FAQs – The SEC's Proposed Regulation Crypto Assets, a New Regulatory Framework

Q: Does the proposal apply to all crypto assets?
A: No. The proposal is focused on certain "covered investment contracts" involving a crypto asset that is not itself a security. It is not a blanket exempt offering regime for all digital assets or tokenized securities.

Q: Could a public company use these exemptions?
A: Potentially, depending on the transaction and the issuer's eligibility. A public company considering a crypto-related offering would also need to assess its existing Exchange Act disclosure and reporting obligations separately.

Q: Would an issuer still need SEC filings?
A: Yes, particularly under the fundraising exemption. The proposal contemplates public SEC filings, financial statements, and ongoing reporting, including a new Form 1-CRYPTO for fundraising offerings.

Q: Can retail investors participate?
A: Yes, subject to the conditions of the applicable exemption. The proposal would generally permit retail participation, although the fundraising exemption would impose investment limits on non-accredited investors.

Q: Can issuers generally solicit investors?
A: Yes. The proposal would permit general solicitation under both exemptions, subject to the requirements of the applicable framework.

Q: When can issuers "test the waters" under the fundraising exemption, and when can sales occur?
A: Under the proposal, testing-the-waters communications would be permitted at any time, including before filing or confidential submission of Form 1-CRYPTO. After filing but before SEC qualification of the offering statement, issuers could make oral offers and certain written offers, in addition to testing-the-waters communications. Actual sales could occur only after qualification, subject to the offering-circular delivery requirements.

Q: Would securities sold under the proposal be restricted securities?
A: No. Unlike many traditional private-placement exemptions, covered investment contracts sold under either the startup exemption or the fundraising exemption would not be restricted securities and would not be subject to rule-based holding periods or resale restrictions. This is one of the more significant practical differences from Regulation D and could facilitate secondary-market liquidity. Companies should nonetheless consider the applicability of other Securities Act requirements, including with respect to affiliates and underwriter status.

Q: What disclosures would issuers need to make?

A: The proposal emphasizes project-specific disclosure, including the issuer's promised managerial efforts, the associated network or application, token economics and distribution, governance, conflicts, and material risks.

Q: What does the safe harbor do?
A: It would allow an issuer to establish that the covered investment contract has ceased to exist once the relevant promised managerial efforts have been completed or permanently ceased, subject to a public filing and supporting analysis. If satisfied, the crypto asset would no longer be subject to such covered investment contract for purposes of the definition of "security."

Q: Does the proposal eliminate state securities law issues?
A: Not entirely. It would preempt certain state registration and qualification requirements for qualifying transactions, but state antifraud authority would remain.

Q: Should companies contemplating crypto-related activities do anything now?
A: Although the proposed rules have not yet been adopted, companies evaluating crypto-related products, capital raises, or other digital asset initiatives should consider whether the proposal could affect transaction structure, disclosure, communications, and future compliance planning.

Q: What financial statements are required?
A: Requirements depend on the exemption and tier. The startup exemption does not require financial statements. For the fundraising exemption, Tier 2 offerings require audited financial statements, while Tier 1 offerings generally do not require an audit (though if an issuer obtained an audit for another purpose, those audited statements generally must be filed).

Q: Can foreign issuers use the proposed exemptions?
A: It depends. The fundraising exemption would require the issuer to be a U.S. entity with substantial U.S. nexus, including a majority of executive officers or directors who are U.S. citizens or residents, more than 50% of assets located in the United States, and principal business administration in the United States. The startup exemption would be more flexible, permitting issuers to be entities, individuals, or groups of individuals or entities, without the same U.S. nexus requirements.

Q: What types of distributions would be covered?
A: The startup exemption's definition of "covered transaction" is broad and would include not only capital-raising transactions but also airdrops, distributions related to staking, governance, or securing a network, and transfers as gas fees or testing compensation—essentially, the various distributions that may be necessary in connection with developing a crypto network or application.

Q: Are there bad actor disqualification rules?
A: Yes. The proposal would incorporate the bad actor disqualification provisions from Regulation A. Exemptions would not be available if the issuer or certain associated persons (including directors, executive officers, 20% beneficial owners, and promoters) have been

subject to specified disqualifying events such as certain criminal convictions, court injunctions, SEC disciplinary orders, or certain other regulatory actions. Events occurring before the effective date of the final rule, if adopted, would not disqualify an issuer but would need to be disclosed to investors.

Q: Can the startup exemption be used more than once?
A: Generally, no. The startup exemption would be available on a one-time basis. The issuer and its affiliates could not subsequently rely on the startup exemption with respect to the same crypto asset, or a "substantially similar" crypto asset. This restriction is designed to prevent circumvention of the four-year duration limit and the $5 million offering limit. The "substantially similar" standard would prevent issuers from making superficial changes to a crypto asset to reset the exemption. Serial entrepreneurs with genuinely different crypto projects, however, potentially could use the startup exemption for separate, distinct crypto assets. The potential ambiguity of the proposed "substantially similar" standard may be a frequent topic raised in comments on the proposal (e.g., would the native token of a forked blockchain be considered "substantially similar" to the native token on the original blockchain).

Q: Does the proposal address integration with other offerings?
A: Yes. The proposal reminds issuers that the integration doctrine and Rule 152 apply when conducting offerings under Regulation Crypto Assets alongside other Securities Act offerings. This is consistent with integration provisions in existing exemptions such as Regulation A, Regulation D, and Regulation Crowdfunding. Issuers contemplating multiple concurrent or proximate offerings would need to analyze whether those offerings should be integrated.

Q: Will the offering limits be adjusted over time?
A: Yes. Proposed Rule 102 would require the SEC to periodically adjust the $5 million startup exemption limit and the Tier 1 and Tier 2 fundraising exemption limits to reflect changes in the Consumer Price Index, at least once every five years. This mechanism is designed to prevent the effective value of the offering limits from eroding over time due to inflation.

Q: Does the fundraising exemption permit continuous or delayed offerings?
A: Yes, in certain circumstances. Modeled on Regulation A, the fundraising exemption would permit continuous or delayed offerings for securities offered by selling securityholders, securities issued pursuant to employee benefit plans, securities issued upon exercise of options or warrants, securities issued on conversion of other securities, securities pledged as collateral, and certain other continuous offerings. However, "at the market" offerings (offerings at fluctuating market prices rather than fixed prices) would not be permitted under the fundraising exemption.

Q: Are there auditor independence requirements?
A: Yes. Tier 2 offerings under the fundraising exemption would require audited financial statements. Audits could be conducted under U.S. GAAS or PCAOB standards, but the auditor would be required to satisfy specified independence requirements. This is consistent with the approach taken in Regulation A and is intended to promote investor confidence in the quality of audited financial information.

Q: How does this affect existing Exchange Act reporting companies?
A: An issuer that is current with Exchange Act reporting requirements under Section 13 or 15(d) would be deemed to have satisfied the ongoing reporting obligations under the fundraising exemption. If the issuer subsequently terminates or suspends its Exchange Act reporting, the Regulation Crypto Assets reporting obligation would either terminate (if the issuer qualifies for suspension) or recommence for subsequent periods. This integration is designed to avoid duplicative reporting burdens for companies already subject to Exchange Act disclosure requirements.

Q: Is this the "Innovation Exemption"?
A: No. The SEC has discussed the implementation of a sandbox for, among other things, the trading of certain digital assets securities on novel platforms such as automated market makers (AMMs) without the need to register these securities or platforms, but this proposal does not address the "Innovation Exemption."