.” For purposes of the Proposal, the Commission explains that the term “group” is “intended to be consistent with the group concept under the beneficial ownership reporting rules.”³⁴

Without the additional context from the Proposal, the Interpretation’s “central party” definition could be misconstrued to capture any crypto system with a governance token, as some combination of unaffiliated holders would always hold a majority of voting power, regardless of the number of holders. Under this reasoning, the validators of any proof-of-stake network, the delegators to those validators, the contributors to any code repository or the liquidity providers on any onchain venue could conceivably be aggregated into a “group” exercising operational or economic control. Accordingly, we recommend that the Commission confirm and harmonize the intended scope of the “central party” concept in the final rulemaking.

In particular, the Commission should state in rule text that “group,” as used in the “central party” context, means two or more persons acting in concert or under common control with respect to the operational, economic or voting control of a crypto system, consistent with the concerted-action principles under Section 13(d) of the Exchange Act, and that dispersed, unaffiliated holders, validators, delegators, core contributors, developers, foundations, liquidity providers, users and other ecosystem participants do not constitute a “group” or a “central party” by reason of their aggregate holdings, stake, delegated stake, contributions or ordinary participation alone—even where their actions may be aligned by the economic incentives of a crypto asset network. The rulemaking should further confirm that “control” is to be applied consistently with its established meaning under the Federal securities laws and is not extended to capture open, permissionless participation.

B. The Commission should distinguish programmatic buybacks from discretionary buybacks.

The FAQs do not define the term “buyback,” nor is such term defined or discussed in the Interpretation or the Proposal. Given the wide array of crypto asset buyback program structures, we recommend that the Commission clarify the intended scope of this term, including

³² Proposal at 54554.

³³ Interpretation at 13719 n.54.

³⁴ Proposal at 54536 n.203 (citing *Modernization of Beneficial Ownership Reporting*, Release No. 33-11253, 88 Fed. Reg. 76896, 76932 (Nov. 7, 2023), and noting that group formation “does not depend solely on the presence of an express agreement” but turns on “concerted actions by two or more persons”); see 15 U.S.C. § 78m(d)(3); 17 CFR 240.13d-5(b).

distinguishing programmatic buybacks from discretionary buybacks. A programmatic buyback executes according to fixed, publicly disclosed parameters (for example, a set share of protocol fees, purchased on a defined schedule, according to a fixed formula or on a continuous basis in the open market through a mechanism anyone can verify onchain) and involves no discretion as to timing, size or the supply from which purchases are made. By contrast, a discretionary buyback is conducted by a central party that decides when to buy, how much and from whom, including from insiders or a treasury. The latter involves information asymmetries and the type of discretion that warrant the protection of the Federal securities laws. The former does not.

We read the “no central party” condition under amended Question 2.5 as directed at the discretionary case. This reading is consistent with the Proposal’s treatment of functional systems generally, where once a network or application is functional, services to secure, maintain, improve or enhance the system or its functionality, or to facilitate network effects, do not constitute essential managerial efforts, and value is expected to derive from the programmatic operation of the system and from supply and demand dynamics, rather than from the efforts of others.³⁵

The Commission should confirm in rule text that an issuer’s announcement, maintenance or execution of a programmatic buyback or burn program with respect to a non-security crypto asset associated with a functional crypto system would not constitute a representation or promise to undertake essential managerial efforts, regardless of the existence of a central party. The Commission should also confirm that a discretionary issuer repurchase program conducted by a central party may constitute a representation or promise to undertake essential managerial efforts, depending on the relevant facts and circumstances, especially where the issuer presents the buyback as creating yield or return for token holders or where the crypto system is not functional.

V. Federal Preemption

Section 18(a) of the Securities Act provides that states may not require registration or qualification of “covered securities.” Section 18(b)(3) further provides that a security “is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule.” As proposed, Rule 500 would define “qualified purchaser” under Section 18(b)(3) to preempt State registration and qualification requirements for offers and sales of covered investment contracts under Regulation Crypto Assets and for certain secondary market transactions.³⁶ The Commission asks in Questions 138 through 142 whether secondary market preemption is necessary and how it should be scoped.³⁷

We believe that such preemption is necessary. As proposed, however, secondary market preemption would continue for only as long as the issuer remains subject to, and current with, the disclosure, filing or periodic reporting requirements of an exemption under Regulation Crypto Assets.³⁸ Consequently, preemption would terminate the moment a covered investment contract

³⁵ Proposal at 54527–28.

³⁶ *Id.* at 54555–58.

³⁷ *Id.* at 54576–77.

³⁸ *Id.* at 54557.

ceases to exist, including if the issuer has qualified for the investment contract safe harbor.³⁹ The Proposal also cautions that, while the safe harbor would control with respect to the Commission's administration of the Federal securities laws, it would not prevent other parties from asserting that a crypto asset is subject to an investment contract or otherwise constitutes a security.⁴⁰

These consequences could create perverse incentives to delay fulfillment of promises, as successful completion and perfection of the Rule 400 safe harbor could expose holders, deployers and venues to registration and qualification regimes across more than fifty jurisdictions. This could further lead to an untenable scenario in which a State securities regulator disagrees with the issuer and the Commission's interpretation of *Howey* and asserts regulatory jurisdiction over issuers that have satisfied the safe harbor, with no means for the SEC to challenge such actions.

To address these concerns, we recommend that the Commission allow issuers that have satisfied the conditions of the safe harbor to elect via Form TR to either (i) opt out of reporting obligations under the Federal securities laws, or (ii) opt into a modified continued reporting obligation. Issuers that opt in would retain "covered security" status with respect to a covered investment contract, conditioned on representations and promises to file an annual certification, rather than full periodic reporting. The annual certification should be limited to identifying the subject crypto asset and the filer, confirming that the filer has not made any new representations or promises of essential managerial efforts with respect to the asset during the period and disclosing any material change to the information previously furnished. Filing the statement should not reopen the full disclosure obligations of Rule 103 or of any exemption, and the Commission should permit the statement to be filed by an unaffiliated person or through onchain governance where no sponsoring entity remains.

This limited expansion of the preemption scope would address the concerns discussed above without unduly infringing on states' rights, as state regulators would retain antifraud authority and have no legitimate interest in regulating investment contracts that have ceased to exist through satisfaction of the safe harbor.

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³⁹ *Id.* at 54552.

⁴⁰ *Id.* at 54555.

VI. Conclusion

HPC supports the Proposal and urges the Commission to adopt it with the five recommended refinements described above. These recommendations will help advance the Commission's stated objective of creating a tailored crypto asset offering regime to facilitate capital formation and accommodate innovation, while ensuring investor protection.

We would welcome the opportunity to discuss these recommendations with the Commission or its staff or to provide any additional information or assistance that would assist the Commission in finalizing the Proposal. Please direct any questions to the undersigned.

Respectfully submitted,

/s/ Jake Chervinsky

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Hyperliquid Policy Center

/s/ Brad Bourque

Brad Bourque
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Hyperliquid Policy Center