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Crypto Task Force
Securities and Exchange Commission
450 Fifth Street NW
Washington, DC 20001

Commissioner Pierce and members of the Crypto Task Force:

Thank you for the opportunity to add our thoughts on the ongoing discussion regarding crypto assets. CrowdCheck Law has had extensive experience in trying to fit crypto assets into the existing regulatory framework and agree that, indeed, "There's too much confusion." While as a matter of policy we have never participated in the debate as to the nature of a "security" under *Howey* and other precedent, once an issuer or project manager has decided to comply with securities law, we have had extensive experience in trying to fit such issuances into available exemptions under the Securities Act, specifically Regulations A, CF, D and S. That experience in many cases has proved frustrating.

You suggest the following taxonomy as a basis for discussion:

- *First, crypto assets that are securities because they have the intrinsic characteristics of securities;*
- *Second, crypto assets that are offered and sold as part of an investment contract, which is a security, even though the crypto asset may not itself be a security;*
- *Third, tokenized securities; and*
- *Finally, all other crypto assets, which are not securities, in my view, and are currently the biggest category.*

We believe there may be some merit to defining the term "tokenized" (as used in the third category) as we have encountered the term being used to mean different things. Issuers and industry participants may use the term "token" to refer to shares whose ownership is reflected on a private permissioned blockchain controlled by a registered transfer agent, which in many ways are no different than traditional securities. Or it can mean economic, ownership or governance rights recorded on a public blockchain. Does the term just mean that distributed ledger technology is used somewhere in the

record-keeping process, or does it (or should it) have a more specific meaning? The distinction between tokenized traditional securities and native digital assets needs to be clear.

We are also aware of a significant amount of confusion in the market with respect to "tokenized securities", even in published commentary by sophisticated individuals. The implication is that the "tokenization" somehow changes the nature of the security represented by the token, which is not the case. Tokenization in some cases may make clearance and settlement more efficient, but if the tokenized instrument is a security, securities laws still apply.

With respect to the final category, there are clearly many types of instruments that are not, in our view, securities, such as the "memecoins" covered by the recent Corporation Finance guidance, or assets that are commodities or currency. However, we believe that the Commission needs to make it clear that when such assets become part of an investment contract, as set out in the second category, the fact that memecoins (or orange groves, or barrels of whisky) are not securities themselves does not affect the fact that normal securities laws apply to that contract.

Security Status

With respect to your questions 1 and 2, we would note the need, not only for guidance as to whether assets fall within the definition of "security," but also the need for detailed guidance as to what <u>type</u> of security a particular asset is and how it should be treated under GAAP. We have experienced the frustration of having to debate with the Commission's legal and accounting Staff the appropriate accounting treatment of particular assets, ending up with a solution that treated certain assets as equity for legal purposes and debt for accounting purposes (or vice versa). We respectfully suggest that placing the burden of making (and defending) this determination on the issuer on a case-by-case basis is both unfair to the issuer and does not help potential investors' ability to make informed investment decisions.

Public Offerings

While some tokens differ from traditional securities only with respect to the token "overlay," as you note, some securities and their "issuers" do differ from traditional securities in significant ways. Nevertheless, we believe that it is possible to provide meaningful disclosure in offerings subject to Commission review (both registered and Regulation A).

We believe that Regulation A currently provides the most appropriate option for public offerings of either tokenized traditional securities or novel crypto assets, without violence to the original objectives of Regulation A or the need for significant rulemaking. Regulation A's disclosure requirements as currently in effect were well-designed for raising capital for early-stage companies, and can apply just as well to early-stage projects. All that is required is for the drafters and reviewers of disclosure to take a common-sense, principles-based approach. For example, references to board members and managers may not apply precisely to some blockchain projects, but stepping back and asking the question "who is the investor relying on to create this project, what control do they have and what experience do they have that assures the investor they can develop and manage the project?" will generally elicit the appropriate information. In some cases Rule 261, which provides that securities eligible to use Regulation A be equity, debt, or securities convertible or exchangeable for equity, may prove an obstacle. However, we believe that the statutory intent underlying this rule (in a statute that pre-dates

the crypto world) of providing funds for innovative early-stage projects would support either a C&DI or a no-action position that “equity” in this context should include early-stage crypto projects.

We further note that the “exit” provisions to Regulation A ongoing reporting suit native digital assets that are securities at inception, but cease to be securities once a specific blockchain project has been sufficiently developed. We believe the Commission should confirm that when an instrument that was a security ceases to be such (by reason of decentralization, completion of a blockchain project, etc.) there are no longer 300 holders of record of the applicable class of securities.

We do not otherwise believe that rulemaking is necessary, although some of the changes that we would like to see to Form 1-A in general (for example, clarification as to how to complete Part I for Series LLCs) would also assist its use for crypto assets.

More extensive rulemaking would be necessary to be able to register non-traditional crypto assets on Form S-1.

Safe Harbor from Registration

We believe that if an exemption under Regulation A is available, there would be no need for a safe harbor of the kind described.

Trading

While not directly responsive to a secondary trading question posed, our experience with secondary trading for securities issued pursuant to Regulation A warrants another look at preemption of state laws for issuers who are current in their reports pursuant to Regulation A. As noted above, we believe Regulation A is a suitable exemption for issuers pursuing public offerings of either tokenized traditional securities or novel crypto assets. However, those issuers face a surprise when finding out that secondary trading -- which is one of the key reasons to utilize tokenized securities or crypto assets -- is not available without complying with state laws for secondary trading, which often based on the outdated "manual" exemption. In fact, the manual exemption provides less information for potential secondary purchasers of securities than the ongoing reporting requirements of Regulation A. An issuer that is reporting under Regulation A, and is trading through an appropriately registered trading system or exchange, should not be required to also comply with the various requirements for secondary trading at the state level. This is an appropriate case for preemption.

Tokenized Securities

We believe the Commission should emphasize the fact that creating a digital representation of a security on a blockchain or issuing a security directly on a blockchain does not change the substance of the security but may benefit issuers and investors, especially with respect to clearance and settlement. We believe that this is not well understood by potential issuers or investors. We further note that issuers in particular often do not understand that matters of corporate law are governed by the state of organization and that the Commission cannot directly affect requirements relating to the keeping of the corporate ledger and the like.

We appreciate the Task Force's outreach with respect to these matters and would be happy to provide any further information that you might find useful.

Yours truly,

/s/ Sara Hanks

Founding Partner
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