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June 26, 2025

Submitted via SEC Website

Commissioner Hester M. Peirce
Chair of SEC Crypto Task Force
crypto@SEC.GOV
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Public Offerings of Investment Contracts and Related Disclosure

Dear Commissioner Peirce and Members of the SEC's Crypto Task Force:

On behalf of The Digital Chamber (“**TDC**”), we respectfully provide this submission in response to Commissioner Hester M. Peirce’s February 21, 2025 statement soliciting public input on regulatory issues related to blockchain technology and crypto assets (the “**Statement**”).¹ In particular, this letter addresses Questions 7, 8, and 9 of the Statement related to public offerings. TDC has already provided and will also be providing additional responses to many of the other questions posed by the Statement in separate submissions.

As the Crypto Task Force is well aware, various types of assets may be digitally represented using blockchain technology, allowing them to be more easily recorded and transferred. That includes financial assets, such as stocks and bonds, which when represented and transferred using blockchain technology are often referred to as “tokenized securities” or “digital securities.” For purposes of this letter however, our discussion is generally limited to offerings of blockchain-native assets that confer certain capabilities with respect to a blockchain, distributed ledger, or other similar technology (a “**Token Network**”), or represent a tangible or intangible asset, and are recorded using a Token Network, but do not represent a note, stock, or other financial instrument that confers legal rights of debt or equity in a legal entity (“**Tokens**”).²

¹ Comm’r Hester M. Peirce, *There Must Be Some Way Out of Here*, SEC (Feb. 21, 2025), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-rfi-022125>.

² We do not believe the mere technological act of tokenizing an asset alters whether the asset meets the definition of a security under the Securities Acts (or result in the creation of a new or separate security). Thus a tokenized equity security is an equity security and should not require special or different treatment under the federal securities laws.

As explained more fully herein, we believe the Securities and Exchange Commission (“SEC” or “Commission”) should issue targeted relief for public offerings of investment contracts that involve Tokens. We include a proposal of suggested guidelines that are designed to identify and elicit the disclosure of material information regarding Tokens that may be offered pursuant to investment contracts as **Appendix A** attached hereto. Finally, we suggest changes to Regulation A that would make it more viable for offerings of investment contracts involving Tokens.

Question 7

Could disclosure guidance and/or targeted relief address the concern, or are new forms or other mechanisms needed?

While new forms and rulemaking will ultimately be required in the context of public offerings of investment contracts, targeted exemptive relief issued on a faster timeline will promote the SEC’s three-part mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation until any new forms and rules can be proposed and adopted. As part of this targeted exemptive relief, the SEC needs to set forth clear criteria for what constitutes a security subject to any proposed disclosure regime.

Our submission focuses on Tokens that are not securities, but that may be offered and sold pursuant to investment contracts. Investment contracts are securities and may require registration along with certain bespoke disclosures that are unique to investment contracts which are not equity securities.

As an initial matter, TDC believes the Commission should take immediate action to clarify that “investment contracts” are not equity securities. While that clarification can be addressed by staff or Commission guidance, targeted exemptive relief is necessary because many rules and requirements under the Securities Act of 1933, as amended (the “**Securities Act**”), and the Securities Exchange Act of 1934, as amended (the “**Exchange Act**,” and together with the Securities Act, the “**Securities Acts**”), are dependent on the type of security at issue (e.g., equity or debt).

Below, we explain why investment contracts are not equity securities and why, as a result, exemptive relief is necessary beyond disclosure guidance.

Investment Contracts are not “Equity” and Therefore Require Bespoke Disclosures

Legal precision requires distinguishing between the characteristics of equities, investment contracts, and Tokens.³ As explained in our previous Crypto Task Force submission, Tokens

³ Although the Statement and our letter focuses on public offerings, these characteristics exist regardless of whether the security is offered and sold in a registered public offer or pursuant to an exemption from registration.

may be the subject of an investment contract, but the Token itself is not the investment contract.⁴ And investment contracts, as a category of securities, are fundamentally different from traditional equity securities, such as stock. While clearly “securities” under the federal securities laws, the legal, financial, and operational characteristics of investment contracts diverge in critical ways from stocks and other equities.⁵ These differences should inform the Commission’s regulatory approach, as the Commission has done in the past when confronted with other unique types of securities, such as asset-backed securities and those issued by real estate investment trusts.⁶

Like “investment contract,” the term “stock” is included in the definition of a security but is not separately defined in the Securities Acts or regulations thereunder. However, courts interpreting the definition of a security have identified those characteristics usually associated with common stock as: “(i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value.” *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n.2 (1985) (quoting *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 851 (1975)).

Certain of those characteristics usually associated with stock could also be present with respect to a Token, without the Token itself necessarily being a security.⁷ For example, many Tokens clearly have the capacity to appreciate in value just like other commodities such as gold or silver. Nevertheless, the Token is separate and distinct from the security being offered—which is an investment contract.

An example can help illustrate the legal distinction between stocks and investment contracts. One of the defining features of stock is its negotiability—a concept embedded in the traditional understanding of equity securities, as evidenced by the reference to certificates and transferable shares in the definition of equity security under the Securities Act.⁸ Negotiability refers to the capacity of a security to be transferred freely and unconditionally.⁹ In contrast,

⁴ See our previous letter to the Crypto Task Force, *Re: Security Stats of Certain Crypto-Asset (Token) Transactions* (Apr. 28, 2025), available at <https://www.sec.gov/files/ctf-written-input-tdc-rfi-042825.pdf> at p. 7.

⁵ The term “equity securities” is defined differently under the Securities Acts (*cf.* 15 U.S.C. § 78c(a)(11) and 17 C.F.R. § 230.405). But common to each definition, and a central characteristic of equity securities, is a similarity to “stock.”

⁶ See Chairman Paul S. Atkins, Keynote Address at the Crypto Task Force Roundtable on Tokenization (May 12, 2025), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-crypto-roundtable-tokenization-051225>.

⁷ See our previous letter to the Crypto Task Force, *Re: Security Stats of Certain Crypto-Asset (Token) Transactions* (Apr. 28, 2025), available at <https://www.sec.gov/files/ctf-written-input-tdc-rfi-042825.pdf>.

⁸ 17 C.F.R. § 230.405.

⁹ See Black’s Law Dictionary: “Negotiable” means “capable of being transferred by delivery or indorsement when the transferee takes the instrument for value, in good faith, and without notice of conflicting title claims or defenses.... The truth is that ‘negotiable’ has an original and an acquired signification. Originally, it meant transferable; but afterwards it was used to indicate the supposed effects of transfer, namely, that the transferee (1) took free from equities, and (2) could sue in his own name.” See also the definition of “instrument” (a “written legal

negotiability is not a requisite feature of investment contracts. Though some investment contracts may be negotiable, investment contracts may also take the form of “arrangements or schemes” that are inherently particularized and context-specific. These “arrangements” are not necessarily embodied in a certificate, nor are they always reduced to a negotiable instrument that can be readily transferred or traded. Rather, the defining characteristic of an investment contract lies in the economic realities of the particular transaction. As the Supreme Court noted in *Marine Bank v. Weaver*, 455 U.S. 551, 560 n.11 (1982), “each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.” More recently, multiple courts have struggled with the novel question of whether and when secondary transactions in Tokens are investment contracts. This case-by-case approach reflects the bespoke nature of investment contracts.

Investment contracts are not part of a company’s capital structure in the way equity or debt securities are. Indeed, the subject of how to describe, and, separately, how to present on the issuer’s financial statements, one of the only Tokens registered as a security was the subject of multiple detailed correspondence between SEC staff and the issuer of that Token.¹⁰ This distinction underscores the reality that investment contracts, though regulated as securities, do not result in ownership interests in an enterprise or as claims against its assets. Rather, they often represent a contingent right or expectation tied to the performance of an enterprise or promoter.

The fact that certain investment contracts may include investment features that are similar to stock or equity does not itself make them equities. This principle is well-established in case law. For example, participatory bonds may carry voting rights, a feature traditionally associated with equity. Nevertheless, these rights do not change the fundamental nature of the instrument as debt rather than equity. Similarly, even when an instrument possesses “stock-like” characteristics, it may not necessarily fall within the definition of a stock security under *Landreth*.¹¹

SEC Staff has acknowledged these distinctions in recent guidance.¹² In a statement titled *Offerings and Registrations of Securities in the Crypto Asset Markets*, the Division of Corporation Finance noted:

“SEC rules require an issuer to provide a materially complete description of its securities [being offered]. The specific disclosure depends on the particular type of security, with these rules setting forth requirements for specifically identified

document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate”), and “negotiable instrument.”

¹⁰ See, e.g., Letter to INX Limited Re: Amendment No. 2 to DRS F-1 (Sept. 21, 2018), Comment #1, #33. See also Chairman Paul S. Atkins, Keynote Address at the Crypto Task Force Roundtable on Tokenization (May 12, 2025) at fn. 5, available at <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-crypto-roundtable-tokenization-051225>.

¹¹ *Great Lakes Chemical Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376, 387–89 (D. Del. 2000).

¹² SEC, Div. of Corp. Fin. Staff Statement: *Offerings and Registrations of Securities in the Crypto Asset Markets* (Apr. 10, 2025), <https://www.sec.gov/newsroom/speeches-statements/cf-crypto-securities-041025>.

types of securities, such as traditional capital stock and debt securities. These rules also include a general category for securities that are not specifically identified, referring to them as ‘other securities’ or ‘other kinds of securities.’ *In the context of offerings and registrations of securities in the crypto asset markets, we have observed disclosure where issuers have considered how this requirement applies in the context of their particular security, such as where an offering or registration involves a subject crypto asset.*” (emphasis added).

This recognition is a helpful starting point. However, the Commission could and should go further by issuing guidance tailored specifically to investment contracts. Such guidance would clarify that investment contracts are not equity securities and outline how existing disclosure obligations apply to non-equity securities such as investment contracts that do not fall neatly into the categories of stock or debt, thereby promoting consistency, legal certainty, and more effective investor protection. Furthermore, the type of security (e.g., equity, debt, other) being offered not only informs the specific disclosures that must be made, but also triggers substantive requirements under the Securities Acts and rules thereunder, discussed below.

Exemptive Relief is Necessary

Certain registration requirements under the Securities Acts and exemptions therefrom have different requirements for equity securities and other types of securities. For example:

- Regulation S and Rule 144 each establish different requirements for equity securities and debt securities;
- Section 12(g) of the Exchange Act requires issuers to register a class of *equity securities* if meeting certain thresholds; and
- Various forms under the Securities Act require filers to accurately identify the “type” of security offered (e.g., Form D, Form 1-A).

Additionally, the Exchange Act imposes several ongoing obligations specific to issuers of *equity securities*, including:

- Certain parts of Section 13 of the Exchange Act:
 - Tender offer rules, e.g., Rules 13e-3, 13e-4, and Regulation 14D;
 - Beneficial ownership reporting rules in Regulation 13D-G; and
 - Institutional investment manager reporting in Rule 13f-1.
- Section 14 of the Exchange Act (proxy rules);
- Section 16 of the Exchange Act; and

- Section 17A of the Exchange Act (transfer agent requirements).

Given that investment contracts are distinct from equities, relief should be granted for certain Exchange Act requirements applicable to registrants with a class of equity securities registered under Section 12 and registrants with a Section 15(d) reporting obligation.¹³ Clarity that investment contracts are not equities would also facilitate compliance with the federal securities laws (and thereby investor protection) by enabling issuers and other market participants to establish transfer restrictions necessary to follow applicable distribution compliance periods under Regulation S; properly calculate limitations on the amounts of investment contract securities permitted to be sold by affiliates pursuant to Rule 144; identify whether investment contracts are required to be registered under the Exchange Act and thereby transact in or facilitate transactions in investment contracts without the risk of transacting in an unregistered security; and so on.

It is both appropriate and necessary to regulate investment contracts as securities. This regulatory treatment is consistent with the statutory mandate and serves important public policy objectives. However, it does not follow that investment contracts should be regulated as equity securities. Investment contracts do not share the defining features of stock—such as negotiability, pro rata ownership, residual claims, and participation in corporate governance. Imposing regulatory requirements designed for equity instruments onto investment contracts—particularly novel ones involving Tokens—risks distorting disclosure expectations and compliance obligations in ways that do not enhance investor protection, but introduce unnecessary burdens and uncertainty for issuers and intermediaries.

Question 8

Should the Commission develop tailored disclosure requirements for offerings or classes of specific categories of crypto assets? What types of disclosures would be important for investor protection? Should disclosure occur both at the time of sale and on an ongoing basis? If so, what information should the ongoing disclosure contain and how should that disclosure occur?

The SEC's current disclosure framework is designed primarily for traditional operating companies registering equity securities. What may be material information for an investor considering an investment in the equity security of an operating company is inapplicable and immaterial for investors considering an investment contract involving Tokens. The disclosure requirements incorporated into the various registration and periodic reporting forms promulgated under the federal securities laws via Regulation S-K and Regulation S-X are not tailored to, or appropriate for, investment contracts. Investment contracts often involve numerous promoters and parties, therefore certain issuer-specific disclosures and financial information may not be relevant. For example, as discussed in our response to Question 7, investment contracts are not

¹³ Note that a Section 15(d) registrant is currently not subject to the proxy rules, Section 16, beneficial ownership reporting, institutional investment manager reporting, or the third-party tender offer rules.

part of a company's capital structure in the way equity or debt securities are, and purchasers of investment contracts (typically) do not hold ownership interests in a corporation or claims against the assets of a corporation. Unsuitable disclosures should not be required. To the extent a promoter of an investment contract involving Tokens wants to offer and sell the investment contract to the public, they will need to register that offering under the Securities Act or find an exemption from registration. Therefore, the Commission should develop tailored disclosure requirements for investment contracts involving Tokens. As with clarification that investment contracts are not equity securities, the Commission could provide targeted exemptive relief establishing tailored disclosures and relief from the requirements of Regulations S-K and S-X until new regulations and forms are proposed and adopted. However, it bears reiterating and clarifying that any tailored disclosures contemplated would relate to the *investment contract*—the security being offered and registered—not the Token itself (though information about the Token is likely to be material to the investment contract).¹⁴

In light of the foregoing, TDC does not believe there should be ongoing periodic disclosure requirements applicable to investment contracts akin to what is required under the Exchange Act for issuers of equity securities. While ongoing disclosure obligations make sense for issuers of securities in a traditional operating company, the facts and circumstances that constitute the terms of an investment contract may cease to exist after the offering period of the investment contract expires (or shortly thereafter). While certain information about Tokens and the blockchain networks to which they relate may be material to direct purchasers of those Tokens on an ongoing basis, Tokens are distinct from investment contracts and are not themselves securities, so the expiration of the investment contract should extinguish any disclosure obligation under the federal securities laws.

Our recommendation is that required disclosures for investment contracts involving Tokens should be made at the time the offering of the investment contract is registered, akin to requirements for public offerings of securities under the Securities Act. During the time the investment contract remains open (i.e., until the promoter's obligations have been satisfied such that purchasers are no longer reliant on the promoter's efforts),¹⁵ it is reasonable to treat the offering similar to a continuous offering. In this regard, the promoter would have a duty to update the disclosures with any material information necessary in order to make them not misleading (either as an amendment or a supplement) and provide periodic updates regarding the performance of the investment contract. Once the investment contract has been fulfilled and

¹⁴ Tokenized securities are not within the scope of this letter. However, assuming a tokenized security simply uses distributed ledger or blockchain technology to record the ownership of traditional assets (corporate stocks or bonds) as opposed to other recordkeeping technologies, there are no material changes to the characteristics of the asset, rights of holders, or obligations of issuers that would require changes to the applicable existing disclosure requirements.

¹⁵ While TDC appreciates the intent behind FinHub Staff's *Framework for "Investment Contract" Analysis of Digital Assets*, consensus among market participants is that it raises more questions rather than answering them. Accordingly, we believe this guidance should be rescinded. The principle that Tokens may be bought in transactions that are not securities transactions is incorporated in the idea that the investment contract can be fulfilled and terminated.

purchasers are no longer reliant on the promoter, the promoter can deregister the offering, file an exit report, and provide any final disclosures. While the duty to update disclosures, and to terminate the offering of an investment contract are existing concepts under the securities laws, the Commission should consider exemptive relief to streamline the process for doing so in the context of registered investment contracts.

We do not believe there is a justification under the existing securities laws to require the promoter of an investment contract to continue to make ongoing disclosures after the investment contract has been registered but is no longer being offered and the promoter has completed all material performance obligations, at which point the investment contract—the security—ceases to exist.

We include a proposal for suggested disclosure guidelines that are designed to identify material information concerning Tokens that may be offered pursuant to investment contracts, *U.S. Disclosure Guidelines for a Particular Category of Tokens*, as **Appendix A** attached hereto (the “**Disclosure Guidelines**”). The Disclosure Guidelines are specifically tailored to address the distinct nature of investment contracts involving Tokens and elicit relevant information about the promoter(s) and Tokens is actually material to purchasers of an investment contract involving Tokens and can be incorporated into potential SEC guidance and/or new disclosure regulations and forms. As the Disclosure Guidelines note, they are intended to serve as a starting point and do not claim to answer all questions.

Question 9

Does Regulation A under the Securities Act, including the disclosure and ongoing reporting requirements, provide a useful vehicle to conduct offerings of crypto assets? Would revising aspects of Regulation A make it more useful for crypto asset offerings?

To the extent that a specific Token is a security, yes, Reg A+ can provide a useful means to conduct an offering for such securities. We believe, however, that modifications to Reg A+ are necessary to improve its utility as a viable capital raising pathway for offerings of investment contracts that involve Tokens, as well as offerings of tokenized equity securities.

We also note that at a recent meeting of the SEC’s Small Business Capital Formation Advisory Committee, each of Chairman Paul Atkins, Commissioner Hester Peirce, and the Advisory Committee itself acknowledged Regulation A’s current limitations.¹⁶ We concur with

¹⁶ See Chairman Paul S. Atkins, Remarks at the Small Business Capital Formation Advisory Committee Meeting (May 6, 2025), available at: <https://www.sec.gov/newsroom/speeches-statements/atkins-sbcfac-050625>; Commissioner Hester M. Peirce, Quarter Frictions: Remarks before the Small Business Capital Formation Advisory Committee (May 6, 2025), available at: <https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-sbcfac-050625>. See also Tom Zanki, SEC Panel Says Easier Trading Would Rev Up ‘Reg A’, Law360 (May 6, 2025), available at <https://www.law360.com/fintech/articles/2336097>.

this assessment and believe that meaningful reforms to Reg A+ are both timely and necessary, including the following:

Amend Regulation A to Clarify Eligibility for Investment Contracts

Currently, Regulation A and Form 1-A, the SEC’s Offering Statement used to qualify offerings under Regulation A, Part I – Notification, Item 4 – Summary Information Regarding the Offerings and Other Current or Proposed Offerings, limit the specific classes of securities that can be offered through the offering statement to equity securities, debt securities, and other equity-related convertible securities.¹⁷

Notably, investment contracts are not expressly included among the types of securities that can be offered, despite the fact that investment contracts are expressly included in the definition of a “security” under the Securities Act. This exclusion from Reg A+ creates an artificial barrier for offerings of investment contracts. We recommend that the SEC amend Regulation A to explicitly include investment contracts as eligible securities to allow promoters of investment contracts that involve Tokens to utilize Reg A+.

We also note that many other aspects of Form 1-A relate specifically to equity securities, such as the information required under Item 1. Issuer Information with respect to stockholder’s equity, earnings per share, and the information required in the Outstanding Securities table, none of which would be applicable to investment contracts. Amendments should be made Form 1-A to provide for and acknowledge the unique characteristics of investment contracts. The SEC may want to consider looking to the Disclosure Guidelines provided in **Appendix A** for potential amendments to the required Reg A+ Form 1-A disclosures as well.

Facilitate Secondary Market Trading Through Federal Preemption

A significant impediment to the use of Reg A+ is the patchwork of state-level blue sky regulations which apply to secondary resales of securities offered under both Tier I and Tier II. This state-by-state regime imposes significant legal, operational, and regulatory burdens on issuers and registered broker-dealer/alternative trading system platforms attempting to establish or provide secondary liquidity for investors in Reg A+ offerings.

We strongly support that the SEC at long last consider amendments to Section 18 to include resales of securities qualified under Reg A+ Tier II as “covered securities” to the extent that the issuer continues to provide the required ongoing public disclosures.¹⁸ As discussed during the recent Small Business Advisory Committee meeting, federal preemption would enhance market efficiency and investor access without compromising investor protection. We are cognizant that many market participants have been advocating for this change since Reg A+ Tier

¹⁷ See 17 CFR 230.261(c).

¹⁸ Again, we wish to emphasize the distinction between Tokens and investment contracts. Secondary transactions in Tokens are unlikely to be securities transactions. However, there may be situations in which investment contracts (either involving Tokens or other types of rights or assets) are traded in secondary transactions.

It was first enacted as part of the JOBS Act in 2012. Without the opportunity for meaningful secondary liquidity, Reg A+ offerings will continue to be of less interest to investors seeking a known investment exit strategy.

Permit At-the-Market and Delayed Offerings

Reg A+ also lacks flexibility with respect to offering mechanics. For example, Reg A+ currently prohibits at-the-market or delayed offerings which presents practical challenges for all issuers, including issuers of investment contracts that involve a Token, where market dynamics often require the ability to adjust offering terms in real time. We recommend that the SEC amend Regulation A to permit at-the-market and delayed offerings, thereby aligning it more closely with the flexibility afforded under shelf registration statements pursuant to Rule 415 under the Securities Act. Such reforms would be especially beneficial for issuers seeking to match supply with evolving demand conditions in a compliant manner.

Tailor Disclosure Requirements to the Nature of Investment Contracts

As discussed in our response to Question 8 above, disclosure obligations under existing SEC regulations—including for Reg A+ offerings utilizing Form 1-A—are designed primarily for operating companies offering equity or debt securities. These requirements are often ill-suited to investment contracts, particularly those involving Tokens, where purchasers of investment contracts (typically) do not hold ownership interests in a corporation or claims against the assets of a corporation and where multiple promoters, developers, or ecosystem participants may contribute to the project. In many cases, the types of disclosures required for equity securities would not only be impractical but could also prove misleading or irrelevant.

We urge the Commission to amend the disclosure requirements required on Form 1-A for offerings of investment contracts that involve a Token to reflect the structural and economic realities of investment contracts. The attached Disclosure Guidelines are tailored to address the distinct nature of investment contracts involving Tokens and elicit relevant information about the promoter(s) and the investment contract that is actually material to investors.

Staff Unwillingness to Qualify Tokenized Securities Offerings

Historically, it was difficult, if not impossible, for issuers to clear comments with the SEC Staff to qualify any offering that involved securities represented in a tokenized, blockchain format, whether those securities were equity securities or investment contracts that involved a Token. This led to extreme delays and significant costs for issuers interested in pursuing tokenized Reg A+ or registered offerings.

We urge the SEC to continue to remove the internal obstacles that impacted the blockchain industry and ensure that tokenized Reg A+ offerings are processed as fairly and efficiently as other uncertificated securities offerings. There is a great deal of interest across a large range of issuers looking to tokenize equity securities and qualify these offerings under Reg

A+, as well as for broker-dealers to provide regulated trading for such assets. The chilling effect of the prior administration, however, resulted in many issuers putting those plans on hold or canceling their offering plans altogether. It would be helpful for the SEC to issue a statement to the industry making it clear that tokenized equity offerings will no longer be subject to denial or delay based solely on the technology used to represent the securities being qualified under Reg A+.

TDC thanks the many members that contributed their time and expertise towards the development of this letter, including but not limited to the significant efforts of Daniel Engoren, attorney, Sidley Austin LLP; and Josh Lawler, Partner, Zuber Lawler LLP.

* * *

If you have any comments or questions relating to this letter or would like to arrange a meeting to discuss further, please do not hesitate to contact the undersigned at 214-969-3510 or ltessler@sidley.com, and Sonia Barros at 202-736-8387 or sbarros@sidley.com.

Regards,



Lilya Tessler
Partner



Sonia Gupta Barros
Partner

Attachment

cc: Cody Carbone, Chief Executive Officer, The Digital Chamber
Annemarie Tierney, Senior Strategic Advisor, The Digital Chamber

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APPENDIX A

Fintech and Blockchain Symposium

May 3, 2024

SIDLEY



Rutgers Center for Corporate
Law and Governance
Blockchain and Fintech Program

PROPOSED U.S. DISCLOSURE GUIDELINES FOR A PARTICULAR CATEGORY OF TOKENS

Background

The proposed token disclosure guidelines set forth in this document were designed by a working group of academics and practitioners composed primarily of lawyers, former federal regulators, and legal scholars from a variety of backgrounds, including people knowledgeable about U.S. securities, commodities, swaps, technology, intellectual property, consumer protection, and commercial law, among other areas.

The proposed disclosure guidelines are designed to identify and elicit the disclosure of material information about certain types of tokens (as explained more fully herein). The proposal makes no recommendation about when disclosures should initially be provided (or to/by whom), whether or when updates should take place (or to/by whom), or the frequency of disclosures or updates. The proposal also makes no recommendation about where and how the initial disclosures and updates (if required) should be made available or whether they should be subject to prior review and/or approval by any regulator or self-regulatory body. The proposal provides a flexible disclosure regime that can be a guide for disclosures under existing regulations and new legislation that relates to certain types of tokens.

Although the starting point for the proposed disclosure guidelines was Form 10, Form 1-A, and Form SF-1 under U.S. federal securities laws, the contemplated disclosure is not meant to designate tokens as securities or imply that securities laws and rules apply to the types of tokens covered by the proposed guidelines. The proposal also takes into consideration several pending legislative bills that provide for a token disclosure regime under CFTC regulation and oversight. The proposal is informed by various laws and rules, including securities, swaps, commodities, and consumer protection, and most especially the following concepts:

- Disclosure of information that is material to both purchasers and users of the tokens;
- General anti-fraud standards from those laws, particularly for the materiality standard;
- The ability to leverage disclosures made by third parties, so long as there is a reasonable basis to believe those disclosures are applicable, material, and not misleading; and
- Flexibility to meet various facts and circumstances which may change over time.

We believe that it is more important to agree on the scope and substance of the disclosure guidelines than who may administer any implementing regime. For this reason, the proposal does not suggest the oversight of any particular regulator or self-regulatory body. There may be more than one body that administers the guidelines, depending on various factors beyond the scope of this proposal.

This version of the proposed token disclosure guidelines is intended to start a dialogue. Supporters and contributors will be reaching out to their respective networks to solicit feedback and support. If you would like to be included as a contributor or supporter, reach out to one of the individuals or industry groups listed below.

Proponents of Proposed U.S. Disclosure Guidelines

The proposed disclosure guidelines include contributions and support from:

GLOBAL DIGITAL ASSET &
CRYPTOCURRENCY ASSOCIATION



THE **DIGITAL**
CHAMBER



GBBC Global Blockchain
Business Council

Support from industry groups does not necessarily reflect the views of any particular member of the group.

Lee A. Schneider, General Counsel, Ava Labs, Inc.

Lilya Tessler, Partner, Sidley Austin, LLP

Rachel Barnett, Chief Legal Officer, IEX Group, Inc.

Joseph A. Hall, Partner, Davis Polk & Wardwell LLP

Nancy Wojtas, Senior Counsel, Cooley LLP

Khalil Bryant, Associate, Haynes and Boone, LLP

Daniel Engoren, Attorney, Sidley Austin, LLP

Yuliya Guseva, Professor of Law, Head of the Blockchain and Fintech Program,
Rutgers Law School

Douglas S. Eakeley, Professor of Corporate and Business Law, Rutgers Law School

Carol Goforth, Distinguished Professor of Law, University of Arkansas

J.W. Verret, Associate Professor of Law, George Mason University

Agostino Capponi, Professor, Director of the Center for Digital Finance and Technologies,
Columbia University

James Park, Professor of Law, UCLA School of Law

Lin William Cong, Professor of Management & Associate Professor of Finance,
Cornell University SC Johnson School of Business

Individuals listed are supporting in their individual capacity and not in the name of their organization.



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**Rutgers Center for Corporate
Law and Governance**
Blockchain and Fintech Program

April 22, 2024

From: Professor Douglas Eakeley, Professor Carol Goforth, and Professor Yuliya Guseva

Re: Disclosure Guidelines for Native Tokens, Discussion Draft

Statement in Support of the Proposed Disclosure Guidelines

We support the creation of a relevant and specific disclosure framework for digital assets such as native tokens. An appropriate and modernized disclosure system is a sine qua non for promoting and maintaining a more transparent and efficient market. Adequate disclosures are critical to combatting fraud, protecting investors, and improving price formation and market integrity. Quoting Justice Brandeis, “sunshine is said to be the best of disinfectants.” Of course, the required information should be relevant and material to purchasers of assets.

The proposed Disclosure Guidelines are well-developed and represent a valuable starting point in promoting these objectives. Legal and economic scholarship supports the need for targeted disclosures, including relevant information relating to network governance, risks associated with the particular token, material participants, and other disclosure categories as listed in the Guidelines.

The proposed Guidelines do not address the issue of classification of digital assets as securities, commodities, or another type of asset. Instead, they focus on the information and disclosures relevant and material to all purchasers of digital assets and to digital-asset markets in general. This underlying approach addresses the crucial objectives of improving market transparency and integrity. The Guidelines aim to achieve this without addressing asset classifications and which federal agencies (for example, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or both) should have jurisdiction.

We believe that the second major contribution of this project is its potentially positive impact on the international regulatory environment. Major jurisdictions, including the European Union, are ahead of the United States in designing regulatory regimes specifically designed for digital assets. The E.U., for example, has a system that envisions disclosure principles similar to those proposed in the Guidelines.

These Disclosure Guidelines do not assign reporting obligations to a specific entity, such as the “issuer” in securities markets. In conventional securities law, a corporate issuer is deemed the least-costly and most effective source of information about the firm. The onus of disclosures is thus placed on the corporate party that has an informational advantage regarding the value of the offered and traded securities, as well as its prospects and risks. In some projects involving digital assets, individual developers, firms, or foundations may possess a similar informational advantage. In others, however, the insider advantage may be non-existent or have dissipated over time after a network launch. Additional and careful regulatory research is needed to determine the least costly and efficient sources of initial disclosures and future periodic reporting in these latter situations. While we do not opine on solutions, one possible approach is assigning more reporting obligations to exchanges, an avenue already considered by the regulatory bodies in the United Kingdom. Another possibility might involve creating self-regulatory organizations (SROs) in digital asset markets, an approach that has worked well for other asset classes here and abroad.

Respectfully,

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General Instructions

The category of tokens to which the proposed regime applies is called “[native DLT](#)” tokens (“Tokens”; *see also* “[intrinsic](#)” tokens). The embedded link provides further definition of this category. Tokens may have many functions and features within and outside the protocol, system, or network (the “Network”) on which they were created or generated, including but not limited to functioning as a mechanism of payment, resource allocation, and/or sybil resistance or Network security; formal or informal governance or voting rights; rights to receive payments, attend events or participate in activities; evidence of membership in a formal or informal group or organization; *etc.*

The guidelines apply regardless of whether (a) the Token is [classified as](#) “fungible”, “[non-fungible](#)” (“NFT”), or under another technical standard; (b) a Network utilizes an account-based or token-based [system](#) (or another technical design); and/or (c) the Token is created or generated on a centralized or decentralized Network (where “decentralized” is defined as no single source of truth, no single point of failure, and no single authority responsible for or capable of changing data and/or account or transaction information).

Important assumptions underlying the proposed guidelines are discussed at the end of this document.

The disclosure guidelines are meant to assist with developing the appropriate scope and substance of disclosures for Tokens. Those that provide these disclosures should tailor their information to the specific facts and circumstances of the Token, taking into account the materiality principle to help identify information that is most useful to purchasers and to users of the Tokens as of the date the disclosures are provided.

Network

Provide a narrative, plain-English description of the Network, including the associated risks, such as:

- Explain what the Network does and how it accomplishes its core objectives, including, to the extent relevant, the material characteristics of the Network’s architecture, software and functionality.
- Explain the underlying technology of the Network, including, to the extent relevant, the roles and responsibilities of different participants on the Network who are responsible for its functioning and maintenance.
- Provide an overview of the measures taken to ensure Network security, including links to summaries of third-party audits, formal verification, penetration testing, or other measures, if available.
- Identify instances where the Network is susceptible to single points of failure or attack, including, where applicable, if there are single sources of truth related to the Network, and/or a single authority capable of or responsible for changing data recorded on the Network or transactions effected by users, including, to the extent relevant, any consensus mechanism, validation or mining mechanism, including the associated rules.
- If relevant, describe how transactions are validated on the Network and how the blockchain is designed to achieve consensus among Network participants and other information, such as an explanation of any protocol rules and consensus rules (including cryptographic consensus).
- Provide details on statistics available to measure Network performance, including (if applicable) number of transactions executed per unit of time, time to finality, and block confirmation time.
- Include an explanation of any fees, such as transaction costs, gas fees, etc., applicable for utilizing the Network, including how they are assessed and who receives such fees.

- Where the Network is not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Tokens

Provide a narrative, plain-English description of the creation or generation of the Tokens and their key functions and features, including the associated risks, such as:

- Explain the creation or generation of the Tokens and how they were distributed to initial holders and any ongoing distribution, including, to the extent relevant, the Tokens' key design features and the rights and obligations of holders and users of the Tokens.
- If relevant, describe the conditions under which the key functions and features of the Tokens (including any rights and obligations) may be changed and by whom.
- Describe the current or anticipated functions and features of the Tokens, including usage on the Network. Provide details on what the Token is and how the Token functions and/or is anticipated to function both within and outside the Network.
- If the Tokens are used as a means of payment on the Network, describe what actions and/or activities they can be used to pay for, including, to the extent relevant, whether the Tokens are used as "gas", or payment for performing a transaction on the Network, to create or register a new digital asset or smart contract on the Network, to purchase goods or services on the Network, to allocate resources on the Network, to perform or participate in governance functions, and/or to secure the Network.
- Describe any incentive models including fee or reward mechanisms (and who receives them), and any mint/burn mechanisms.
- Where the Tokens are not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Governance

Provide an explanation of any governance mechanisms for implementing changes to the Network or Tokens, including voting thresholds and quorum requirements and whether there is any governing body and/or any type of foundation that makes governance decisions. If applicable, describe any governance rights provided to Token holders. Explain whether and how Material Participants (defined below) are required to initiate or implement any changes to the Network or Token agreed upon through governance. The associated risks also should be described, including the conditions in which modifications to the Network or Tokens may be made, or if certain modifications are not possible. Where the Network is not yet in existence, the disclosures should explain what is intended with respect to governance.

Governance Arrangements

To the extent relevant to governance of the Network, set forth information with respect to any governance arrangements, formal or informal, involving each person who, to the best of discloser's knowledge, owns more than 5% of the Tokens (which person shall include any entities). Include, to the extent known, the percentage of beneficial ownership of 5% or greater Token holders in such arrangement based upon [X] number of Tokens outstanding as of [insert date]. The associated risks also should be described. If relevant, include how the Network or Material Participants (defined below)

manage and use Tokens held in treasury. Where the Network is not yet in existence, the disclosures should explain what is intended with respect to these matters.

Technology

Describe how the Network’s technology and software is maintained and updated, including how code updates are written and reviewed and ultimately deployed. Identify whether the Token’s smart contract can be modified, by whom, and what effect(s) that may have on the rights of holders of the Tokens and/or on the finality of transactions and data. Identify any official or other material communications channels for discussion of technical matters related to the Network. The associated risks also should be described. Where the Network is not yet in existence, the disclosures should explain what is intended with respect to these matters.

Material Participants

- To the extent known, provide the names and relevant experience, qualifications, attributes, and skills of each person, group of persons, or entity that materially contributed and/or continues to contribute to the development and/or operation of the Network and/or the Tokens, which can include any member of the core development team(s) and/or, founders, officers, directors, key employees, significant validators, and/or persons with significant governance power or authority (“Material Participants”).
- To the extent known, indicate generally the percentage of Tokens held by the Material Participants as a group, whether directly or beneficially, as of the date of this disclosure, which data can be presented in aggregate form.
- Describe any limitations or restrictions on the transferability of Tokens held by Material Participants and any arrangement or agreements to provide Tokens to Material Participants.
- The risks associated with having Material Participants also should be described.
- Where the Network is not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Token Supply and Vesting Information

Provide information about the Token’s supply and vesting, which information may include, but is not limited to, as applicable:

Total Token Supply	Total number of Tokens that there will ever be in existence
Circulating Token Supply	The number of Tokens that have been minted, burned and are currently in circulation as of [date]
Token Release Schedule	Release schedule for additional Tokens that can be minted or distributed by the Network as well as an indication of whether supply is intended to be inflationary vs. deflationary and whether issuance is fixed vs. variable
Vesting and/or Lock-up Schedules	To the extent known, schedule for Tokens that have been allocated to Material Participants that are subject to vesting and/or lock-ups

Token Distribution/Allocation	Information about how Tokens were initially distributed among investors, founders, miners/node operators, other participants, treasury reserve, <i>etc.</i>
Airdrops	Token supply that was provided or is intended to be provided as an airdrop (<i>i.e.</i> , free distribution)
Token Rewards (by Each Category of Network Participant)	Which participants, including miners, node operators, stakers and delegators, liquidity providers, <i>etc.</i> , receive any type of token rewards or payments for their activity or actions on the Network
Costs Associated With Transacting on the Network	Costs including “gas fees”, fees to miners, and other network costs
Number of Active Wallet Addresses	The number of wallet addresses actively transacting in the Token
Total Value Locked	The sum of all Tokens deposited in the Network that are earning rewards, interest, <i>etc.</i> , as applicable
Treasury	Total Tokens in the treasury of the Network and/or any entity that may be viewed as an ecosystem foundation, community development pool, or other similar treasury.

Explain whether there is any way to change the Total Token Supply, Circulating Token Supply, Token Release Schedule, Vesting Schedules, and Token Rewards, and the mechanism to make any such change.

The risks associated with these matters also should be described. Where the Network and/or the Tokens are not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Additional Financial Information

Explain whether the price or value of the Token bears any direct, material relationship to any entity’s ongoing financial performance due to any promise by such entity to share such financial performance with Token holders and the mechanism by which such financial performance is shared. Provide the relevant financial performance information. The associated risks also should be described. Where the Network and/or the Tokens are not yet in existence, the disclosures should explain what is intended with respect to these matters.

Risk Factors

- Provide a narrative, plain-English description of applicable risks relating to the Network and the Tokens, which may include, among other things and to the extent relevant, the following risks that are associated with, among other things, unique features of the Tokens, price volatility, limited rights of Token holders, valuation and liquidity, novel technologies, legal and regulatory and other known material risks that could impact the Token or the Network.
- Describe relevant cybersecurity risks of the Tokens, the Network and their usage including, among other things, and to the extent relevant, hacking vulnerabilities and other cybersecurity events that could result in a substantial, immediate, and/or irreversible loss for Token holders. Additional examples may include risks of bugs, errors, flaws

or vulnerabilities in relevant software code, risks related to ransomware and malware attacks, or any other security compromises of the Network and the risks associated with those security breaches to Token holders.

- Where the Network and/or the Tokens are not yet in existence, the disclosures should discuss the likely risks with respect to each of the items above.

Exhibits

Provide the following documentation if available, including, to the extent materially relevant:

- Any and all relevant whitepapers (including any technical and Token whitepapers) and other documentation related to the Network and/or the Tokens;
- Source code that has been open sourced (i.e., a text listing commands to be compiled or assembled into an executable computer program used by Network participants to access the Network, amend the code, and confirm transactions);
- Location of a publicly accessible code repository;
- Documentation on the Token's smart contract(s);
- Recent code audit reports; and
- Location of a publicly available and independently maintained block explorer (and/or instructions for an independent third party to create a block explorer or similar tool for verifying the transaction history of the Tokens).

Offering and Sale Information

This portion of the proposal is intended for offerings and sales of Tokens that are made prior to the distribution of Tokens on the Network. In addition to providing the aforementioned disclosures, the following disclosures would supplement the above disclosures and are only relevant if there is an offering and sale (defined as some form of payment or barter in exchange for Tokens). In all other situations, *e.g.*, where the Network is in existence and a distribution of Tokens has been widely made, these disclosures are not required but the rest of the disclosure regime is applicable.

Token Offering and Sale Details

- Details of the offering and sale, including the number of Tokens in the offering, purchase price, length of offering period and qualifications of purchasers.
- Explain how the Network will be launched and the Token supply at launch, including the number of Tokens to be issued in an initial allocation. Explain how the offering price was determined.
- Explain the number of Tokens sold in any prior offerings and sales.
- Provide information about any potential dilution of Tokens or Token supply.

Use of Proceeds

- Provide an estimate of what the net cash proceeds from the offering and sale of the Tokens will be (approximately \$[] million, after deducting estimated offering expenses of \$[] million and assuming that the maximum proceeds of the cash offering of \$[] million are received).
- Provide information about the proceeds from any prior Token sales.
- Provide information about any agreements for the distribution of Tokens in an offering and sale and the purchase price of those agreements.
- Provide an overview of the intended use of proceeds from the Token sales, including whether the intended use of proceeds will be used for working capital and other general corporate purposes, such as the development of the Tokens and the Network, payment of salaries, hiring employees and consultants, organizing and hosting educational and developer events, and/or making investments in the development of applications for the Network.
- Describe the intended use of the proceeds from prior offerings and sales, if any, including whether use of proceeds will include general categories, such as (i) payment of compensation and hiring of employees and retaining of consultants and developers, (ii) continuing development of the Network and underlying blockchain, and supporting the application ecosystem, as applicable, (iii) payment of federal and state income taxes (and any estimates on tax amounts), (iv) allocation for research and development, (v) marketing and education, and (vi) any other anticipated use of proceeds.
- Explain who will use the proceeds from the sale of Tokens. If applicable, note any risks related to the failure to apply these funds effectively and whether such risks could have a material adverse effect on the value of the Tokens.

Appendix

Assumptions

The proposed guidelines are based on the following assumptions:

1. The proposal does not use the term “issuer” or designate any particular party as responsible for making the disclosures due to the difficulty in establishing a definition for the term “issuer” or determining who the “issuer” might be in certain factual situations. Who should be responsible for making the disclosures is also dependent on the particular facts and circumstances and may change over time.
2. The proposal provides guidelines which are flexible and can be adopted as requirements under different regulatory regimes and industry standards.
3. The proposal takes no position on penalties or liability for failure to make the disclosures.
4. This proposed regime is centered on Tokens that are on a blockchain or other distributed ledger technology but might be helpful for other types of digital assets created on other types of technologies, including centralized databases.

