



June 12, 2023

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

RE: Proposed Amendments to Exchange Act Rule 3b-16 (SEC Release No. 34-97309)

Dear Ms. Countryman,

We appreciate the opportunity to comment on the U.S. Securities and Exchange Commission (“SEC” or “Commission”) proposal to amend the definition of “exchange” in Rule 3b-16 under the Securities Exchange Act of 1934 (“Exchange Act”) to include “communication protocol systems” which support the trading of digital asset securities (the “Proposal”).¹

We support the SEC’s efforts to offer clarity on how digital assets can fit within existing regulatory frameworks. However, we believe the expansion of the “exchange” definition in the Proposal is overly broad and would capture activity beyond the scope of the intent and letter of the Exchange Act.

The Commission proposes to include within the definition of “exchange” in Rule 3b-16(a) of the Exchange Act, “an organization, association, or group of persons that constitutes, maintains, or provides a market place or facilities for bringing together buyers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange if it is not subject to an exception under Rule 3b-16(b) and it: (1) brings together buyers and sellers of securities using trading interest; and (2) makes available established, non-discretionary methods (whether by providing a trading facility or communications protocols, or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade.”²

In response to comments on the initial proposal from Coinbase, Delphi Digital, Blockchain Association, Defi Education Fund, and others, the Commission wrote “if, for example, an organization deploys a smart contract that the organization cannot significantly alter or control but constitutes a market place for securities under existing Exchange Act Rule 3b-16 or Rule 3b-16, as proposed to be amended, then that organization would be responsible for compliance with federal securities laws for that market place.”³

¹ *Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 regarding the Definition of “Exchange”*, Release No. 34-97309 (April 14, 2023), available at <https://www.sec.gov/rules/proposed/2023/34-97309.pdf>.

² *Id.* at pg. 6.

³ *Id.* at pg. 30.

We do not offer comment on the Commission's desire to capture decentralized marketplaces which can be functionally controlled by their code deployers or other persons in a pragmatic sense, such as through upgrading the smart contracts by usage of an administrative key or through decentralized governance. This letter is focused on one issue in the Proposal -- the Commission's attempt to expand the Exchange Act to hold the deployer(s) of immutable code, i.e., code which the "organization cannot significantly alter or control," liable for registration as an exchange and compliance with federal securities laws.

Anyone can create software and upload it to decentralized public blockchains, and that software can be written such that no further changes are possible ("immutable software" or "immutable code"). Deployers of immutable code cannot be considered to "constitute, maintain, or provide a market place or facilities" in the context of decentralized blockchains. Indeed, they have merely written software and released it for free for the whole world to review, replicate, and interact with. To extend federal securities laws, and accordingly the regulatory reach of the SEC, to immutable software code itself, or to the authors of immutable software code, is a dramatic expansion of the Commission's authority and could be considered regulation of free speech.

The Commission states in the Proposal that "a software developer who, acting independently and separate from an organization, publishes or republishes code without any agreement (formal or informal) with any person for that code to be used for a function of a market place or facilities for bringing together buyers and sellers of securities may be less likely to be acting in concert to provide a market place or facilities for bringing together buyers and sellers."⁴ We need more clarity than "may be less likely." At a minimum, the final release needs to be clear that such person **would not be** acting in concert. Furthermore, a group of developers, or anything that constitutes an "organization... acting in concert" should not be required to register under the Exchange Act if the code they write and/or distribute, through a public blockchain or otherwise, functionally creates a market place **if that code cannot be altered and the market place cannot be "controlled" in any meaningful sense**. Whether the code is written by one individual or a group of individuals, if their immutable code cannot be modified or altered after deployment, that software will never be able to comply with the Exchange Act, even if the group of persons that wrote and deployed it registered with the Commission.

As a practical matter, expanding the definition in this way would also be unenforceable. For example, certain blockchains act as permissionless, decentralized networks to which any person in any jurisdiction can upload software code. The effect of this expansion would be to create an unenforceable prohibition on software development and deployment which can be done pseudonymously and from any location in the world, moving the Commission beyond financial regulatory enforcement and into a role of policing the open internet.

⁴ Id. at pg. 28 (emphasis added).

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The Commission must recognize and reckon with the fact that that the deployment of widely available decentralized computation networks has made possible the creation of autonomous software, some of which may create marketplaces. No amount of rulemaking will change this fact.

For the reasons discussed above, the SEC should strike from the Proposal any language that would subject mere deployers of immutable code to an uncertain and unenforceable licensing regime.

Respectfully submitted,

/s/ Alex Thorn

Head of Firmwide Research
Galaxy Digital