April 18, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-02-22—Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities

Dear Secretary Countryman:

I appreciate the opportunity to comment on the Commission's proposed Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities.

I write on my own behalf and in my personal capacity, informed by more than a decade of work in technology policy. Currently, I am the Senior Research Fellow for Technology and Innovation for Stand Together, a non-profit organization dedicated to breaking the barriers that prevent individuals from reaching their full potential. Before joining Stand Together, I was the acting Chief Technologist at the Federal Trade Commission and an attorney advisor to acting Chairman Maureen K. Ohlhausen. In March of 2018, I established the FTC's Blockchain Working Group to coordinate blockchain- and cryptocurrency-related enforcement and education efforts within that agency.[1]

As to the proposed Amendments: As a preliminary matter, and given the proposal's breadth, scope, scale, complexity, and potential consequences to competition and innovation, a 30-day comment period does not provide adequate time for meaningful comments and fails to provide interested parties with a reasonable opportunity to participate in the rulemaking process. I urge the Commission to extend the comment period by at least 60 days,[2] particularly since the Commission's proposed changes to the definition of "exchange" do not appear to be a logical outgrowth of its initial concept release in September 2020.[3] Other parties have expressed similar concerns, but the Commission has not yet acknowledged those concerns.[4]

Substantively, I also have concerns with the Commission's proposal based on a preliminary review. First, I believe that portions of it exceed the Commission's authority. The Commission is

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[1] Neil Chilson, *It's Time for a Blockchain Working Group* (March 16, 2018), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2018/03/its-time-ftc-blockchain-working-group.

[2] *Cf.* Commissioner Hester M. Pierce, Dissenting Statement on the Proposal to Amend Regulation ATS (Jan. 26, 2022) (suggesting 90-day comment period would be reasonable), https://www.sec.gov/news/statement/peirce-ats-20220126.

[3] *See also id.* ("Unexpectedly for me—and perhaps for many in the market—this proposed amendment goes far beyond the scope of the concept release that was issued with the initial September 2020 proposal.").

[4] *See, e.g.,* Comments of Nicholas Anthony, CATO Institute, Center for Monetary and Financial Alternatives, File No. S7-02-22, at 1-2 (February 22, 2022), https://www.sec.gov/comments/s7-02-22/s70222-20117513-269841.pdf.

a creature of statute, which possesses only those powers that Congress chooses to confer upon it.[5] "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."[6] Congress need not expressly negate an agency's claimed powers; for "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with . . . the Constitution[.]"[7] No matter how well-intentioned its public policy goals may be, the Commission must not "assume . . . that whatever might appear to further the statute's primary objective must be the law."[8] It should "presume more modestly instead that the legislature says what it means and means what it says."[9]

Section 3(a)(1) of the SEC Act of 1934 defines "[t]he term 'exchange' [to] mean[] any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."[10] That definition controls, limiting the statute's reach.[11] Accordingly, the Commission must conform its regulation to the statutory definition of "exchange."

The Commission's proposal fails to do so. For instance, the Commission would define as "exchanges" persons or organizations who "make available … communications protocols" that can bring together buyers and sellers of securities.[12] Yet the statute only covers entities that constitute, maintain, or provide "a market place (sic) or facilities."[13] A communications protocol is not a trading facility. The SEC's own proposal admits as much when it defines "discretionary methods" by contrasting facilities with communications protocols: "(whether by providing a trading facility *or* communications protocols….)."[14] Nor is a communications protocol, as commonly defined, a marketplace. At most, a communication protocol could provide a series of instructions for how to create a marketplace. But just as architectural drawings of the New York

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[5] *See La. Pub. Serv. Com v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986).

[6] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) (cleaned up).

[7] *Ry. Labor Executives' Assn's v. Nat'l Mediation Bd*., 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

[8] *Henson v. Santander Consumer USA Inc*., 137 S. Ct. 1718, 1725 (2017) (cleaned up).

[9] *Id.* (cleaned up).

[10] 15 U.S.C. § 78c(a)(1). The statutory definition of "exchange" has remained unchanged since 1934. *See* SEC Act of 1934, Tit. I, § 3(a)(1), P.L. 291, 48 Stat. 882 (June 6, 1934). Its words should be interpreted as they would be understood as of 1934. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." (cleaned up)). *see also Util. Air Regulatory Grp. v. EPA,* 573 U.S. 302, 324 (2014).

[11] *See, e.g., Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 781–82 (2018) (rejecting the SEC's efforts to "expand" statute's unambiguous definition of "whistleblower" and declining to give Chevron deference to the SEC's more expansive interpretation, even though the statute expressly gave the SEC authority "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of" the statute).

[12] 87 Fed. Reg. 15,504.

[13] 15 U.S.C. § 78c(a)(1).

[14] 87 Fed. Reg. 15,646 (emphasis added).

Stock Exchange Building are not the building itself, similarly a communications protocol is not itself a marketplace or facility. As a result, the SEC does not appear to have statutory authority to include those that make available communications protocols within the definition of "exchange," as it proposes to do.[15] The Commission's proposed expansion of the definition of "exchange" is thus ultra vires and unlawful. The Constitution tasks Congress—not the unelected Commission—with adapting the SEC's authority if needed to address technological innovations such as communications protocols.[16]

Even if the Commission had statutory authority to expand the Act's definition of "exchange" to include those making available an unspecified range of "communication protocols," the Commission's approach raises significant due process concerns because it fails to provide constitutionally adequate fair notice of what entities must comply with the new requirements. The Constitution requires that the Commission respect the due process rights of the companies it regulates. Entities regulated by an administrative agency have a due-process right to fair notice of a regulator's requirements.[17] The agency bears the responsibility to promulgate clear regulations.[18] To provide proper notice, a regulation must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[19] Related to this requirement, regulations must be sufficiently clear and precise so as to not authorize and encourage seriously discriminatory enforcement.[20]

Yet the proposed changes to the Commission's regulations do not define the term "communications protocols." This broad term would, under common usage, sweep in entities that do not appear to have been contemplated in the Commission's initial September 2020 proposal. The Commission has failed to provide constitutionally-required notice of what types of entities it believes provide "communications protocols" that would cause those entities to fall within the reimagined definition of "exchange."

In sum, these issues are, upon first review, substantial – and the Commission should extend the comment deadline to allow commenters to provide adequate feedback. Failing that, the Commission, in any further future action, must both clarify the intended scope of the proposed definition of "exchange" and justify its statutory authority.

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[15] *See* 87 Fed. Reg. 15,496, 15,498, 15,502 (Mar. 18, 2022); *see also* Dissenting Statement, *supra* note 2 ("What the staff is recommending for our consideration today is an expansion in the definition of exchange that would apply to any trading venue, including so-called communication protocol systems, for any type of security, not just for government or fixed-income securities.").

[16] *See also Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 664-65 (2022).

[17] *See Fed. Commc'ns Comm'n v. Fox TV Stations, Inc*., 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2167 (2012) (agencies should provide regulated entities fair warning of prohibited or required conduct).

[18] *See Marshall v. Anaconda Co*., 596 F.2d 370, 377 n.6 (9th Cir. 1979); *see also Ga. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005–06 (11th Cir. 1994) (ascertainable certainty standard).

[19] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926).

[20] *See Fox TV*, supra note 17, 567 U.S. at 253; *Giaccio v. Penn*., 382 U.S. 399, 402–03 (1966) (due process violated if "judges and jurors [may] decide, without any legally fixed standards, what is prohibited and what is not in each particular case").

Thank you very much for your time and attention.

Respectfully submitted,

/s/ Neil Chilson
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