CHAMBER OF DIGITAL COMMERCE

June 1, 2020

Via email (rule-comments@sec.gov)

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

Re: File No. S7-05-20; Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (Releases Nos. 33-10763; 34-88321)

Dear Ms. Countryman:

The Chamber of Digital Commerce (the "Chamber") appreciates the opportunity to comment on amendments that the U.S. Securities and Exchange Commission (the "Commission") recently proposed with respect to, among other things, rules governing certain types of offerings under the Securities Act of 1933 (the "Securities Act").[1]

The Chamber is the world's largest blockchain trade association. Our mission is to promote the acceptance and use of digital assets and blockchain technology, and we are supported by a diverse membership that represents the blockchain industry globally. Through education, advocacy, and close coordination with policymakers, regulatory agencies, and industry across various jurisdictions, our goal is to develop a pro-growth legal environment that fosters innovation, job creation, and investment. We represent the world's leading innovators, operators, and investors in the blockchain ecosystem, including leading edge startups, software companies, global IT consultancies, financial institutions, insurance companies, law firms, and investment firms.

The Jumpstart Our Business Startups ("JOBS") Act was focused on the critically important public policy objective of expanding startup and small business access to capital by leveraging technology and democratizing investment opportunity. As we shift to the next phase of the global pandemic crisis, the importance of this objective will be acute. We commend the Commission for looking at ways to increase the benefits and

[1] Facilitating Capital Formation and Expanding Opportunities by Improving Access to Capital in Private Markets, 85 Fed. Reg. 17956 (Release Nos. 33-10763; 34-88321) (Mar. 31, 2020) (the "Release").

utilization of existing JOBS Act exemptions and encourage additional measures to ensure that we reinvigorate the capital formation process by leveraging technology, including blockchain and distributed ledger technology ("DLT").

Our comments focus on the Commission's proposal to increase offering limits under Tier 2 of Regulation A under the Securities Act[2] and to increase both offering limits and investment limits under Regulation Crowdfunding, which was adopted under provisions of both the Securities Act and Securities Exchange Act of 1934 (the "Exchange Act").[3] The Chamber supports these proposed amendments to both regulations. We ask, moreover, that the Commission consider increasing offering limits under Tier 1 of Regulation A as well and refrain from limiting the types of securities that may be offered under Regulation Crowdfunding. The Chamber opposes limitations on the types of securities eligible under Regulation Crowdfunding. Finally, the Chamber requests that the Commission provide greater clarity and guidance on how tokenized securities may be offered in reliance on Regulation A and Regulation Crowdfunding.

Regulation A

The Chamber supports the Commission's proposal to raise the limit for Tier 2 offerings from the current total of $50 million[4] conducted in a 12-month period, and agrees that higher Tier 2 issuance limits could encourage increased capital raising through Regulation A.[5] We request, however, that the Commission consider raising the total 12-month investment limit to $100 million, rather than $75 million, as proposed in the Release. The $100 million limit is more consistent with the average size of initial public offerings ("IPOs") and, thus, would provide a viable alternative to IPOs for smaller offerings.[6]

Higher limits would improve the issuer's economics in a Tier 2 offering, allowing the issuer to spread the offering costs it incurs across a broader investment pool. Larger Tier 2 offerings likewise would provide economic incentives for broker-dealers to participate in such offerings. Finally, an increase in Regulation A offerings would provide non-accredited retail investors with additional investment opportunities. This category of retail investors has fewer investment options as compared to accredited investors, particularly with respect to smaller issuers. Growth in Regulation A offerings would mean growth in retail investment opportunities. We note that while increasing offering

[2] 17 C.F.R. §230.251 *et seq.*
[3] 17 C.F.R. §227.100 *et seq.*
[4] 17 C.F.R. §230.251(a)(2).
[5] According to Commission data, issuers raised approximately $2.2 billion in offering conducted under Tier 2 Offerings during the period between implementation of amendments to Regulation A in 2015 and December of 2019. Approximately 10 percent of those offerings reached the $50 million limit across completed and ongoing offerings. Release at 17961, 17990.
[6] Jennifer Rudden, *Median Deal Size of IPO in the United States from 2005 to 2019,* STATISTA (Mar. 2, 2020), https://www.statista.com/statistics/251149/median-deal-size-of-ipos-in-the-united-states/. The average IPO size between 2005 and 2019 was $119.92 million. *Id.*

limits should help bring greater investment opportunities to retail investors, existing investor protections under Regulation A would remain in place. Non-accredited investors would continue to be subject to investment limits equal to the greater of a percentage of their annual income or net worth unless the securities offered will be listed on a national securities exchange.[7]

The Chamber also requests that the Commission take steps to improve secondary market trading of securities issued under Tier 2 of Regulation A. Although Tier 2 offerings are exempt from state registration requirements, secondary market sales are not. We believe that exempting secondary market sales from state registration requirements would encourage broader use of Tier 2 and foster liquidity in securities issued in such offerings.

Further, the Chamber encourages the Commission to consider increasing Tier 1 limits to $40 million. The Commission emphasized in the release adopting the current Tier 1 offering limits that such limits had to be high enough to be useful for issuers.[8] The low utilization of Tier 1 offerings suggests that the limits may not be high enough. As with Tier 2 limits, increased Tier 1 limits should make such offerings more attractive by improving offering economics for issuers and broker-dealers.

Finally, we encourage the Commission to exempt Tier 1 offerings and secondary market trading of securities issued in such offerings from state registration requirements. We believe that state registration requirements raise the costs and regulatory burdens associated with Tier 1 offerings and discourages use of Tier 1 offerings to raise capital. Exempting Tier 1 offerings and securities issued in such offerings from state registration requirements would not undermine investor protections. Non-accredited investors would continue to be subject to investment limits equal to the greater of a percentage of their annual income or net worth, and the regulatory regime governing trading of such securities would remain unchanged.

Regulation Crowdfunding

The Chamber supports the Commission's proposal to increase offering limits from $1.07 million[9] to $5 million[10] and to increase investment limits as described below. The Commission states that evidence suggests that some issuers may not utilize crowdfunding because the offering limits are too low.[11] The Chamber believes

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[7] 17 C.F.R. §230.251(d)(2)(C).
[8] Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21806, 21813 (Release Nos. 33–9741; 34–74578; 39–2501) (Apr. 20, 2015).
[9] 17 C.F.R. §227.100(a)(1).
[10] Release at 17944.
[11] According to the Release, crowdfunding offerings raised $108 million between May 2016 and December 2018, which was substantially less than amounts raised in small Regulation D offerings during the same period. The Commission noted that the average offering size during this period was $213,678. *Id.* at 17992.

increasing issuance and investment limits could stimulate greater use of Regulation Crowdfunding by smaller issuers. The larger issuance limits may make crowdfunding a viable option for more issuers, particularly those issuers that want to raise more than $1.07 million, but for which a Regulation A offering may be cost prohibitive and for which a Regulation D offering is too limiting in terms of the investor pool. Crowdfunding offerings permit greater participation of retail investors, in contrast to Regulation D offerings, which permit limited participation of non-accredited investors.

Increasing investment limits likewise could stimulate increased interest in crowdfunding offerings. Eliminating crowdfunding investment limits on accredited investors would make the treatment of accredited investors consistent across offering types; accredited investors are not subject to such limits in Regulation D offerings, for example.[12] Moreover, allowing an interested accredited investor to invest more than $107,000 in a given crowdfunding offering may assist issuers in meeting their capital raising goals.

Amending rules governing application of non-accredited investor limits likewise could have a positive effect on capital raising. Rather than capping investments of non-accredited investors at a percentage equal to the lesser of their annual income or net worth, the cap would be the greater of those two products, which should allow such non-accredited investors to increase their investment in crowdfunding offerings, should they so choose. As the Commission notes, this approach to investment limits would be consistent with those contained in Regulation A.

While the Chamber supports the Commission's proposed increases in the offering and investment limits under Regulation Crowdfunding, it does not support limiting the types of securities that may be issued under this regulation to debt securities, equity securities, and securities convertible or exchangeable into equity securities, including guarantees of such securities. The Commission has determined as a policy matter to protect retail investors from the potential risks of participating in crowdfunding offerings by limiting the amount those investors may invest in such an offering in a given year.[13] The Commission's example in support of its proposed limitation is an instrument known as a "Simple Agreement for Future Equity" ("SAFE"), which it believes provides potential investor confusion with respect to descriptions of SAFEs and resulting investor dissatisfaction.[14]

Limiting the types of securities that may be offered under Regulation Crowdfunding will serve not only to decrease the investment options available to retail investors but will also impede issuers' ability to form capital commensurate to their needs. Rather than limit investment choice for investors or flexibility of capital structure for issuers, the

[12] *Id.* at 17994.
[13] 17 C.F.R. §227.100(a)(2)(ii).
[14] Release at 18001.

Chamber believes the better approach would be to require and enforce more clear and robust descriptions of the securities offered.

The Chamber further requests that the Commission confirm that tokenized securities and tokens deemed to be securities because they are investment contracts can be issued under Regulation Crowdfunding irrespective of whether they are debt securities, equity securities, and securities convertible or exchangeable into equity securities, including guarantees of such securities.[15] As a general matter, the Commission should clarify that such assets are "eligible securities" for purposes of Regulation Crowdfunding. The Commission references this circumstance at footnote 353 of the Release:

> Certain securities that may not have all of the characteristics traditionally associated with equity or debt securities, such as tokens, *may* qualify as Regulation A eligible securities, depending on the particular facts and circumstances. If adopted, we believe the proposed amendment to eligible securities under Regulation Crowdfunding *would be applied in the same manner."*[16] (Emphasis added.)

As written, however, the footnote leaves open the question as to whether they will be afforded the same treatment. We believe that the Commission should confirm that footnote 353 means that "tokens," either when issued as tokenized securities or as an investment contract, would remain "eligible securities" under Regulation Crowdfunding. Said another way, the Commission should make clear that tokens would qualify as eligible securities under Regulation Crowdfunding as well as Regulation A and are not barred from utilizing either exemption, regardless of whether or not the proposed limitation to Regulation Crowdfunding is adopted.

The Chamber believes, moreover, that the Commission should clarify how Regulation A and Regulation Crowdfunding apply to tokenized securities and tokens that are investment contracts given the unique nature of those instruments. These tokens often do not neatly fit into debt or equity security baskets yet are still under the remit of the

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[15] Tokens issued using blockchain or DLT can be securities in several ways. First, they can either represent or symbolize an instrument that meets the definition of a "security" under Section 2(a) (1) of the Securities Act. Any traditional security, including an equity interest in a company, a limited partner interest in a venture capital fund, and a range of other debt- and equity-like instruments, potentially can be issued as a tokenized security. In addition, tokenized securities can also be asset-backed, representing interests in real estate or fine art, among other assets. Second, they can be or represent an investment contract as interpreted by the Supreme Court in *SEC v. W.J. Howey Co* and others. Each raises unique questions with respect to compliance obligations under the Securities and Exchange Acts. *See* CHAMBER OF DIGITAL COMMERCE, UNDERSTANDING DIGITAL TOKENS: MARKET OVERVIEWS AND GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS, 15-16 (2d ed. 2019), https://digitalchamber.org/wp-content/uploads/2020/02/Understanding-Digital-Tokens.pdf.

[16] Release at 18001, n. 353.

securities laws (including both the Securities Act and the Exchange Act). Application of Regulation A or Regulation Crowdfunding triggers certain requirements that do not fit well when applied, such as certain of the ongoing reporting requirements. As the SEC applies its learnings from its interactions with these types of tokens, we suggest the Commission clarify, in conjunction with industry input, how such assets can be issued under these regulations, taking into account the unique attributes of these assets.

Capital Raising and Tokenized Securities

The Chamber appreciates and supports the Commission's proposal to increase the offering and investment limits described above but believes that the Commission should use this opportunity to provide greater clarity and guidance on how tokenized securities can be issued under these regulations and rules. As the Commission recognizes in the Release, capital can be raised through existing JOBS Act exemptions, including Regulation Crowdfunding, Regulation A, and Rule 506, and through the use of tokens.[17] The technology underlying the tokens offers increased transparency while protecting personally identifiable information, increased functionality (*e.g.*, dividend payments), automated compliance, and real-time settlement of transactions.[18] Leveraging this technology to power securities transactions would result in a broader, more efficient, and ultimately more successful capital raising effort than through traditional means.

The Chamber believes that comprehensive Commission guidance on offering tokenized securities, as well as tokens that are investment contracts, would both promote innovation in the U.S. capital markets and stimulate growth in those markets. In particular, the Commission should specify the requirements under Regulation A and Regulation Crowdfunding so that they are consistent and transparent for issuers, and investors receive necessary disclosures.

Supporting Innovation in the Blockchain Industry

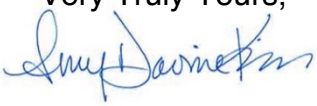
We also believe it is worth considering how new capital raising measures can reinforce the objectives of the JOBS Act by increasing capital raising options for promising young ventures. To that end, the Chamber supports Commission and legislative efforts to create safe harbors aimed at allowing these ventures to develop blockchains, blockchain-based infrastructure, or DLT, as well as tokens that will function on those blockchains, infrastructure, and DLT in a manner that would not require the issuance of such tokens to be immediately registered under the Securities Act, but would protect persons and entities who invest in such ventures.

The Chamber greatly appreciates the opportunity to comment on the proposed rule amendments set out in the Release and appreciates the Commission's consideration of

[17] Release at 18001, n. 351.
[18] *See* CHAMBER OF DIGITAL COMMERCE, *supra* note 17.

the above comments and concerns. Please feel free to contact us with any questions regarding our comments.

Very Truly Yours,



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