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VIA ELECTRONIC SUBMISSION

Crypto Task Force Chairman, Commissioner Hester M. Peirce

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0213

Re: Securities Exchange and Broker Status of NFT Marketplaces

Dear Commissioner Peirce:

Ozone Networks, Inc. (**OpenSea**), based in the United States, is the world's first digital marketplace for non-fungible tokens (**NFTs**). We are grateful for the opportunity to provide input to the Crypto Task Force as it takes on the important work of reviewing the Securities and Exchange Commission's (**Commission**) approach to digital assets.

In this submission, we address why NFT marketplaces like OpenSea are not exchanges or brokers under the Securities Exchange Act of 1934 (**Exchange Act**) and what steps the Commission should take to confirm this non-regulated status.

Non-Security Status of NFTs

At the outset, we note that NFTs are not securities under the Exchange Act. Among other reasons, most NFTs are collectibles or art, purchased primarily for consumption, novelty, or aesthetic value rather than for investment. This point aligns with your dissenting statement concerning the *Stoner Cats* enforcement action, which noted that "the Commission must take care to preserve the ability of artists to sell their work, build a fan base, and involve that fan base in future creative endeavors."¹ While the non-security status of NFTs is beyond the primary scope of this submission, OpenSea stands ready to

¹ Comm'rs Peirce & Uyeda, *Collecting Enforcement Actions: Statement on Stoner Cats 2, LLC* (Sept. 13, 2023).

address this issue further should the Crypto Task Force find it beneficial to its work on digital assets.

Even if, however, the Commission were to conclude that some NFT transactions constitute securities, classifying OpenSea and similar NFT marketplaces as securities exchanges or brokers would be regulatory overreach. We provide the core reasons why below.

NFT Transaction Flow: From Minting to Transfer

Relevant to the regulatory discussion, NFTs generally exist on blockchains that have smart contract functionality, such as Ethereum, Solana, or Polygon. Each blockchain defines its standards and protocols for NFTs, ensuring the token behaves like a non-fungible asset and can include metadata. The creation process, known as “minting,” involves executing a smart contract on the blockchain to generate a unique token ID and embed relevant metadata. This metadata typically includes details like the creator’s information and may contain a link to an external asset, such as a media file containing a piece of digital art.

After minting, the NFT can be viewed on marketplaces like OpenSea, where owners can list an NFT for sale, and potential buyers can make offers to purchase the NFT from its holder. If a buyer and seller agree on terms, the party accepting the terms of sale will send a signed transaction payload to the blockchain for execution. Once the blockchain confirms that the parties’ conditions are met, the NFT smart contract instantaneously triggers the transfer of ownership from the seller’s wallet to the buyer’s. This is all executed on-chain, with the blockchain validating and recording the transaction, thus performing the transfer.

Importantly, this decentralized transfer happens without a central authority, such as OpenSea, executing the transaction. OpenSea serves as an online marketplace that allows people to discover NFTs and connect with buyers and sellers. However, the actual transfer of value and assets is carried out on the blockchain through publicly disclosed smart contracts.

Why NFT Marketplaces Like OpenSea Are Neither Exchanges Nor Brokers

NFT marketplaces like OpenSea are neither exchanges nor brokers under federal securities law. The Commission’s 2024 Division of Enforcement had a different view and issued a Wells Notice to OpenSea, asserting that OpenSea was acting as an unregistered securities exchange and broker. Against this backdrop, OpenSea takes this opportunity to

explain why there should be no question that OpenSea and NFT marketplaces like it are neither exchanges nor brokers under federal securities law.

OpenSea Is Not an Exchange

The Exchange Act defines an “exchange” as any organization that “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 . . .” 15 U.S.C. § 78c(a)(1). Rule 3b-16 further clarifies that, to qualify as an exchange, an organization must (1) bring together the orders of “multiple buyers and sellers” and (2) use “established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact . . .” 17 C.F.R. § 240.3b-16(a).

OpenSea does not meet the definition of an exchange primarily because:

- **OpenSea Does Not Bring Together “Multiple Sellers”**

To qualify as an exchange, a marketplace must have multiple sellers. As the Commission clarified when proposing Rule 3b-16, marketplaces do not meet the “multiple sellers” requirement if they have “multiple sellers, but only one seller for each instrument.”² In other words, having multiple sellers across different instruments does not qualify; there must be multiple sellers of the *same* asset.

The requirement of multiple sellers presumes the asset being traded is fungible, meaning it is interchangeable with identical items. If the token is unique, there is only one possible seller: the current owner. Therefore, an NFT marketplace, which showcases unique digital items, cannot qualify as an exchange.

- **OpenSea Is Not a “Trading Facility” and Does Not “Set Rules”**

To qualify as an exchange, a marketplace must also provide for the non-discretionary interaction of orders, either as part of a trading facility or by setting rules. In traditional securities markets, the “facility” is the system that executes trades. For NFTs, trade execution occurs on the blockchain itself, where transactions are recorded and executed through smart contracts. OpenSea helps its users format instructions for these

² SEC, Regulation ATS Proposing Release, 63 F.R. 23504, 23508 (Apr. 29, 1998); *see also* SEC, Regulation ATS Adopting Release, 63 F.R. 70844, 70849 (Dec. 22, 1998) (a trading system that has “only one seller for each security” does “not meet the multiple buyers and sellers test”).

transactions but does not control or execute them. Accordingly, OpenSea does not provide the system that executes the transactions (the “trading facility”).

Similarly, the “rules” that govern NFT transactions are not set by OpenSea. Instead, they are encoded in the blockchain’s protocol and smart contracts. These rules are immutable. When users post a bid or an offer for an NFT through OpenSea, they are agreeing to the terms of a smart contract that governs the NFT’s transfer of ownership. As such, OpenSea does not meet the regulatory definition of an exchange, which requires either a trading facility or rules set by OpenSea to govern non-discretionary order interactions.

While exchanges like the New York Stock Exchange provide an execution facility and set rules for order interactions, marketplaces like OpenSea offer an informational infrastructure, with transaction execution handled by the blockchain and smart contracts. OpenSea’s role is more akin to marketplaces like eBay, where buyers and sellers interact independently (though OpenSea does not provide the ancillary transaction services, such as facilitating payment processing and shipping, that eBay does).

OpenSea Is Not a Broker

The Exchange Act defines a “broker” as “any person engaged in the business of effecting transactions in securities for the account of others.” 15 U.S.C. § 78c(a)(4)(A). To establish an entity’s broker status, courts have typically required the Commission to demonstrate “a regularity of participation in securities transactions at *key points* in the chain of distribution.” *SEC v. StratoComm Corp.*, 2 F. Supp. 3d 240, 262 (N.D.N.Y. 2014) (cleaned up and emphasis added), *aff’d*, 652 F. App’x 35 (2d Cir. 2016).

Several non-dispositive factors are relevant to this determination, including whether the entity: (1) actively solicits investors; (2) receives transaction-based compensation; (3) handles securities or funds of others in connection with securities transactions; (4) processes documents related to securities sales; (5) participates in the order-taking or order-routing process; (6) sells, or previously sold, securities of other issuers; (7) is an employee of the issuer; (8) is involved in negotiations between the issuer and investor; or (9) provides investment advice or merits assessments of securities.³

The only judicial decision addressing whether blockchain interfaces like OpenSea qualify as brokers is *SEC v. Coinbase*. That case involved the Commission’s claim that Coinbase’s self-custodial wallet software, which provided access to third-party liquidity for fungible

³ See *SEC v. GEL Direct Trust*, 2023 WL 3166421, at *2 (S.D.N.Y. Apr. 28, 2023); *SEC v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984); *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003); *Foundation Ventures, LLC v. F2G, Ltd.*, 2010 WL 3187294, at *5 (S.D.N.Y. Aug. 11, 2010).

token trading, was an unregistered securities broker.⁴ Although not in the NFT context, the court's dismissal of the Commission's claim is instructive. Merely charging transaction fees and displaying pricing information, as Coinbase's software did, was insufficient to confer broker status. Notably, Coinbase did not custody funds, negotiate trading terms, make investment recommendations, arrange financing, process trade documentation, or conduct asset valuations.

OpenSea does not act as a broker for many of the same reasons, including because its marketplace features:

- **No solicitation or investment advice.** NFT marketplaces like OpenSea passively display information, such as NFT listings, offers, and transfer history, without soliciting investments or providing trading advice. They adopt a "permissionless" approach, presenting blockchain data neutrally and with minimal filtering that is designed to avoid user harm, not influence trading decisions.
- **No negotiation or execution of transactions.** NFT marketplaces assist buyers and sellers in making offers and engaging with each other directly, but the transactions themselves are carried out peer-to-peer, with users sending transaction instructions via their self-custodied wallets to the blockchain for execution. OpenSea simply formats these instructions using the programming logic of the underlying blockchain.
- **No custody of customer assets.** Ownership of NFTs is always recorded on blockchains, and buyers and sellers retain custody of those digital assets by holding the private keys associated with their NFTs. Marketplaces like OpenSea merely provide an interface for users to explore NFTs. Users custody their own assets in third-party wallets, and through their wallets, they initiate NFT transactions. At no point does OpenSea either control or hold users' NFT assets.
- **No financing arrangements, processing trade documentation, performing valuations, or other hallmarks of broker services.** Like Coinbase's wallet software, OpenSea does not engage in any other services traditionally associated with brokering.

The Policy Rationales Behind the Securities Laws Confirm These Results

The policies guiding these regulatory frameworks reinforce the clear inapplicability of the exchange and broker definitions to OpenSea.

⁴ *SEC v. Coinbase, Inc.*, 726 F. Supp. 3d 260, 306-07 (S.D.N.Y. 2024).

Exchange Regulation Is Designed to Address Self-Dealing and Inequitable Access, Risks That Are Absent for NFT Marketplaces Like OpenSea

Congress created the regulatory framework for exchanges to mitigate risks, such as self-dealing or inequitable administration, that could undermine investor confidence and market integrity. See, e.g., 15 U.S.C. § 78k-1 (empowering the Commission to issue regulations prioritizing fair competition among market participants and order execution without the participation of a dealer).

By contrast, marketplaces like OpenSea, which provide an interface and communication tool for blockchain transactions, do not present such risks. These transactions are “inherently transparent,” as noted in your call for submissions to the Crypto Task Force, and there is no risk of undisclosed self-dealing or unfair privileging of traders in the execution of orders. The transaction logic set forth in smart contracts, along with the blockchain rules that underpin them, are publicly accessible for anyone to examine. As a rule, blockchains and smart contracts do not prioritize some market participants over others, but even if they did, that would be easily discovered by market participants—who would take their business elsewhere.

As a result, the regulatory solutions designed for traditional exchanges do not apply to marketplaces like OpenSea. For instance, Section 6(c) of the Exchange Act prohibits membership in national securities exchanges by anyone other than registered broker-dealers, based on the understanding that investors may participate in exchanges only through these members. 15 U.S.C. § 78f(c). By contrast, NFT marketplaces like OpenSea do not grant access only through privileged “members.” The opposite: they require users to self-custody assets and to engage in transactions directly with counterparties through immutable smart contracts. Therefore, the concern that users must depend on intermediaries to access OpenSea and that those intermediaries may abuse their privileged position is entirely absent. In short, the transparency and direct market access provided by blockchain-based platforms make the foundational premises of exchange regulation inapplicable.

Broker Regulation Is Designed to Protect Clients from Conflicts of Interest and Financial Instability, But These Concerns Do Not Apply to NFT Marketplaces

Broker regulation is intended to protect brokers’ clients by imposing requirements such as capital maintenance, professional conduct standards, and recordkeeping obligations. These requirements are designed to prevent conflicts of interest, financial instability, and misconduct by market participants. Such protections are superfluous for platforms built on decentralized transaction protocols like OpenSea, because the underlying risks are absent.

For example, NFT marketplaces do not hold or facilitate the flow of funds or assets and thus cannot commingle them, making capital requirements and financial recordkeeping irrelevant. Moreover, OpenSea does not recommend investments or execute transactions on behalf of users. Instead, users retain full control over their digital assets, and OpenSea merely provides an interface to view publicly available information and to allow users to initiate peer-to-peer transactions on the blockchain. As such, the regulatory burden that applies to brokers, including obligations to disclose material information and recommend suitable investments, is unnecessary for NFT marketplaces.

OpenSea's Recommendations for Regulatory Response

The Division of Enforcement's previous move to extend exchange and broker regulations to OpenSea appeared to be focused more on expanding the Commission's jurisdiction than on addressing the particular risk profiles of NFT marketplaces and considering whether existing regulations are relevant to those risks. OpenSea encourages the Commission to reject that approach and instead let the actual issues guide the regulatory solutions.

In addition, the Commission's past enforcement agenda has created uncertainty. We therefore urge the Commission to remove this uncertainty and protect the ability of U.S. technology companies to lead in this space.

First, we propose that the SEC clearly state that NFT marketplaces like OpenSea do not qualify as exchanges under federal securities laws for the reasons already discussed.

To this end, the Commission should issue informal guidance in the near term, such as an interpretive release or staff bulletin, clarifying how Rule 3b-16 applies to NFT marketplaces. In preparing this guidance, the Crypto Task Force should specifically address the application of exchange regulations to marketplaces for non-fungible assets, similar to the recent staff statements on meme coins and stablecoins.⁵ This clarification would offer immediate benefits to NFT collectors, buyers, and sellers, as well as the broader NFT ecosystem, by removing regulatory uncertainty.

In addition, to resolve this issue permanently, we recommend that, as part of any rulemaking for blockchain-based platforms, the Commission ensure that any revisions or additions to Rule 3b-16 maintain and expand the exclusion of marketplaces that do not bring together orders of "multiple buyers and sellers," as well as the exclusion of marketplaces that do not establish trading facilities or set rules. In this regard, it would be

⁵ See Div. of Corporation Fin., SEC, *Statement on Meme Coins* (Feb. 27, 2025); Div. of Corporation Fin., SEC, *Statement on Stablecoins* (Apr. 4, 2025).

appropriate for the SEC to use its authority under Section 36 of the Exchange Act to specifically exempt NFT marketplaces like OpenSea, thereby eliminating any doubts regarding the statute's interpretation and application.

Second, we urge the Commission to clarify that marketplaces with the following characteristics are not brokers under the Exchange Act:

- The marketplace aggregates and presents information about NFTs via a website, app, or other interface but does not provide valuations, solicitations, or investment advice regarding specific NFTs or projects. The SEC should make clear that merely highlighting or promoting new or popular NFTs or providing descriptive, fact-based information does not constitute solicitation or investment advice.
- The marketplace provides a website, app, or other interface that facilitates communication of offers to buy and sell NFTs between users and transmits transaction instructions to blockchains for execution, including via smart contracts. However, the marketplace does not execute transactions or control, hold, or direct the use of users' digital assets, including NFTs.

These criteria exclude marketplaces like OpenSea, which function as exploration tools, without interfering with the Commission's role in overseeing entities that intermediate securities transactions in ways that enable abuse.

As a next step, we ask the SEC to clear the existing industry confusion on this issue by publishing informal guidance. In the longer term, we invite the Commission to exempt NFT marketplaces like OpenSea from proposed broker regulation under Section 15(a) of the Exchange Act.

Should the Crypto Task Force have any questions regarding these recommendations or the other topics discussed above, we would be pleased to address them.

Respectfully submitted,

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