HEALTHY MARKETS ASSOCIATION
A MEMBER ORGANIZATION

July 24, 2025

Via Electronic Mail and Web Submission

Hon. Paul Atkins, Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Tokenization of Securities

Dear Chairman Atkins:

The Healthy Markets Association writes to share our concerns regarding the Commission's consideration of the regulatory parameters for "tokenized" securities.[1] While blockchain technology offers opportunities for advancements in the plumbing of capital markets, and is already delivering advances in some areas, the appropriate regulation of tokenized securities is entirely separate from the discussion itself.

We understand from press reports and industry discussion that some market participants are offering tokenized US equity securities, and at least one has asked the Commission and staff for an exemptive order or no-action relief from the application of the securities laws and otherwise applicable rules.

We have profound concerns with the lack of enforcement of the applicable federal securities laws and rules, as well as the processes through which exemptions from them are being sought. We urge you to apply the law and reject the requests.

Substantive Concerns

In May, it was reported that Kraken would begin selling tokens of US equity securities in "select markets."[2] In June, it was reported that Coinbase is seeking relief from the SEC to offer "tokenized" US stocks.[3] In July, Robinhood announced that it would offer derivatives of both

[1] HMA is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. We promote these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and seek to promote robust public markets. Our members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms.

[2] *Kraken launches tokens to offer 24/7 trading of U.S. equities*, Reuters, May 22, 2025, *available at* https://www.reuters.com/business/autos-transportation/kraken-allow-trading-apple-tesla-nvidia-shares-digital-tokens-wsj-reports-2025-05-22/.

[3] Hannah Lang, *Coinbase seeking US SEC approval to offer blockchain-based stocks*, Reuters, June 17, 2025, *available at* https://www.reuters.com/business/coinbase-seeking-us-sec-approval-offer-blockchain-based-stocks-2025-06-17/.

public and private equity as "tokens" in Europe.[4] We understand that several other firms are either providing similar products, or are in the process of developing them.

It is not entirely clear how each of these equity derivative products is legally structured, or the extent to which each is complying with existing US or foreign law. Nor is it entirely clear what, if any, exemptions or "no-action relief" is being sought by these and other firms related to tokenized securities.

It appears as though the Commission is faced with essentially two broad-based questions.

First, are "tokens" of US equity securities within the definition of securities? Of course, tokens of securities are securities.

Second, given the answer to the first question, then what rules should be applied to those securities and those who engage with them?

Depending upon how tokens of securities are structured, they are generally either some form of collective investment fund or derivative (such as a security-based swap). We were heartened by Commissioner Hester Peirce's short statement declaring – contrary to the assertions of some in the digital asset industry – that the federal securities laws haven't magically been suspended, and decades of legal precedent into what constitutes a security still exist. As she explained:

> Market participants who distribute, purchase, and trade tokenized securities also should consider the nature of these securities and the resulting securities laws implications. For example, depending on the particular facts and circumstances, a token could be a "receipt for a security," which is itself a security but is distinct from the underlying security held by the distributor of the token. Alternatively, a token that does not provide the holder with legal and beneficial ownership of the underlying security could be a "security-based swap" that cannot be traded off exchange by retail persons. While blockchain-based tokenization is new, the process of issuing an instrument representing a security is not. The same legal requirements apply to on- and off-chain versions of these instruments.[5]

With that statement, we suspect that a majority of the Commission likely believes that tokenized financial products that are directly tied to securities (like equities) are securities. And we agree. However, resolving the question of whether the financial products are securities – and therefore subject to jurisdiction by the Commission – doesn't answer the equally important question of what rules apply to them.

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[4] Press Release, *Robinhood Launches Stock Tokens, Reveals Layer 2 Blockchain, and Expands Crypto Suite in EU and US with Perpetual Futures and Staking*, Robinhood Markets, Inc., June 30, 2025, *available at* https://newsroom.aboutrobinhood.com/robinhood-launches-stock-tokens-reveals-layer-2-blockchain-and-expands-crypto-suite-in-eu-and-us-with-perpetual-futures-and-staking/.

[5] Statement of Hon. Hester Peirce, E*nchanting, but Not Magical: A Statement on the Tokenization of Securities*, SEC, July 9, 2025, *available at* https://www.sec.gov/newsroom/speeches-statements/peirce-statement-tokenized-securities-070925.

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We might hope that the Commission's default approach would be to apply the general rules that apply to the underlying securities or otherwise economically equivalent financial products. The Commission has learned time and again that it must carefully construct rules that work together for financial products that are directly related to each other.

For example, the May 6, 2010 Flash Crash involved the trading of equity derivative securities that were subjected to one set of trading rules (overseen by another regulator), triggering a catastrophic collapse in equities and other equity derivatives that were subjected to different trading rules overseen by your agency.

In the years after that event, the Commission worked with its fellow regulators, registered securities exchanges, investors, brokers, and other market participants to implement coordinated market safeguards to protect against catastrophic collapses like that one.[6]

Similarly, the March 26, 2021 explosion of Bill Hwang's Archegos Capital Management involved the trading of equity derivative securities that were subjected to a different set of trading rules than the equities themselves. Archegos engaged in highly leveraged and concentrated equity derivatives trades, and when it was unable to meet its margin calls, its bank counterparties raced to unwind their trades and exposures as quickly as they could. As that happened, the banks' fire sales of those positions severely depressed prices in a number of stocks, including ViacomCBS and Discovery.[7] In addition to the turmoil in the stocks of innocent companies and unrelated investors, some of the banks suffered enormous losses as well.[8]

This incident raises several points relevant to the tokenization discussion, all of which relate to the importance of Commission rules that acknowledge the integration of related financial products. For example, after more than a decade of statutorily-directed rulemaking and implementation, the Commission's security-based swaps rules still didn't adequately address the risks. Further, the concentration of positions exposed a significant weakness in position reporting. If Form 13F filings included equity derivatives and shorts, as HMA first suggested

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[6] See, e.g., *Order Approving, on a Pilot Basis, the National Market System Plan to Address Extraordinary Market Volatility by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.*, SEC, Exch. Act Rel.No. 67091, May 31, 2012, *available at* https://www.sec.gov/files/rules/sro/nms/2012/34-67091.pdf (now operating as the Limit Up, Limit Down Plan, *available at* https://www.luldplan.com/).

[7] See, Erik Schatzker, Sridhar Natarajan, and Katherine Burton, Bill Hwang Had $20 Billion, Then Lost It All in Two Days, Bloomberg, Apr. 8, 2021, *available at* https://www.bloomberg.com/news/features/2021-04-08/how-bill-hwang-of-archegos-capital-lost-20-billion-in-two-days.

[8] See Takashi Nakamichi, Cathy Chan, and Sridhar Natarajan, *Credit Suisse, Nomura Slump as Banks Tally Archegos Damage*, Bloomberg, Mar. 29, 2021, *available at* https://www.bloomberg.com/news/articles/2021-03-29/credit-suisse-nomura-face-losses-as-banks-tally-archegos-damage and Robin Wigglesworth, *Archegos poses hard questions for Wall Street*, Financial Times, Mar. 29, 2021, *available at* https://www.ft.com/content/89b560ec-212c-4e82-b52e-c3e1408a9e6b.

well-before the Archegos collapse,[9] then Archegos' counterparties could have seen the customer's concentrated holdings, and would have more effectively managed not only their own risks, but also those to the underlying equities (well before the risks and impacts grew so large).

Further, the exemption for "family offices" that allowed Archegos to avoid some regulatory oversight and obligations highlights why the Commission should be reluctant to recreate a similar exemption for entities trading in other equities derivatives (irrespective of whether they are "tokenized").[10] There are also other important lessons from the Archegos experience.

For example, the securities laws allow the Commission to protect the markets from bad actors. Prior to the Archegos collapse, Hwang settled an enforcement action for insider trading, and was barred from associating with registered brokers, dealers, transfer agents, and other SEC-regulated entities. Unfortunately, the Commission subsequently granted Hwang's request to lift the ban prior to Archegos' collapse. While the Commission sadly chose to expose the markets to a known bad actor in this instance, it could have stopped it. The Commission should carefully consider whether to allow bad actors to enter our markets through a tokenized back door.

We also note that Archegos' trading was subjected to reporting rules, custody obligations, and many other clearly defined rules (including bankruptcy preference rules). These rules allowed regulators and market participants to identify what went wrong, and mitigate the damages in ways that would be simply impossible for tokenized securities without significantly greater rulemaking.

We would be extremely concerned for the integrity and stability of the traditional securities markets (including equities, US treasuries, and others assets), if financial firms touching tokenized securities (including brokers and trading venues) were not compelled to be registered with the Commission, or otherwise comply with all of their applicable rules. These rules might include requiring FINRA registration, as well as compliance with broker sales practice protections, best execution obligations, reporting rules, custody protections, net capital requirements, and more.

As the Flash Crash and Archegos demonstrate, a failure to align regulations would create massive risks of not just investor protections for the people trading them, but for everyone trading in the underlying stock and markets, too. It wasn't just the trading firms that caused those crises that suffered.

We agree with SIFMA that:

> Facilitating transactions in equity securities outside of [existing rules] raises fundamental questions as to how investors would be protected and more

[9] Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, at 10, Aug. 28, 2020, *available at* https://www.sec.gov/comments/s7-08-20/s70820-7717968-222993.pdf.

[10] See, e.g., Benjamin Bain, *Archegos Shows Need to Monitor Family Offices, Regulator Says*, Bloomberg, Apr. 1, 2021, *available at* https://www.bloomberg.com/news/articles/2021-04-01/archegos-shows-need-to-monitor-family-offices-berkovitz-says (citing former CFTC Commissioner and SEC General Counsel Dan Berkovitz).

> generally whether the SEC would have the authority to oversee unregistered entities offering tokenized equity trading to investors. Even if the entity were required to register as a broker-dealer, there is the question of whether it would also be required to be a member of FINRA; the lack of such a requirement would mean that investor protections under FINRA rules would not automatically extend to such entities.[11]

Similarly, we agree with Citadel Securities that:

> While targeted refinements may be required to a limited set of Commission rules and regulations to accommodate specific immutable characteristics of a tokenized U.S. equity, the overarching objective should be to treat tokenized U.S. equities in the same manner as traditional equity securities from a regulatory perspective—particularly when it comes to bedrock principles such as best execution, fair access, and pre- and post-trade transparency.[12]

In equity securities, the rules applicable to trading have developed over decades of trial and error. They are exceedingly complex and interrelated. They are also promulgated by multiple regulators, including over a dozen registered securities exchanges and FINRA. If the Commission excuses one rule, it will have ripple effects throughout the others.

Also, the mere existence of tokenized US equity securities will further exacerbate many of the current concerns in the equities markets, most notably excessive fragmentation and complexity. We have seen no meaningful discussion of these problems by the Commission, its staff, or the proponents seeking to offer the products.

That said, our concerns go well beyond the tokenization of US public equity securities. For example, the largest, most critical financial market in the world is for the trading of US treasury securities. The integrity and stability of that market is unquestionably essential – for both the operation of our government and our economy. At a time of growing concerns regarding the vibrancy of support for treasury auctions, and concerns with liquidity, we do not believe that fragmenting that liquidity through a potentially infinite array of related tokens is wise. If "tokenized" versions of US treasury securities are essentially permitted to escape transparency and other rules, these markets are put at grave risk.

It is ludicrous to have highly complex rules regulating order submissions, trade increments, fees, reporting, and more in one set of financial products, and then create a parallel universe to trade economically equivalent financial products without those same sets of protections for the integrity and stability of the markets. That isn't innovation. Its regulatory arbitrage. The Commission should not create a two-tiered regulatory system for economically equivalent securities, whether public US equity securities, US treasury securities, or other securities.

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[11] Letter from Kenneth Bentson, Jr., SIFMA, to Vanessa Countryman, SEC, June 30, 2025, *available at* https://www.sec.gov/files/ctf-written-input-sifma-063025.pdf.

[12] Letter from Stephen Berger, Citadel Securities, to Vanessa Countryman, SEC, July 21, 2025, *available at* https://www.sec.gov/files/citadel-securities-response-crypto-task-force-072125.pdf.

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Process Concerns

Tokenization represents a significant change in policy, market structure, operations, and risk management across several securities markets. The Commission cannot reasonably rely on exemptive authority or “no-action” relief to create a new regulatory regime for tokenized securities.

The regulatory treatment of tokenized securities is a significant policy issue that warrants full agency consideration, including notice, solicitation of public comments, thorough analysis, and adequate time to adjust the impacted systems.

The Commission and your fellow regulators,[13] as well as Congress, have spent years contemplating and seeking to structure an appropriate regulatory regime for native digital assets. And we understand that the Commission’s Task Force has recently solicited feedback on how to adjust the agency’s rules for digital assets.

The Commission has not clearly articulated the policy issues to be addressed in its proposed regulatory changes. It has not identified the relevant facts, nor engaged in any reasonable analysis of those facts, nor identified a reasonable regulatory “solution” to address the identified problems.[14]

As you know, the US Supreme Court has recently materially curtailed agencies’ discretion to interpret their statutory authority and directions.[15] But even prior to that decision, the federal courts have looked dimly upon similar Commission actions in the recent past.

The courts have articulated a relatively robust standard for the Commission’s appropriate exercise of its exemption power, for example.

The Commission has authority under existing law to “exempt any person, security, or transaction . . . from any provision” of the Exchange Act “to the extent that such exemption is necessary or

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[13] In April, HMA joined a Crypto Task Force Roundtable to stress the importance of digital assets trading occurring in regulated environments like registered securities exchanges by registered financial institutions, such as registered brokers, for the benefit of investors like registered investment advisers. However, our remarks were confined to native digital assets, and not to the current efforts to essentially recreate an un- or under-regulated parallel alternative to the capital markets upon which millions of American families and businesses rely. See also, Letter from Tyler Gellasch, HMA, to Hon. Hester Peirce, Apr. 11, 2025, *available at* https://www.sec.gov/files/ctf-input-gellasch-hma-041125.pdf.

[14] We note that you have repeatedly stated that “capital formation” plays the central role in your agenda-setting for the agency, as of July 21st, not a single one of the over 125 letters in the comment file appears to have been submitted by a business seeking to engage in capital formation.

[15] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), *available at* https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf (opinion also applied to *Relentless, Inc. et al. v. Dep’t of Commerce*, 22-1219, 62 F.4th 621 (1st Cir. 2023), which had been consolidated with *Loper Bright* for review by the Supreme Court) (overturning *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), noting that the Administrative Procedure Act “makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. The APA’s history and the contemporaneous views of various respected commentators underscore the plain meaning of its text.”).

appropriate in the public interest, and is consistent with the protection of investors."[16] That power – which requires a vote of the Commission under the law – is generally treated as "an exercise of informal adjudication."[17] In exercising that power, the agency "must explain why it decided to act as it did by providing a statement of reasoning rather than a mere conclusion."[18]

In 2023, the Court of Appeals for the District of Columbia Circuit vacated a 2020 Exemptive Order by the Commission on the grounds that the Commission, amongst other things, "failed adequately to explain its rationale and failed to consider an important aspect of the problem."[19]

The court also noted that "[i]f the SEC wanted to rely on MGEX's analyses to connect the grant of exemptive relief with the goal of promoting competition, it needed to critically review and adopt MGEX's submissions or perform its own comparable analysis."[20] The Commission needed to clearly articulate its own analysis or, if it was relying on others, explain why it found that analysis persuasive.[21] The Commission could not demonstrate "unquestioning reliance" on the "self-serving views of a regulated entity."[22]

More broadly, the court found that the Commission had previously said why its rules were important, and didn't clearly explain why the exemption was necessary. The court reasoned that the Commission:

> needed to "acknowledge" and "offer a reasoned explanation" for its evident change of perspective in the Exemptive Order — which, in contrast with the previous order, effectively discarded the Disclosure Statement requirement for a product meeting the statutory definition of a security future. Neither the Exemptive Order nor the record, however, contains any mention of [those rules].[23]

Some have argued that the Commission staff could achieve a similar result to an Exemptive Order through "no-action" relief. It cannot.

The Commission has a clear, statutorily-defined process for exempting products, activities, and actors from the application of its various laws and rules. That's the exemptive process.

No-action letters, by contrast, are intended to be effectively staff-level guidance and interpretations, not exemptions from the application of the law or rules. No-action letters can be effectively, incrementally used by agency staff to inform and guide industry best practices.

[16] 15 U.S.C. § 78mm(a)(1).
[17] *See, e.g.*, *CBOE Futures Exchange, LLC v. SEC*, 77 F.4th 971, 979 (D.C. Cir. 2023).
[18] *Id.*, at 979-980.
[19] *Id.* at 977.
[20] *Id.* at 979.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 980.

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But no-action letters are not substitutes for rules or law. In general, no-action letters are, by design, not actions by the Commission; and, historically, have not been viewed as final agency actions that may be challenged in court for violating the Administrative Procedure Act.[24]

For example, a recent no-action letter from the Commission's Division of Corporation Finance staff illustrates the appropriately narrow scope of such letters, which are typically, "based on the facts and representations" from the specific request:

> This letter reflects the views of the staff of the Division. It is not a rule, regulation, or statement of the Commission, and the Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person. Because the Division's views are based on the representations in your letter, any different facts or conditions might require the Division to reach a different conclusion.[25]

In general, no-action letters have not been viewed as binding other divisions of the agency, much less the Commissioners (the only people statutorily empowered to direct agency action).[26] Further, they have historically been viewed as revocable at any time for any reason. Accordingly, these letters are often requested, analyzed, and granted without any solicitation of public comments or public analysis. To the contrary, requests and staff determinations (to grant or decline) are typically publicized at the same time, and neither typically identifies all the key issues, facts, or analysis. These documents are typically just a few pages long, and generally bereft of robust data or analysis, although such information may separately be secretly shared between the requesting party and the Commission staff.

At the same time, no-action letters may be accurately viewed, at times, as attempts by the agency's Chairman and staff to grant permission for market participants to engage in an activity (or not meet a regulatory requirement), which would otherwise violate the law.

Further, despite often claiming that the no-action relief can only be relied upon by the requesting party, the Commission leadership has over the past few years nevertheless directed staff to issue no-action letters to industry trade groups with the intention of permitting widespread

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[24] *See* 5 U.S.C. § 704 ("[F]inal agency action[s] for which there is no other adequate remedy in a court are subject to judicial review.").

[25] Letter to Alexander R. McClean, Harter Secrest & Emery LLP, from Luna Bloom, SEC, June 30, 2025, *available at* https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/birchbiomed-063025.

[26] As a practical matter, no-action letters typically reflect little more than the views of the agency Chairman, who has the power to hire, fire, and direct the agency staff. That said, over the years, Commissions have delegated some powers to the agency staff. However, the Commissioners nevertheless retain the rights to effectively overrule the staff, including by calling back up for a vote on actions taken by the staff via delegated authority. 17 CFR 201.431. See also, Letter from J. Matthew DeLesDernier, SEC, to Faisal Sheikh, FINRA, Aug. 26, 2023, *available at* https://www.sec.gov/files/rules/sro/finra/2023/34-98212-letter-deputy-secretary-08252023.pdf (notifying FINRA that an approval order granted the day earlier by the Commission staff had been stayed pending a review and vote of the Commission).

industry practices. For example, in 2017, the SEC provided no-action letters to securities industry trade groups related to compliance with requirements for investment research payment practices and trading obligations.[27] In these circumstances, the no-action relief appears to have crossed the boundary from offering guidance on compliance with the law to instead granting broad exemptions from it – but without complying with the agency's statutory requirements for providing such exemptions.

We understand why Commission staff, individual Commissioners, or even a majority of the Commission, may seek to fundamentally change the application of the agency's rules without undertaking the often years-long effort to propose a change, seek comments, undertake extensive analysis, and then adopt a final rule. We understand why even an exemptive order could be viewed as a substantively and procedurally daunting endeavor. Obviously, both types of agency actions could be readily challengeable in court. No-action relief may be viewed as a quicker, and more flexible alternative to achieve the desired change in the rules. It isn't.

The law demands substantive and procedural accountability from the Commission for rules changes.

While the Commission may – like other agencies – generally view no-action letters as readily subject to modification, suspension, or rescission, that is not always the case. And while no-action letters are often viewed by the Commission as legally non-binding, that isn't always the case.

The Commission could theoretically bring an enforcement action against a party to whom its staff previously granted no-action relief. However, we suspect the courts would determine that the enforcement action was improper, if the target of the enforcement action had reasonably relied upon the letter. Frankly, we suspect the Commission's General Counsel would also caution against such an enforcement action, based on fundamental fairness, laches, and other similar principles.

A 2023 decision in the Fifth Circuit Court of Appeals illustrates the Commission's dilemma.[28]

In 2014, the Commodity Futures Trading Commission awarded academic researchers affiliated with Victoria University of Wellington in New Zealand[29] a no-action letter that essentially permitted them to operate a website that allows for wagers on U.S. election outcomes.[30] That letter asserted that the division (not agency) staff "will not recommend enforcement action to the CFTC for failure to comply with a specific provision of the Act or of a Commission rule,

[27] *See, e.g.*, Letter to Steven Stone, Morgan Lewis & Bockius, from Elizabeth Miller, SEC, Oct. 26, 2017, *available at* https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm (subsequently permitted to expire); *see also*, Letter to Timothy W. Cameron Lindsey Weber Keljo, SIFMA AMG from Heather Seidel, SEC, Oct. 26, 2017, *available at* https://www.sec.gov/divisions/marketreg/mr-noaction/2017/sifma-amg-102617-28e.pdf.

[28] *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023).

[29] *Clarke, at* 633.

[30] Victoria University, CFTC No-Action Letter, CFTCLTR No. 14-130 (Oct. 29, 2014), *available at https://www.cftc.gov/csl/14-130/download (PredictIt No-Action Letter).*

regulation, or order,"[31] provided that PredictIt would abide by certain self-imposed limitations on how it operated, such as maintaining nonprofit status and allowing researchers access to the data.[32]

The PredictIt No-Action Letter (like many others) declared that it:

- "represent[ed] the views of [one division of the agency] only,"
- "d[id] not necessarily represent the positions or views of the Commission," and
- could be subsequently modified, suspended, or terminated at the staff's discretion.[33]

In reliance upon the letter, the recipients and several third parties essentially created a business to engage in political wagering.

In August 2022, the CFTC staff rescinded the no-action letter, stating that the recipient had "not operated its marketplace in compliance with the terms."[34] In September 2022, some of the third-parties that had relied upon the letter sued the CFTC in the Fifth Circuit Court of Appeals, claiming that recission was arbitrary and capricious.[35]

In defending its rescission, the CFTC relied upon decades of legal precedent in which no-action letters "have been regularly found to be non-binding and devoid of legal authority," and are not "final" "agency actions" subject to the APA.[36] That reliance was misplaced.

Instead, the court found that the PredictIt No-Action Letter was a "license" within the meaning of the Administrative Procedure Act and as a result, its rescission was also agency action.[37] The court also determined that the rescission was "final" because it was unappealable,[38] and its rescission forced the plaintiffs to choose between changing their conduct or exposing themselves to liability.[39] Going further, the court explicitly rejected the CFTC's defense that no-action letters are akin to agency decisions not to prosecute or enforce and, therefore, are unsuitable for judicial review.[40]

Put simply, if the Commission staff were to offer "no-action" relief that would effectively act as a license to engage in operations that would otherwise be illegal, that decision-making process must still comply with the APA. There is simply no way that can be done on the current public record. Lastly, we note that courts may permit a legal challenge on APA grounds by anyone "adversely affected or aggrieved by agency action."[41] When it comes to carving "tokenized"

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[31] *Clarke*, at 633.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*, at 644.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*, at 639.
[41] *Id.*, at 640.

securities out of traditional market and investor protections, that could be a very, very large group of potential plaintiffs.

We also suspect that no-action relief will quickly be viewed by even the beneficiaries as inadequate for their purposes. Historically, no-action relief has provided market participants with comfort in situations in which the Commission's staff determines that it would not recommend that the Commission take enforcement action against the requestor based on the facts and representations described in the individual's or entity's request. Put simply, the letter is a promise by the appropriate division staff of the Commission that it would not recommend that the Commission pursue an enforcement action.

But the Commission staff doesn't speak on behalf of private parties and potential litigants. Many of the implicated federal securities laws and rules independently allow for private causes of action against issuers and underwriters. Without a guarantee of protection, the no-action relief would not convey to the market the level of certainty from liability that the Commission may hope to convey.

Lastly, a no-action letter-based process would be effectively initiating an experiment of unknown size and import. It could impact the trading of hundreds, or even thousands of securities.

However, as the Commission was painfully recently reminded by the Court of Appeals for the District of Columbia Circuit's decision vacating the "Transaction Fee Pilot," the agency cannot engage in widespread "pilot" programs or "sandboxes" without engaging in a thorough collection of relevant facts and deeper analysis.[42] The Court of Appeals unambiguously explained:

> Nothing in the Commission's rulemaking authority authorizes it to promulgate a "one-off" regulation … merely to secure information that might indicate to the SEC whether there is a problem worthy of regulation. "Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'"[43]

That stark warning is unquestionably applicable to the agency's consideration of a regulatory "sandbox" for tokenization.

<u>Conclusion</u>

Tokenization of assets presents opportunities for market improvements that the Commission and Congress should explore. At the same time, regulators and Congress should proceed carefully, and avoid multi-tiered market structures that would not just create significant

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[42] *New York Stock Exchange, LLC v. SEC*, 962 F.3d 541 (D.C.Cir. 2020), *available at* https://law.justia.com/cases/federal/appellate-courts/cadc/19-1042/19-1042-2020-06-16.html.

[43] Id. (citing *Ragsdale v. Wolverine World Wide, Inc*, 535 U.S. 81, 91 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000))).

regulatory uncertainty, but also pave the way for undetectable insider trading, money laundering, market manipulations, self-dealing, and catastrophic market failures.[44]

If you have any questions, please contact me at (202) 909-6138 or ty@healthymarkets.org.

Thank you for your consideration.

Sincerely,

President and CEO

cc: Hon. Hester Peirce
Hon. Caroline Crenshaw
Hon. Mark Uyeda

[44] We are concerned that legislation that recently passed the US House of Representatives as well as similar legislation being considered in the Senate would require the Commission to establish entirely new rules for tokenized securities. As drafted, that legislation would effectively "lock in" loopholes that would materially undermine our traditional capital markets, including fragmenting the National Market System. See, H.R. 3633, *Digital Asset Market Clarity Act of 2025*, 119th Cong. (2025), *available at* https://www.congress.gov/119/bills/hr3633/BILLS-119hr3633eh.pdf and *Responsible Financial Innovation Act of 2025*, 119th Cong. (2025), *available at* https://www.banking.senate.gov/imo/media/doc/senate_banking_committee_digital_asset_market_structure_legislation_discussion_draft.pdf (committee discussion draft).