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By email attachment

Chairman Paul S. Atkins
Commissioner Hester M. Peirce
SEC Crypto Task Force
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0213

**Potential Exemptive Order:
Tokenization of Traditional Securities**

Dear Chairman Atkins, Commissioner Peirce, and Members of the Crypto Task Force:

Thank you for this opportunity to express my views to the SEC Crypto Task Force. I hope that the Task Force, after reviewing these brief comments, will also afford me the opportunity to meet with members to discuss the important issues relating to the tokenization of securities and a potential SEC exemptive order. My views expressed here are made in my personal capacity. I was a speaker at the SEC's recent Roundtable on custody issues; my brief bio is appended to this letter. My full CV is available here:
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Introduction

My observations as to tokenized securities focus primarily on the thoughtful and important comments recently made by Commissioner Peirce at the SEC's 31st International Institute for Securities Market Growth and Development. I applaud the goals expressed by Commissioner Peirce and the potential "sandbox" exemptive order for making access to investing in tokenized securities more efficient and accessible. However, without some important qualifications and conditions, adoption of the proposal could have unintended adverse consequences. In particular, as discussed below, it could allow broker-dealers and banks, in part through the intermediated securities holding infrastructure, to exploit DLT (including blockchain) technology to entrench even further the monopoly that exists for the infrastructure supporting custody of legacy securities. It also could potentially expand and entrench this monopoly power for the custody of digital assets. This result would conflict with the underlying

philosophical tenets as well as the policy goals to which most advocates of blockchain technology subscribe.

The demise of direct holding

Before addressing tokenized securities specifically, I must address the kernel of my concerns about unintended adverse consequences. These concerns are not limited or specific to the context of expanding use and access for tokenized securities. They are grounded in the existing infrastructure for holding publicly traded securities—the intermediated holding system. The registered owner of the vast majority of publicly traded securities—both equities and debt—is a partnership (Cede & Co.) that is the nominee of The Depository Trust Company, DTC. (DTC and other clearing agencies are subsidiaries of The Depository Trust and Clearing Corporation, DTCC). The principal equity holders of DTCC are the broker-dealers and banks that are its participants—and who are significant beneficiaries of the incumbent infrastructure.

The origins of the current securities holding infrastructure are generally known. The development of DTC as a central depository arose from the paperwork crunch of the 1960s. The principal goal of this development was the facilitation of settlement—delivery of securities against payment.¹ Through the aggressive expansion of the infrastructure and marketing it has morphed into a permanent state of post-settlement repose for most of these securities.² Indeed, by virtue of DTC’s book-entry-only architecture, intermediated holding is essentially the *only* means of holding publicly traded bonds today. Moreover, in the recent past there existed several regional securities exchanges with associated securities depositories. Due to the SEC’s imposition of open access and interoperability requirements, with the well-intentioned goal of enhancing competition, these entities fell by the wayside. This left the DTCC family in an even more dominant position.³

I must emphasize that I am not suggesting that there is anything nefarious involved in the developments leading to, or the maintenance of, the current infrastructure. Sound principles of corporate governance certainly support the behavior of the DTCC family and its predecessors in furthering the interests of their shareholders. On the other hand, it would be foolish to assume that the goals of DTCC and its owners necessarily reflect sound public policy—especially with a view to the future and the potential afforded by advances in technology.

A new model for direct-holding infrastructure

¹ See generally WILLIAM T. DENTZER, JR., *THE DEPOSITORY TRUST COMPANY: DTC’S FORMATIVE YEARS AND CREATION OF THE DEPOSITORY TRUST & CLEARING CORPORATION* (2008).

² This circumstance is reminiscent of the classic Eagles’ lyrics: “You can check out any time you like, but you can never leave.” Glenn Lewis Frey, Don Felder, & Donald Hugh Henley, *Hotel California* (1976).

³ On the development of DTCC’s dominant position, see Dan Awrey & Joshua C. Macey, *Open Access, Interoperability, and DTCC’s Unexpected Path to Monopoly*, 132 YALE L.J. 96 (2022) (explaining how SEC’s open access and interoperability requirement led to DTCC’s monopoly position and the downfall of the regional exchanges and depositories).

My 2020 article⁴ identified several problems that are imposed by the current securities holding infrastructure. The article also explained how a new platform, which might or might not draw on blockchain technology, could ameliorate these problems by making post-settlement direct holding of securities on the books of issuers the norm. It also explained how this might be achieved while retaining substantially all of the benefits, convenience, and flexibility of post-settlement intermediated holding. In two 2024 articles,⁵ co-authored with Sandra Rocks, we reported on the work of an ABA Task Force that we chaired. Those two articles further elaborated on the operations and problems associated with the current infrastructure in a variety of contexts. They also and expanded the consideration of how a direct-holding model might be implemented.⁶ Although the current intermediated holding infrastructure works well in many respects, in addition to the several identified problems it also imposes substantial costs that are ultimately borne by issuers and, therefore, by investors.⁷

In my view the cited articles and the research and investigation on which they are based establish at least a prima facie case for serious reexamination and potential reforms of the current infrastructure. Based on the extensive meetings and informal discussions during the work of the ABA Task Force mentioned above, the principal recommendation of the Task Force (with no dissents by any participants) is the implementation of an independent study:

This Report recommends the organization, completion, and widespread dissemination of an independent and thorough study, including a benefit-cost analysis, of the current securities holding infrastructure. The study should assess the problems identified in this Report and the means of addressing those problems discussed here. The study also should identify and assess any additional problems and issues identified in the study. The study should make recommendations, if any, concerning the plausible means of addressing the problems discussed here and identified in the study, including possible modifications of the current infrastructure. It also should address and recommend

⁴ Charles W. Mooney, Jr., *Beyond Intermediation: A New (FinTech) Model for Securities Holding Infrastructures*, 22 U. PA. J. BUS. L. 386, 427–42, 449–51 (2020).

⁵ Charles W. Mooney, Jr. & Sandra M. Rocks, *Final Report on the Work of the Task Force on Securities Holding Infrastructure: Part One*, 79 BUS. LAW. 343 (2024); Charles W. Mooney, Jr. & Sandra M. Rocks, *Final Report on the Work of the Task Force on Securities Holding Infrastructure: Part Two*, 79 BUS. LAW. 679 (2024) (hereinafter, Part Two).

⁶ For example, the article explains how a system of synthetic securities accounts maintained through intermediaries (such as broker-dealers and banks) could provide services in a direct-holding environment equivalent to those typically provided today in the intermediated holding system. See Mooney & Rocks, Part Two, *supra* note 5, at 692-99.

⁷ One mistaken assumption made by some is that a norm of post-settlement direct holding would somehow eliminate the need for the important services currently provided by broker-dealers and bank custodians. Nothing could be further from the truth. But providing these services, including trading, settlement, monitoring, and reporting, need not require these intermediaries to remain in the post-settlement “chain of title” in the intermediated holding system.

necessary steps concerning implementation of any recommendations, including the encouragement of specific proposals for infrastructure reforms.

The study should be undertaken by an independent entity that does not represent the interests of any stakeholder or group of stakeholders, such as an established and impartial research organization. The study should be adequately funded, so that it could acquire and access data that has, for example, been unavailable to the Task Force. Ideally, the study would be commissioned or sponsored by a governmental entity, such as the SEC or another federal regulator of financial institutions and markets, or by a group of such entities.⁸

This approach should be contrasted with the attitude generally expressed (sometimes explicitly but often implicitly) by securities industry participants during the formal and informal meetings and discussions involved in the work of the ABA Task Force: “If it ain’t broke, don’t fix it.” But the conclusion (really, an assumption or merely an article of faith) that the incumbent infrastructure for securities holding in the U.S. public securities market is not in need of fundamental reexamination and potential reforms *has never been systematically explored*.⁹ Whether one views this prevailing attitude as “voodoo economics,” “pseudo science,” or simply a manifestation of self-interest, it certainly is not an appropriate methodology for assessing important public policies. Although the articles cited here and a handful of other academic articles might appear to be exceptions, they clearly are not the sort of independent systematic, empirically-based, benefit-cost study contemplated by the ABA Task Force.

Ironically, intermediated holding is also common for digital assets such as crypto currencies. No doubt the relatively unwieldy (at least for many investors) current technology (public key cryptography) has an influence on this behavior. But it is also likely that, given the dominant intermediated holding infrastructure, many investors simply view intermediated holding of securities as their only practical alternative.

To be clear, my advocacy for serious consideration of a direct-holding model as a norm for post-settlement securities holding does not signify any opposition or hostility to intermediated holding in its proper domain or a view that intermediated holding is somehow “bad” or should be eliminated.¹⁰ It is an essential component of the DTCC system (involving in

⁸ Mooney & Rocks, Part Two, *supra* note 5, at 706.

⁹ The need for fundamental infrastructure reforms is not a newly discovered issue. For example, the discussion at the SEC’s 2018 Roundtable on proxy-plumbing featured several interventions supporting the need for such reforms, including the potential adoption of blockchain technology. *See Id.* at 699-701.

¹⁰ For example, my 1990 article was highly influential as the intellectual underpinning for the reform of Uniform Commercial Code Article 8 to adapt that article to deal with intermediated holding and securities accounts. *See* Charles W. Mooney, Jr, *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 *Cardozo L. Rev.* 305 (1990). Moreover, I served on the U.S. delegation for work on the UNIDROIT Geneva Securities Convention, which deals with intermediated holding, as well as

particular DTC and National Securities Clearing Corporation, DTC's sister corporation, as a central counterparty). My central thesis is that the need for the norm of persistent *post-settlement* intermediated holding is highly questionable and should be seriously examined. Among the potential benefits of a direct-holding norm would be the alleviation of many problems associated with shareholder voting and the exercise in general of security holder rights. Such an infrastructure also could reduce the enormous costs of maintaining the regime for protection of entitlement holder rights against the default or insolvency of securities intermediaries and facilitating security holder rights through awkward workarounds pasted on the intermediated holding system. More generally, there does not appear to be a need for post-settlement intermediated holding as the norm, other than this is the way the incumbent system (owned and operated by securities intermediaries who benefit from its continuance) works. Of course, unlike the untested assumptions of incumbent defenders of the status quo, these are *hypotheses*. They would be examined in an independent study as proposed by the ABA Task Force.

The promise and potential unintended adverse effects of an exemptive order for tokenized securities

In her comments, Commissioner Peirce explained that the “Crypto Task Force is considering a potential exemptive order that would allow firms to use DLT to issue, trade, and settle securities.” As an abstract matter, of course, I applaud the potential for innovative use of DLT (including blockchain) technology and tokenization to improve current systems for trading and settlement of securities, including transactions in the legacy securities market. But there is reason for concern that incumbent intermediaries, such as registered broker-dealers and, perhaps, bank custodians, will tokenize *security entitlements* maintained in securities accounts. This tokenization would leave the underlying legacy securities, which are not issued in tokenized form, to be held by the intermediaries in the current intermediated holding system—i.e., with Cede & Co. as the registered owner on the books of the issuers.¹¹ Presumably, the tokenized security entitlements held with multiple intermediaries would be made interoperable on various trading and settlement platforms through available and emerging technologies. But achieving frictionless interoperability through tokenized *security entitlements* issued by different intermediaries would be challenging. Intermediated securities would remain siloed—intermediary by intermediary. The error-prone process of reconciling holdings of entitlement holders on the books of broker-dealers, for example, with the broker-dealers’ holdings (e.g., with DTC), would be compounded by the need to reconcile the tokens with an intermediary’s book entries to entitlement holders’ accounts. This could introduce even additional inefficiency and error.¹² Worse still, the predictable (indeed inevitable) result would be that these markets and platforms for tokenized *security entitlements* would crowd out, and remove incentives for, the

participation as one of the authors of the UNIDROIT Legislative Guide on Intermediated Securities.

¹¹ This would leave in place the existing problems associated with post-settlement intermediated holding, including sticky issues arising from the fact that security entitlements on the books of broker-dealers do not necessarily reflect the number or amount of securities of an issue that actually are held by the broker-dealer. This results from imbalances caused by, *inter alia*, flexibility permitted by the customer protection rule.

¹² Note also the persistent imbalances in the accounts of broker-dealers, mentioned in note 11.

robust development of the issuance of tokenized *securities* and the continued development of infrastructures for the direct holding (e.g., “self-custody” in the language of the investment management community) of both legacy securities as well as tokenized securities.¹³

From the perspective of the Crypto Task Force, it is quite understandable that there might exist an ineluctable temptation to take steps, such as the potential exemptive order, that might result in a relatively rapid development of an active market in “tokenized securities”—even if the assets are actually tokenized *security entitlements*. This could be an especially attractive approach for demonstrating apparent “progress” in modernizing the securities markets, inasmuch as it seems that issuers of legacy securities are not rushing to issue tokenized securities. I suspect, but of course have no way of knowing, that this might also assuage those in the current administration who may be looking for speedy results to further their political ends.

Issuers of legacy securities apparently have little incentive to issue tokenized securities in the absence of an established and reliable infrastructure for trading and the settlement of tokenized securities trades—which should be a high priority for the SEC.¹⁴ In the legacy market, at least, it has long been clear that issuers have a strong preference for their shareholders to hold directly. But, as explained in the articles cited here, the absence of a direct-holding infrastructure that affords or otherwise has the benefits and convenience of intermediated holding creates a substantial roadblock. It is interesting as well that more progress seems to have been made in the very recent years in making direct holding of digital assets feasible and investor-friendly than has been made over a period of decades for legacy securities. Given the ownership of the intermediated securities holding infrastructure, this is neither surprising nor a coincidence.

In her comments Commissioner Peirce quite appropriately expressed concern about “heavy-handed regulation [that] can protect incumbents by making it too costly for would-be competitors who want to challenge existing firms with better, cheaper products and services.” But I fear that an exemptive order that facilitates a market in tokenized securities *or* tokenized security entitlements, but fails to impose adequate conditions, may inadvertently amount to just such unwanted protection for incumbent intermediaries (as well as for many crypto intermediaries) that would prefer to inhibit further development of a direct-holding infrastructure and attendant competition. Indeed, as noted above a robust market for tokenized *security entitlements* in particular could stifle further innovations in the development of a direct-holding infrastructure as well as incentives for the issuance of tokenized *securities* outside of a boutique environment. Given the dominant position of DTCC in the incumbent securities holding infrastructure and the centralized nature of that infrastructure, potential competition for post-

¹³ You will recall that there was substantial support for an expansion of the role of self-custody in the context of the Investment Company Act and Investment Advisors Act among the speakers at the SEC Roundtable on April 25, 2025.

¹⁴ It would not be in the interest of any particular issuer to expend resources necessary to foster such changes in the infrastructure, even if the issuer had the power and influence to do so. More immediate and directly beneficial efforts directed toward increasing profits and share prices dominate. Moreover, the classic collective action problem would present similar hurdles for issuers as a group. For debt securities, issuance of tokenized securities currently would face some additional practical obstacles, given the dominance of DTC’s book-entry only system.

settlement holding lies not with any similar competitors (considering the high barriers to market entry). Potential competition lies instead with the development of direct-holding infrastructures that could provide benefits to investors comparable to those available with intermediated holding.

Before addressing potential conditions for an exemptive order that would productively facilitate tokenization in the securities markets, I should make it clear that I do not oppose an exemptive order designed to achieve the benefits outlined by Commissioner Peirce. Perhaps tokenized security entitlements could offer certain benefits, at least in the short to medium term, in the contexts of trading and settlement.¹⁵ But exemptive action for incumbent broker-dealers, for example, appears to be unnecessary unless needed solely to permit tokenization, inasmuch as those intermediaries have access to the current infrastructure for trading and settlement. And I note that Commissioner Peirce's comments do not address the issue of post-settlement holding per se. But I believe that the potential for the development of a direct-holding model as the norm for legacy securities (tokenized or otherwise) should remain front and center. It should not be precluded as a realistic alternative by the facilitating tokenization of security entitlements. Instead, it should be the subject of further careful independent study as recommended by the ABA Task Force.

Plausible prophylactic conditions for an exemptive order

I doubt that there is substantial disagreement that regulatory intervention in some form would be required for a fundamental reform such as the development of a satisfactory direct-holding infrastructure that could become the norm.¹⁶ Accordingly, the following discussion includes a general description of the conditions (precedent and subsequent) that I believe should be imposed by an exemptive order.

The exemptive order might be conditioned on:

1. Definitive arrangements for the prompt funding and implementation of the independent study proposed by the ABA Task Force.
2. A positive expression by the SEC of support for serious consideration of infrastructure reforms that would implement as the norm a post-settlement direct-holding model for publicly traded securities, tokenized and otherwise.
3. SEC issuance of a request for proposals (RFPs) to the Fintech community seeking outlines of infrastructure modifications that would facilitate direct holding as the norm in

¹⁵ They might even facilitate direct holding. For example, as a final step in a settlement cycle the transfer of a token to an issuer's transfer agent could trigger a smart contract that would add the beneficial owner's interest to the books of the issuer as a registered owner and correspondingly debit (and extinguish) the underlying security entitlement.

¹⁶ See Mooney & Rocks, Part Two, *supra* note 5, at 705:

One hopes that this Report, followed by an independent study as recommended here, may provide a catalyst for further action and spark some coordinated activity by organizations representing issuers and investors that would, finally, lead to regulatory intervention. The SEC, for example, might accept the apparently inevitable conclusion that "the industry" is not going to solve the problems on its own.

the legacy securities markets while maintaining the overall benefits and convenience of intermediated holding.

Of course, these are the preliminary and general ideas of one person on an important topic. I have many more thoughts and ideas, as will others, for the structure of appropriate conditions. But I hope the foregoing is sufficient to prime the pump for beginning and continuing substantive discussions. The principal goals should be (i) not to disincentivize the development of innovative approaches to the issuance of tokenized securities and direct holding for all types of securities, whether or not tokenized, and instead (ii) to provide positive incentives for the development of these approaches.

Finally, I am both encouraged and fearful that the present time is the first, best, and potentially the last opportunity for serious consideration of fundamental infrastructure reforms. As to the first and best opportunity: Never in my professional life have I perceived the makeup of the SEC, including the present four Commissioners and the Crypto Task Force, to be more conducive and open to out-of-the-box, imaginative, innovative, *and courageous* approaches to reforms. As to the last opportunity: I have expressed my fears above about broad exemptive relief that facilitates and institutionalizes tokenized security entitlements, in particular, without adequate safeguards to keep a direct-holding model on the table and being seriously considered. Such incomplete and unbalanced relief could so entrench the current post-settlement intermediated holding infrastructure that fundamental reforms might never be addressed (although one should “never say never”).

Finally, on an optimistic and apt note quoting Commissioner Peirce: “There must be some way out of here.”

Conclusion

I reiterate my gratitude for your consideration of my views on the securities holding infrastructure, tokenized securities, tokenized security entitlements, and a potential exemptive order. I do hope to have an opportunity to continue a discussion with the Task Force on these matters if my input would be helpful for your important work.

Respectfully submitted,

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Professor Mooney has published widely on the legal and regulatory aspects of securities. His 1990 article is recognized as “the intellectual foundation of Revised [1994 UCC] Article 8.” He represented the United States at diplomatic conferences for the Geneva Securities Convention and was a contributing author of the UNIDROIT Legislative Guide on Intermediated Securities.

Professor Mooney earned his J.D. cum laude from the Harvard Law School. He joined the Penn faculty after 14 years of law practice, including as a partner of Shearman & Sterling. He is an elected member of the American College of Bankruptcy, the International Insolvency Institute, The American Law Institute, and the American College of Commercial Finance Lawyers.