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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: Scoping Out

Dear Commissioner Peirce and Members of the SEC Crypto Task Force,

On behalf of The Digital Chamber ("**TDC**"), the world's largest digital asset and blockchain trade association, we respectfully provide this submission in response to portions of Commissioner Hester M. Peirce's February 21, 2025 *There Must Be Some Way Out of Here* statement (the "**Statement**"). In particular, this letter addresses Questions 5 and 6 of the Statement, related to identifying categories of crypto assets (and transactions) that do not fall within the authority of the U.S. Securities and Exchange Commission (the "**Commission**" or the "**SEC**") and taxonomy issues.

The confusion over the security status of certain digital assets was perhaps best exemplified during a House Financial Services Committee hearing on September 27, 2023.[1] During that hearing, then Commission Chair Gary Gensler was asked whether the purchase of a Pokémon card would constitute a securities transaction. He responded with certainty that such a purchase was not a securities transaction. When asked about the securities law status of the same exact Pokémon card if it was tokenized on the blockchain and sold, however, he responded he would need more information to determine whether that would be a securities transaction. Commissioner Peirce rightly noted that this failure to provide a clear regulatory framework for blockchain-enabled products and services "creates unnecessary angst for innovators who do not know whether and when their work might fall into regulatory disfavor. It also harms the public by keeping from them the innovations they would otherwise enjoy."[2]

As we detail in our responses, the Commission should clarify that if the purchase or sale of an asset would not otherwise be considered a securities transaction, then the mere process of

[1] Oversight of the Securities and Exchange Commission, H. Financial Service Committee, 118th Cong. (2023); relevant testimony *available at* https://tinyurl.com/yv9z6cuf (last visited June 27, 2025).
[2] Comm'r Hester M. Peirce, *Hobs and Hobbes: Wharton FinTech Lecture*, U.S. Sec. and Exch. Comm'n (Nov. 1, 2024), *available at* https://tinyurl.com/mrxkke7v (last visited June 27, 2025).

tokenizing or creating a cryptographically authenticated digital representation of that asset does not convert that non-securities transaction into a securities transaction. If the sale of a Pokémon card is not a securities transaction, then the sale of a non-fungible token ("**NFT**") Pokémon card is not a securities transaction. We also recommend that, while a taxonomy would be useful to ensure that the Commission and market participants are speaking the same language and to delineate specific types of digital assets that have special treatment or are subject to a safe harbor, a tokenized asset should not have a different taxonomy from its underlying asset. Finally, we provide some suggestions on how the SEC could improve its process of communicating with the industry.

TDC offers the following responses to assist the Commission in evaluating how it can best scope out its authority around products and services enabled through cryptographically secured append-only ledger technologies.

Question 5

Should the security status of certain categories of crypto assets be addressed, such as stablecoins, wrapped tokens, and NFTs?

The Commission's Division of Corporate Finance ("**CorpFin**") has released several statements regarding the application of the federal securities laws to certain categories of blockchain technologies and crypto assets.[3] TDC encourages the Commission continue to think deeply about these issues and to issue additional generally applicable guidance to provide more clarity to the industry. As specified in greater detail in response to Question 6 below, TDC also recommends that the Commission enact a more streamlined and transparent process for marketplace participants to obtain informal guidance and suggest rulemaking.

As to NFTs, stablecoins, and wrapped tokens, the Commission should provide formal guidance, and rulemaking as appropriate, to allow the market to clearly separate consumer sales of goods and services, which are outside the Commission's jurisdiction, from securities transactions that are regulated by the Commission. Prior Commission enforcement actions have applied securities laws to certain NFT sales based on pooled consumer funds and resale features,

[3] Div. of Corp. Fin, *Statement on Certain Protocol Staking Activities,* U.S. Sec. and Exch. Comm'n (May 29, 2025), *available at* https://tinyurl.com/3dwc5v5b (last visited June 27, 2025) (the "**Statement on Staking**"); Div. of Corp. Fin, *Statement on Stablecoins,* U.S. Sec. and Exch. Comm'n (Apr. 4, 2025), *available at* https://tinyurl.com/y84rdkm6 (last visited June 27, 2025) (the "**Statement on Stablecoins**"); Div. of Corp. Fin, *Statement on Certain Proof-of-Work Mining Activities,* U.S. Sec. and Exch. Comm'n (Mar. 20, 2025), *available at* https://tinyurl.com/d5px5ph5 (last visited June 27, 2025) (the "**Statement on PoW**"); Div. of Corp. Fin, *Staff Statement on Meme Coins,* U.S. Sec. and Exch. Comm'n (Feb. 27, 2025), *available at* https://tinyurl.com/29x5xfh8 (last visited June 27, 2025) (the "**Statement on Memecoins**").

invoking the state law "risk capital" test rather than the established *Howey* standard.[4] This has led to legal uncertainty around digital ownership of these assets and significantly chilled innovation.

To provide clarity, TDC recommends that the SEC issue formal guidance and commence rulemaking as necessary to: (1) exempt *bona fide* consumer sales of goods and services (including NFTs) from securities laws where no profit or equity interest (or interest exercisable or convertible thereto) is offered and there is no contractual obligation for repayment; and (2) reaffirm *Howey*'s proper scope—limiting securities regulation to transactions involving an investment in an enterprise where that enterprise, by law or by agreement, may be required to make payments to holders, depending on the success or failure of that enterprise. In the case of stablecoins and wrapped tokens, TDC requests that the Commission issue formal guidance and commence rulemaking as necessary to specifically clarify how existing rules apply to tokenized financial instruments and cross-chain interoperability tools without unnecessarily classifying them as securities or investment contracts.

In all cases where the current Commission provides clarity around these matters, it is critically important that the Commission insulate those positions from future political changes by creating lasting regulations, and via other means available to the Commission, so that market participants can proceed to develop businesses and consumer use cases without fear of a future abrupt change in regulatory approach and corresponding enforcement repercussions.

NON-FUNGIBLE TOKENS

Background on Non-Fungible Tokens

The term NFT simply refers to a cryptographically verified token recorded on a blockchain which has some unique features to differentiate that token from similar tokens. As with other assets, digital assets can be:

- Fungible – each storing divisible and non-unique value like an unmarked bar of gold;
- Non-fungible – each representing a unique and indivisible item, like a piece of art; or

[4] *Silver Hills Country Club v. Sobieski*, 55 Cal.2d 811, 361 P.2d 906 (Cal. 1961); *see also* SEC's Mem. in Supp. of Mot. for Summ. J., *SEC v. LBRY, Inc.*, No. 1:21-cv-00260-PB (D.N.H. May 4, 2022) (DKT. #55-1) (Arguing the sale of LBC tokens constituted sales of investment contracts because those sales were used to fund operations of LBRY, Inc.'s business and because buyers "shared in the profits and risks of, the LBRY Network.").

- Semi-fungible – with some fungible and non-fungible qualities, like as a dollar bill, which is treated as fungible when used for the purchase of goods and services, but which may have unique features in its serial numbers or printing quality which some collectors value above the face value of the currency itself or that allow for tracking.

In blockchain technology, whether a token is fungible, non-fungible, or semi-fungible simply depends on the technical specifications as to how the token was created.[5] Many blockchain networks have developed certain token "standards" which ensures interoperability, consistency, and predictability for tokens as well as otherwise allowing the tokens to interact with the applicable blockchain technologies in a defined and standardized way.[6] The fungibility of a token (or lack thereof) in no way makes a token any more or less likely to be sold in a securities transaction.[7]

For the purpose of our response, the term "**Consumer NFTs**" is used to describe non-fungible and semi-fungible digital tokens which are primarily sold to consumers for their use and enjoyment and not as an investment contract or other security. While some Consumer NFTs have been, and will be, bought for speculative purposes, what differentiates Consumer NFTs from fungible or non-fungible tokens sold in securities transactions is not the subjective motive of a

[5] The creation of a digital token is often referred to as "**Minting**," which is the creation event that brings a blockchain-native token into existence, confers ownership, and makes it transferable or usable under the rules of the protocol.

[6] Using the Ethereum network as an example, there are various common token standards used across the industry such as ERC-20 tokens (fungible cryptocurrencies, memecoins, and utility tokens), ERC-721 tokens (non-fungible tokens designed to be linked to unique features in the token's individual metadata), ERC-1155 tokens (semi-fungible tokens which have unique serial identifiers but have batchable metadata for use as token-gated access to products or services), ERC-1404 tokens (semi-fungible tokens with easily implemented restrictions on transferability for compliance with applicable law), and others. *See also* David J. Kappos, Lee A. Schneider, Daniel M. Barabander & Callum A.F. Sproule, *Fuzzy Tokens: Thinking Carefully About Technical Classification Versus Legal Classification of Cryptoassets*, 38 Berkeley Tech. L.J. 1 (2023).

[7] TDC notes that other responses submitted on these questions have advocated for the use of certain taxonomies for NFTs based on whether they fit within defined categories such as "Collectible Tokens" or "Digital Art." TDC encourages the Commission to consider whether it would be appropriate to issue formal or informal guidance as to the securities law status of transactions involving those categories of NFTs, or any of the other common use cases discussed below. *See, e.g.*, Letter from Edward Lee to Comm'r Hester M. Peirce, Chairman of SEC Crypto Task Force, U.S. Securities and Exchange Commission (Apr. 1, 2025), *available at* https://tinyurl.com/2s3h739v (last visited June 27, 2025); Email from Miles Jennings, Jai Ramaswamy, Scott Walker, and Michael R. Korver to Comm'r Hester M. Peirce, Chairman of SEC Crypto Task Force, U.S. Securities and Exchange Commission (Mar. 13, 2025), *available at* https://tinyurl.com/mr3umtwz (last visited June 27, 2025). It is worth noting that whether an NFT is a "Collectible Token" for purposes of SEC guidance should not be limited to whether the item is a "collectable" for purposes of how the sale of such an item would implicate tax laws. *See* DEPT. OF THE TREASURY, NOTICE 2023-27, TREATMENT OF CERTAIN NONFUNGIBLE TOKENS AS COLLECTIBLES. If the Commission does choose to utilize the term "collectible" for ease of reference with respect to certain NFTs in guidance under federal securities law, it should be clear that whether the digital asset is a "collectable" for securities law purposes is unrelated to its tax status under Section 408(m) of the Internal Revenue Code of 1986. *See* I.R.C. § 408(m).

particular purchaser,[8] but rather an objective analysis into conditions of the sales and interrelated agreements surrounding those sales.[9]

Common Use Cases for Consumer NFTs

A primary benefit of Consumer NFTs is that they allow consumers to directly own the goods and services they enjoy in an increasingly digital world. The internet is currently dominated by centralized platforms that provide services in exchange for user data and attention.[10] Centralized platforms monetize user behavior and content, typically through advertising. Content is hosted and controlled by centralized entities, and users can license access to content such as streaming movies or buying in-game items in video games. Users do not own the content they "purchase"; rather, users merely purchase licenses from these centralized entities.

"Web3" refers to a new model for internet applications built on blockchain technology, emphasizing user ownership, decentralization, and interoperability. In this model, users own their digital purchases in the form of Consumer NFTs and the portability of those Consumer NFTs are often limited only by whether a particular platform is integrated with the blockchain on which the Consumer NFT is Minted.

Art was one of the first areas in which consumers and enthusiasts found value in Consumer NFTs. CryptoPunks, for example, is a Consumer NFT collection of 10,000 unique digital characters, each with its own unique characteristics and attributes. With over $3 billion in cumulative sales, CryptoPunk creators Matt Hall and John Watkinson have been referred to as the "highest-selling living artists of our time."[11] Consumer NFTs representing digital art, music, and other artistic expressions have all the characteristics of those underlying artistic expressions but

[8] "The mere presence of a speculative motive on the part of the purchaser or seller does not evidence the existence of an 'investment contract' within the meaning of the securities acts. In a sense anyone who buys or sells a horse or an automobile hopes to realize a profitable 'investment.'" *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F.Supp. 359, 367 (S.D. N.Y. 1966). *See also Dahl v. English*, 578 F.Supp. 17 (N.D. Ill. 2983) (sale of art in lithographic plate form not a securities transaction despite allegations of pooling of funds and subjective investment intent by purchasers); *Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 845 (D.S.C. 1988), *aff'd* in part, *rev'd* in part *sub nom. Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991) (same for sale of art master as a reproduction plate); *Woodward v. Terracor*, 574 F.2d 1023, 1025 (10th Cir. 1978) (land sale not an investment contract despite advertisements for profit potential).

[9] *See Hocking v. Dubois*, 885 F.2d 1449, 1462 (9th Cir. 1989) (explaining that determining whether a transaction is a securities transaction requires an "examination of the economic reality of each transaction…and the nature of the investment and the collateral agreements.").

[10] *See generally* Dixon, Chris, READ WRITE OWN: BUILDING THE NEXT ERA OF THE INTERNET (2024) (explaining the functionalities of the current internet as opposed to blockchain enabled products and services provided online).

[11] *CRYPTOPUNKS JOIN THE NODE FOUNDATION*, NODE (May 13, 2025), *available at* https://tinyurl.com/bdzk9bjk (last visited June 27, 2025).

with cryptographically secured verification of provenance. Consumer NFTs may enable users to buy and sell their digital purchases (such as e-books, digitized music, and electronic copies of movies) in the same way they can buy and sell physical purchases, which generally is not permitted under licensing models for products purchased on centralized platforms.[12]

Other types of goods and services are also sold through Consumer NFTs. Brands like Adidas, Nike, Budweiser, Starbucks, Tiffany & Co., and others have explored the use of Consumer NFTs to connect with their users in a way less prone to digital manipulation or "bots" and more likely to reach loyal supporters.[13] Consumer NFTs allow brands to cryptographically secure future sales through requiring proof of Consumer NFT ownership to access such sales. Brands can also airdrop rewards or promotion materials to holders of certain Consumer NFTs. Similarly, event tickets sold through Consumer NFTs can create an immutable record of who purchased tickets to, or attended, prior events for potential rewards or priority access to future events.

In addition, some video game developers are also working to sell in-game items (an industry in which users spent over $50 billion dollars last year)[14] as Consumer NFTs which would allow consumers to sell items from games they no longer play to fund purchases of items in games they do play.[15]

Each of those examples – art, gaming items, concert tickets, and consumer goods – are products and services which can be improved upon in some aspect through the use of Consumer NFTs. And we note that sales of art, gaming items, concert tickets, and consumer goods in their physical or non-cryptographically verified digital form have traditionally never been subject to U.S. federal or state securities laws unless associated with a separate investment contract.

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[12] Joshua L. Durham, *Creating True Digital Ownership with the "First Sale" Doctrine*, 23 Wake Forest J. of Bus. & Int. Prop. L. 136 (Winter 2022) (arguing that while the "First Sale Doctrine" generally restricts sellers of copyrighted goods from putting resale restrictions on those good past the initial sale, preventing users from copying and selling copies of those copyrighted goods is well established and there is no way to sell most digital goods without creating a copy on somebody else's device. Consumer NFTs, on the other hand, do not create a copy when sold, but rather have their ownership records updated on the blockchain).

[13] Kappos *et al.*, *supra* note 6 at 12 (explaining the functionalities of Adidas issued Consumer NFTs).

[14] *US Video Game Spending Hit $59.3 Billion in 2024, Led by Mobile*, PocketGamer.biz (June 5, 2025), *available at* https://tinyurl.com/mrkpa6vz (last visited June 27, 2025).

[15] Vitalik Buterin, one of the primary creators of the technology that would become the Ethereum network, famously was inspired to develop decentralized technologies after his World of Warcraft character was negatively impacted by a game update. See Owen S. Good, *NFT Mastermind Says He Created Ethereum Because Warcraft Nerfed His Character*, Polygon (Oct. 4, 2021), *available at* https://tinyurl.com/3erduaun (last visited June 27, 2025).

Existing SEC Guidance on Consumer NFTs

The only Commission guidance to-date related to NFTs comes in the form of three consent orders issued against separate NFT sellers.[16] Stoner Cats involved the sale of ERC-721 tokens which each depicted a unique image of an inebriated cartoon cat, prospectively giving the owners access to watch a cartoon series featuring an elderly woman and her many cannabis-smoking cats. Flyfish Club involved the sale of ERC-721 tokens which depicted various images of seafood, prospectively giving holders access to a private dining establishment. Impact Theory involved the sale of ERC-721 tokens which depicted a keycard with four of fifty possible symbols, prospectively giving owners "seven categories of utility unlocked to varying degrees by each tier" and "VIP access to our vast array of Web3 offerings and collectibles."[17]

Each of the NFT Consent Orders emphasized that consumer funds were pooled to finance the creation and delivery of the goods and services associated with the respective NFTs. The SEC cited this pooling, along with the transferability of the NFTs, as factors in determining that the unregistered sale of these NFTs constituted unlawful securities offerings. The NFT Consent Orders also required the destruction of any NFTs remaining in the creators' possession, and two of the three companies have ceased operations largely resulting from these actions.

Prior to the NFT Consent Orders there was a common understanding that if an individual or business sold a product or service to a consumer, unless that product or service also entitled the buyer to some share of the profits or losses from some business endeavor, that sale was not a securities transaction.[18] This common sense understanding was completely upended by the NFT Consent Orders, which applied the previously state-level-only "risk capital" test rational,[19] rather than the federal-level *Howey* Test that has been precedent since 1946.

Indeed, if any one of Flyfish Club, Stoner Cats, or Impact Theory NFTs had been sold as non-transferable NFTs, then there could be no reasonable expectation of profits by purchasers and

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[16] *In the Matter of Stoner Cats 2*, LLC, Securities Act Rel. No. 11233 (Sept. 13, 2023) ("**Stoner Cats**"); *In the Matter of Flyfish Club*, LLC, Securities Act Re. No. 11305 (Sept. 16, 2024) ("**Flyfish Club**"); *In the Matter of Impact Theory, LLC*, Securities Act Rel. No. 11226 (Aug. 28, 2023) ("**Impact Theory**") (collectively the "**NFT Consent Orders**").

[17] George Pagoulatos, *Impact Theory Founder Key*, Medium (Oct. 6, 2021), *available at* https://tinyurl.com/44vtahvr (last visited June 27, 2025).

[18] Comm'r Hester M. Peirce & Comm'r Mark T. Uyeda, *NFTs & the SEC: Statement on Impact Theory, LLC*, U.S. Sec. and Exch. Comm'n (Aug. 28, 2023), *available at* https://tinyurl.com/y5dkuzpj (last visited June 27, 2025) ("We do not routinely bring enforcement actions against people that sell watches, paintings, or collectibles along with vague promises to build the brand and thus increase the resale value of those tangible items.").

[19] *See Silver Hills Country Club*, 55 Cal.2d at 811 (creating a "risk capital" test used primarily in state securities law, particularly in states like California, to determine whether a transaction involves a "security" and therefore must comply with state securities regulations).

thus would assumedly not have been subject to the NFT Consent Orders.[20] There is no world where non-transferable restaurant memberships, streaming services, or fan club passes are better for consumers than transferable versions of the exact same products or services.[21] Using that rationale, anything with a resale market, such as sneakers, cars, baseball cards, or concert tickets could be required to be registered with the Commission prior to sale or resale.[22]

Even more troubling was the Commission's restraint on artistic expressions implicit in the NFT Consent Orders. Each of the NFT Consent Orders required the creators to "destroy" all NFTs (and the related artwork contained in metadata of those NFTs) remaining in the sellers' possession. It is unclear how the destruction of art falls within the Commission's investor protection mandate or how it had the authority to mandate the registration of art without such a requirement being an unconstitutional prior restraint on free speech.[23]

RECOMMENDATIONS AS TO NFTS

The Commission's approach to Consumer NFTs as expressed through the NFT Consent Orders impose regulatory burdens on expressive and functional technologies in ways that neither advance investor protection nor respect the boundaries of lawful artistic and commercial activity. That posture risks chilling both artistic expression and technological development, without offering meaningful protection to ordinary Americans engaging in emerging digital culture[24] and commerce. To address that regulatory overreach, TDC has the following recommendations for Commission action with respect to Consumer NFTs:

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[20] LA Fan Club, Inc., SEC No-Action Letter, WEB File No. 0710201701 (June 28, 2017) (no action relief granted for fan club membership sales which placed onerous restrictions on transferability of the membership rights and services).
[21] Comm'r Hester M. Peirce & Comm'r Mark T. Uyeda, *Omakase: Statement on In the Matter of Flyfish Club, LLC*, U.S. Sec. and Exch. Comm'n (Sept. 16, 2024), *available at* https://tinyurl.com/mum86r9v (last visited June 27, 2025) ("Will Flyfish Club members really be better off now that the Commission is making it much harder to sell their memberships? The securities laws are not needed here, and their application is harmful both in the present case and as future precedent.").
[22] *Van Huss v. Associated Milk Producers, Inc*., 415 F. Supp. 356, 360 (N.D. Tex. 1976) ("Congress never intended the securities laws to apply to all sales; otherwise, the detailed reporting provisions and other requirements would seriously clog everyday commerce.").
[23] Edward Lee, *The Original Public Meaning of Investment Contract*, 58 UC Davis L. Rev. 667, 676-687 (2024) (providing support for the claim the requiring registration of artworks with the Commission prior to sales of those artworks represents an unconstitutional prior restraint on free speech).
[24] *Statement on Memecoins*, *supra* note 3 (explaining that meme coins purchased for entertainment, social interaction, and cultural purposes do not constitute securities transactions).

Clarify Exclusion for *Bona Fide* Consumer Sales of Products Primarily Intended for Consumption.

Businesses regularly conduct pre-sales of goods and services to finance the delivery of those goods and services to consumers. This includes consumers supporting small businesses on platforms like Kickstarter, presales of motor vehicles, launches of limited edition sneakers, or purchasing tickets for future concerts.[25] If the seller fails to deliver said products or services, consumers are adequately protected under common law breach of contract rights, consumer protection laws enacted across all fifty states, and by the rules and enforcement powers provided to the Federal Trade Commission (the "**FTC**").

Purchasing products and services versus purchasing securities of a business are materially different, even if both involve delivery of consideration to the business in exchange for something of value the purchaser hopes the business will deliver in the future. How the business finances delivery of the promised goods and services should be immaterial.

The Commission can make this clear through a formal interpretive release or other rulemaking to differentiate the sales of products or services (in any format, including Consumer NFTs) from the sales of securities. Suggested language could include:

> **Exclusion for *Bona Fide* Consumer Sales**. An offer or sale of a good, service, or membership shall not be deemed an "offer" or "sale" of a security under the Securities Act, and shall not require registration or exemption if:
>
> (1) The purchaser receives a product, service, membership, or other form of personal use benefit reasonably commensurate with the consideration paid;
>
> (2) The transaction does not entitle the purchaser to a share in the profits, equity, or residual assets of any business or enterprise, nor to any repayment of capital or financial return based on the efforts of others other than an increase in value of the product, service, membership, or other form of personal use benefit purchased or the value of such personal use;
>
> (3) Any rights to resell, transfer, or trade the product or service do not, by themselves, constitute an investment interest; and
>
> (4) The associated marketing materials do not primarily emphasize profits for the holder.

[25] Andy Cush, *Artists Make $8 in Profit from a $100 Concert Ticket*, Hearing Things (Dec. 2, 2024), *available at* https://tinyurl.com/y6fhdfav (last visited June 27, 2025) (explaining that a large portion of the proceeds from ticket sales for concerts goes to putting on the concert itself).

This type of exclusion would make it clear that consumer pre-sales are not investment contracts merely because pooled funds are used to build or deliver the associated product or experience. It would also be consistent with existing securities law precedent that not all transactions involving money are investment contracts, while imposing guardrails to prevent investor abuse by ensuring there is no promised or implied equity or profit participation and limiting investment-style marketing tactics.

The proposed exclusion also ensures that the rules do not inadvertently encompass transactions that are commercial in nature and do not raise investor protection concerns typically associated with the offer or sale of securities.[26] The exclusion would help market participants distinguish between offerings requiring Securities Act registration or an exemption, and non-securities transactions that are outside the scope of federal securities laws.[27]

Clarify the Limiting Principles on Investment Contracts Consistent with *Howey* and its Progeny

Under federal law, the United States Supreme Court's 1946 decision in *SEC v. W.J. Howey Company* is still regarded as the definitional case for "investment contract."[28] In *Howey*, the Supreme Court acknowledged the term "investment contract" was undefined in the Securities Act and the Exchange Act and determined that the meaning of "investment contract" has been "crystalized" by "prior judicial interpretations."[29] Consequently, courts typically look to these elements in such an examination: (1) an investment; (2) in a common enterprise; (3) with an

[26] Similarly, allowing Consumer NFT marketplaces to allow sales to be processed through their platforms based on token standard without needing to review each and every collection to determine if sales of those NFTs constitute investment contracts, is good for consumers. It solves the walled garden problem created in sales of other digital goods. *See, e.g., Frustrated Taylor Swift Fans Battle Ticket Bots and Ticketmaster*, CBS News (last updated Apr. 2024), *available at* https://tinyurl.com/2mhxnphj (last visited June 27,2025). For this reason, while beyond the scope of this submission, TDC encourages the Commission to provide guidance to marketplaces which allow peer-to-peer transactions involving NFTs so that users continue to have optionality in their Consumer NFT purchases and sales. *See* Letter from Adele Faure & Laura Brookover to Commissioner Hester M. Peirce, Chairman of the Crypto Task Force, U.S. Securities & Exchange Commission (Apr. 9, 2025), *available at* https://tinyurl.com/5n72nznm (last visited June 27, 2025).

[27] Clarifying the meaning of "investment contract" falls squarely within the SEC's purview, as demonstrated by its issuance of the TurnKey Jet and Pocketful of Quarters no-action letters and its publication of the "Framework for 'Investment Contract' Analysis of Digital Assets," all of which reflect the Commission's recognized authority to interpret and apply the *Howey* Test in the context of evolving technologies and market practices. *See* TurnKey Jet, Inc., SEC No-Action Letter (Apr. 3, 2019), *available at* https://tinyurl.com/4n5sw9ys; Pocketful of Quarters, Inc, SEC No-Action Letter (July 25, 2019), *available at* https://tinyurl.com/3tvp63ce; *Framework for "Investment Contract" Analysis of Digital Assets*, U.S. Sec. and Exch. Comm'n (July 5, 2024), *available at* https://tinyurl.com/5n77amak (last visited June 27, 2025).

[28] *Howey*, 328 U.S. at 293

[29] *Id*. at 298 (citing *State v. Gopher Tire & Rubber Co.*, 177 N.W. 937 (Minn. 1920).

expectation of profits; (4) to come solely from the efforts of others. *Howey*, 328 U.S. at 301 (these elements are commonly referred to as the "***Howey* Test**").[30]

However, there has been an inconsistent application of the *Howey* Test by the Commission, especially regarding digital assets. In the *Howey* case itself, the Commission took the position that "the Commission's proffered definition of an 'investment contract,' which ha[s] therefore been the established judicial definition, as including any ***contractual arrangement*** for the investment of money in an enterprise with the expectation of profit through the efforts of promotors."[31] More recently, Commission staff applied a new and unique "morphing" analysis to digital assets whereby a digital asset itself was treated as a security at one stage, but could "morph" into something not a security[32] if certain conditions were met. This analysis led to the creation of the ambiguous term "crypto-asset securities."[33] The Commission also stated for the first time that it did not consider the *Howey* Test to be a four part test, as it was the Commission's view that an investment contract "does not require vertical or horizontal commonality *per se*, nor does [the Commission] view a 'common enterprise' as a distinct element of the term 'investment contract.'"[34]

When courts clarified that digital assets themselves are not securities[35] but were instead products capable of being sold in securities transactions,[36] the Commission took the position that,

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[30] It is worth noting that the *Howey* Test is limited in application to "unusual instruments not easily characterized as 'securities.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 (1985). Where the instrument being sold is understood to be a "stock" or has the characteristics of a "stock" such as negotiability, pledgeability, pro-rata voting, profit contingent right to dividends, and appreciation rights, there is no need to apply *Howey* as securities laws clearly apply. *Id.*, *see also United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 847 (1975).

[31] Br. for the SEC, *SEC v. W.J. Howey Co.*, Case No. 843, 1946 WL 50582, at *9 (U.S. Apr. 17, 1946) (emphasis added); *see also* Br. for the SEC, *SEC v. Edwards*, Case No. 02-1196, 2003 WL 21498455, at *17 (U.S. June 26, 2023) ("Thus, the very term 'investment *contract*' makes clear that instruments of that name include those in which a return—whether labeled income or profit—is promised in a contract.") (emphasis in original). Br. for Securities Law Scholars as *Amici Curiae* in Supp. of CoinBase's Mot. for J. on the Pleadings, *SEC v. Coinbase, Inc.*, Case No. 23 Civ. 4738 (KPF) (S.D.N.Y. Aug. 11, 2023).

[32] William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, U.S. Sec. and Exch. Comm'n (June 14, 2018), *available at* https://tinyurl.com/2vfn4pvb (last visited June 27, 2025).

[33] *5 Ways Fraudsters May Lure Victims Into Scams Involving Crypto Asset Securities – Investor Alert*, U.S. Sec. and Exch. Comm'n (May 29, 2024), *available at* https://tinyurl.com/ysw7rhu7 (last visited June 27, 2025).

[34] *Framework for "Investment Contract" Analysis of Digital Assets*, *supra* note 30

[35] This is not to say the digital asset itself cannot be a security, as would be the case with a tokenized asset which is a defined security, such as a tokenized note, tokenized stock, tokenized bond, or any of the other defined "security" assets which would not lose their "security" status through the mere act of tokenization. *See Landreth Timber*, 471 U.S. at 690.

[36] *SEC v. Telegram*, 448 F. Supp. 3d 352, 366 (S.D.N.Y. 2020) (clarifying that a digital asset is not a security nor is a purchase agreement for that digital asset, but rather the entire scheme that comprised the agreements along with accompanying understandings of purchasers is what was determined to be a security); *SEC v. Ripple Labs, Inc.*, Case

if tokens were initially sold as a part of investment contracts, then any secondary market sales of those tokens (even if separate from tokens sold in securities transactions) are securities transactions if the tokens' "promotions and economic realities have not changed in any meaningful way under *Howey*, such that they continue to be offered and sold as investment contracts."[37] The Commission expanded on this position, by claiming that the "promotions and economic realities" of a token were not dependent on the original issuer of that digital asset, but instead on the "ecosystem" surrounding the blockchain network with which the digital asset integrates.[38]

This amorphous standard is antithetical to the Commission's previously understood and statutorily authorized mission,[39] creates market confusion, and expands the *Howey* Test beyond its intent of capturing only "profit-seeking business venture[s]" where "investors provide the capital and share in the earnings and profits" while "promotors manage, control and operate the enterprise."[40] Instead, the Commission's new application of the *Howey* Test lacks any semblance of a limitation, and the market is left wondering when an asset they bought has "morphed" inside or outside of securities laws,[41] what digital asset "ecosystems" are (and why assets such as

No. 1:20-cv-10832, 2023 WL 4507900 (S.D.N.Y. July 13, 2023) ("XRP, as a digital token, is not in and of itself a "contract, transaction[,] or scheme" that embodies the *Howey* requirements of an investment contract. Rather, the Court examines the totality of circumstances surrounding Defendants' different transactions and schemes involving the sale and distribution of XRP."); *SEC v. LBRY, Inc.*, Case No. No. 1:21-cv-260-PB, Transcript of Motion Hearing, at 24:23-26:21 (D. N.H. Jan 30, 2023) (clarifying that previous ruling was not that tokens themselves were securities as an issue not litigated and stating "there are a lot of tokens that have consumptive use that maybe ultimately should be regulated as a commodity rather than as a security. But that's not me. That's not my job.").

[37] SEC's Mem. of Law of Mot. for Leave to Amend the Complaint, *SEC v. Binance Holdings Limited*, No. 1-23-cv-01599-ABJ-ZMF (D.C. Sept. 12, 2024).

[38] Complaint for Petitioner, *SEC v. Binance Holdings Limited*, No. 1-23-cv-01599-ABJ-ZMF (D.C. Sept. 12, 2024) at ¶62 (asserting that the value of a digital asset is "dependent on the success of the enterprise" because digital asset value is "tied … to the token ecosystem"); Hr'g Tr. Jan. 22, 2024, *SEC v. Coinbase, Inc.*, Case No. 1:23-cv-04738-KPF (S.D.N.Y. Jan 22, 2024) (Dkt. # 101) at Tr.19 (Commission: "[T]hat network or ecosystem, that is what drives the value of the token because the token as code is linked to that ecosystem. It is tied to it. It cannot be separated from it. As the value of that network or platform or ecosystem increases, so does the value of the token."); *id*. at 57 (Commission: "[W]hat is the enterprise? It's the network. It's the ecosystem. You are buying into that ecosystem with your token. … The token would be worthless without the ecosystem[.]").

[39] *Mission*, U.S. Sec. & Exch. Comm'n (Aug. 9, 2023), *available at* https://tinyurl.com/wwb5k2jf (last visited June 27, 2025).

[40] *Howey*, 328 U.S. at 298-301.

[41] It is worth noting, that the Supreme Court has specifically rejected that an asset's security status can "transform" after its purchase. *See Marine Bank v. Weaver*, 455 U.S 559, n. 9 (1982) (rejecting the argument that the certificate of deposit at issue there morphed into a "security" once it was pledged).

Ethereum and Bitcoin do not have them such that they are capable of being bought and sold in non-securities transactions), and generally who is expected to register what and when.[42]

TDC strongly recommends that the Commission take immediate steps to commence formal rulemaking actions as necessary specifically limiting the obligations of issuers to register "investment contracts" consistent with Supreme Court precedent back to *Howey*'s intended application: to cover only transactions where an investor pays a promotor (or its affiliate) for a contractual economic interest in an enterprise whereby the promotor purports to use the proceeds in furtherance of that enterprise to allow for payments to be made from that business to the investor. The Commission should also make clear in the proposing release regarding this rule change why the classes of goods and services as described above with secondary markets like concert tickets are not "investment contracts" to be registered with the Commission even though a sale of such goods or services could satisfy the *Howey* Test if read as broadly as the Commission's recent interpretations.

The Commission's recent expansion of the *Howey* Test's beyond its original context has led to regulatory overreach, doctrinal inconsistency, and an attempted power grab by the Commission. Through rulemaking, the Commission can restore *Howey* to its original focus on investments in promoter-led ventures—rather than speculative asset purchases—which would provide clearer, more principled boundaries and prevent the misclassification of asset sales (including digital assets such as Consumer NFTs) as securities transactions.

STABLECOINS

Background on Stablecoins

The Commission has recently provided very helpful background on "Covered Stablecoins" in CorpFins' April 4, 2025 Statement on Stablecoins.[43] To the extent the Commission adopts a specific digital asset taxonomy, it would be helpful for the Commission to fully describe what, if any, type of stablecoin falls within its regulatory purview.

One element missing from the Statement on Stablecoins, however, was a discussion of the critical role that stablecoins play in the blockchain-enabled technology ecosystem generally.

[42] ETHDENVER, *Hester Peirce Fireside: What's America's Crypto Future?| Hester Peirce: SEC*, at 7:00 (YouTube, Feb. 29, 2024), *available at* https://tinyurl.com/47bhurw2 (last visited June 27, 2025) ("If you're not willing to tell people what a security is, it just seems very unproductive to go in after the fact and start picking people off for not having registered.").

[43] *Statement on Stablecoins*, *supra* note 3

Stablecoins are critical infrastructure in digital asset markets. They are widely used as a medium of exchange, unit of account, and store of value within decentralized finance protocols, on centralized exchanges, and in cross-border payments.[44] In addition to their role in crypto markets, stablecoins are increasingly considered for use in traditional payments and remittances.[45] This trend underscores the need for regulatory clarity that not only addresses their use within the digital asset ecosystem but also their increasing integration into conventional financial rails and payment systems. Further, with the vast majority of stablecoins — and stablecoin-related transactions — denominated in U.S. dollars, their increasing prevalence is helping to a significant degree to maintain U.S. dollar dominance in the global economy.[46]

Existing Commission Guidance on Stablecoins

The Statement on Stablecoins provides that "persons involved in the process of 'minting' (or creating) and redeeming Covered Stablecoins do not need to register those transactions with the Commission under the Securities Act or fall within one of the Securities Act's exemptions from registration."[47]

Prior to the Statement on Stablecoins, the only guidance issued by the Commission related to stablecoins came in the form of an enforcement action brought against Terraform Labs PTE Ltd. and its founder Do Kwon related in part to their involvement in the issuance and sale of the algorithmic stablecoin "UST."[48] The court in that matter did not reach a determination as to whether the sale of UST alone constituted a securities transaction, but did rule on summary judgment the "UST in combination with the Anchor Protocol constituted an investment contract."[49]

RECOMMENDATIONS AS TO STABLECOINS

It is worth noting that certain legislation is pending in Congress which may mandate actions to be taken by the Commission related to stablecoins, or otherwise alleviate the need for the

[44] *Adoption: Stablecoin Supply,* University of Cambridge Judge Business School, https://tinyurl.com/37t4k45u (June 27, 2025).
[45] Conner Swenberg, Simon Lacoursière, and Amie Corso, *Engineering the Commerce Payments Protocol Powering Shopify,* Base Engineering Blog (June 12, 2025), *available at* https://tinyurl.com/mrxjk3dw (last visited June 27, 2025).
[46] That said, TDC is not advocating that only U.S. dollar pegged stablecoins should be outside of the securities law framework, and there may be other assets, such as non-dollar fiat-denominated stablecoins, that could warrant treatment similar to "Covered Stablecoins" in the Statement on Stablecoins.
[47] *Statement on Stablecoins, supra* note 3.
[48] *SEC v. Terraform Labs PTE. LTD.*, No. 23-cv-1346 (JSR) (S.D.N.Y. Dec. 28, 2023). We note that UST would not have been a Covered Stablecoin within the Statement on Stablecoins.
[49] *Id.*

Commission to engage in formal rulemaking in this area.[50] As a result, TDC encourages the Commission to continue to study and put out guidance related to stablecoins, but refrain from devoting too many of its limited resources to formal rulemaking in this area while Congress determines if legislation related to stablecoins will be passed.

One area which the Commission may want to consider issuing formal rulemaking related to stablecoins that would not be impacted by the pending legislation, however, would be through amending the Commission's rules governing money market funds under the Investment Company Act of 1940. Some potential amendments to consider include:

- Creating a "Payment Token"[51] definition in 17 CFR § 270.2a-7 which accounts for digital assets pegged to a fiat currency, with that definition further providing protections such as requiring the Payment Token be issued by a registered money transmitter with fully segregated reserves.

- Revising the definition of "Government security" to include digital asset representations of U.S. Treasury obligations, where the U.S. Treasury obligation coupled to the digital asset representation is custodied by a bank or a registered clearing agency.

- Amend portfolio composition and risk limit rules to allow a percentage of portfolio assets be held in Payment Tokens and revise liquidity requirements to reflect real-time settlement redemption abilities of Payment Tokens, so long as it's provided that liquidity buffers are maintained between both fiat and Payment Tokens.

- Creating a rule that generally treats U.S. dollar denominated stablecoins as cash equivalents for securities law purposes (subject to updated rules to allow for that treatment more generally).

By making the above revisions to existing rules, the Commission can bring onchain financial instruments within the scope of regulated investment products without undermining investor protection. This hybrid approach of allowing limited digital asset exposure under strict conditions preserves the Commission's money market fund rules' core protections while enabling modernization of cash management practices.

[50] GENIUS Act of 2025, S. 394, 119th Cong. (2025); STABLE Act of 2025, H.R. 2392, 119th Cong. (2025).

[51] The Commission may wish to use what the Commission has already defined as Covered Stablecoins for this newly defined asset, create a new defined term for Payment Tokens, or borrow the definition from pending stablecoin legislation in Congress.

WRAPPED TOKENS

Background on Wrapped Tokens

A "**Wrapped Token**" is a blockchain-based asset that represents a 1:1 backed version of another cryptocurrency on a different blockchain, akin to a "tokenized" token that can be used outside its native environment. Its purpose is to enable interoperability between blockchains that do not natively support each other's tokens.[52]

One popular example of a Wrapped Token is the ERC-20 token Wrapped Bitcoin ("**wBTC**") on the Ethereum blockchain that represents Bitcoin ("**BTC**"). Each wBTC token on the Ethereum network is backed 1:1 by an equivalent amount of actual BTC on the Bitcoin network held in reserve through blockchain-enabled custodial services. This arrangement allows users to access the Ethereum ecosystem (including decentralized finance protocols, smart contracts, and decentralized exchanges) using the value of BTC without leaving the Ethereum network.

Creating a Wrapped Token often follows the same process, commonly referred to as "**Bridging,**" as follows:

1. The initial token is sent by a user via smart contracts or other blockchain-enabled technologies to a reserve, the contents of which are generally publicly auditable onchain, enabling trust through verification.

2. A Wrapped Token is Minted and sent to the user representing the initial token but now operable on a different blockchain from the initial token.

3. At any time, the user (or any other user which has since received that Wrapped Token) can send back their Wrapped Token, which is then "**Burned**" (*i.e.*, digitally destroyed) and receive back the initial token on its native blockchain.

In this way, a Wrapped Token can be thought of as a cryptographically secured coat check ticket, warehouse receipt, or bailment.

[52] This response only covers Wrapped Tokens as above defined, and does not include other forms of token conversions such as through creation of liquid staking tokens or similar technology products as provided in other submissions. *See, e.g.*, JitoSol, Sec. Classification Rep. (Mar. 18, 2025), *available at* https://tinyurl.com/4y3kdj2k (last visited June 27, 2025).

Existing Commission Guidance on Wrapped Tokens

The Commission has yet to release any formal or informal guidance related to Wrapped Tokens. The Commission has, however, recently released guidance as to certain Protocol Staking Activities.[53] While not directly related to Wrapped Tokens, the Staking Guidance does provide a list of "Ancillary Services" which are described as "merely administrative or ministerial in nature and does not involve entrepreneurial or managerial efforts."

RECOMMENDATIONS AS TO WRAPPED TOKENS

TDC suggests that the Commission issue formal guidance on the full list of "Ancillary Services" related to service providers who facilitate the Minting and Burning of Wrapped Tokens including distinctions as to when such services would be deemed to be merely administrative or ministerial in nature and when such services would constitute the managerial efforts of the provider of such services. Similar our other recommendations, the SEC should specifically clarify that the mere act of "wrapping" a token does not change the character of the underlying token.

The Commission should also issue formal guidance expanding upon Commissioner Peirce's recent statements that "whether something resides onchain does not change its substance for purposes of analyzing its security status."[54] The Commission should formally clarify that the activities necessary make an asset compatible for use on a particular blockchain (as with the Minting of Wrapped Tokens) are not managerial services that constitute an investment contract, and thus do not constitute securities transactions.

6. How can the Commission establish a workable taxonomy while remaining merit- and technology-neutral?

TDC notes that the Statement leads off with four potential broad categories of crypto assets that may fit within the Commission's ultimate taxonomy: crypto assets with intrinsic characteristics of securities; crypto assets offered and sold as part of an investment contract; tokenized securities; and non-securities. TDC has struggled with these categories in assembling various responses to the Statement.

[53] *Statement Staking*, *supra* note 3.

[54] Comm'r Hester M. Peirce, *New Paradigm: Remarks at SEC Speaks*, Sec. and Exch. Comm'n (May 19, 2025), *available at* https://tinyurl.com/37zwsmdh (last visited June 27, 2025).

In our view, an overbroad, sweeping taxonomy that requires all digital assets to cleanly fall within certain buckets could do more harm than good. Not everything needs to fit cleanly into a particular category or have specific rules to avail oneself of a safe harbor. New financial technologies are constantly being developed, and efforts to pigeonhole those technologies into sweeping, broad categories have the potential to stifle innovation as founders try to force their technologies to fit into, or fall outside of, pre-specified categories rather than creating products and services which are best for the protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.[55] This is especially true of the recent experience with digital assets.

Efforts to fit various categories of crypto assets into the securities rubric resulted in confusion across the industry. This led to projects trying to twist themselves into pretzels to avoid the application of laws that shouldn't have been applicable to begin with, and resulted in brain drain within the industry, pushing founders and projects into other jurisdictions.

The importance of existing, well-understood taxonomies should not be understated. A number of concepts are already well-understood within the U.S. federal securities law framework. Much like how the mere act of tokenizing an asset should not convert a non-security into a security, creating a digital representation of an asset onchain also should not change what that asset is called. There should be a single adjective (*e.g.*, "tokenized" or "digital") used by the Commission to denote that a particular asset has a digital representation recorded on a distributed ledger or similar technology.[56] If a particular crypto asset is merely a digital representation on blockchain of another form of asset with a commonly understood name, that adjective should be used to modify the commonly understood name.[57]

Equally important is ensuring that the Commission and the law do not conflate terminology in a way that further muddies the waters. Not every new technology or protocol will fit cleanly into existing, pre-defined buckets. For example, in numerous court filings and speeches, representatives of the Commission referred to tokens that it claimed to be securities within the meaning of the *Howey* Test as "crypto asset securities." That term could be used to represent any of the first three categories within the Statement's potential taxonomy (and possibly all four, as it

[55] *Mission*, *supra* note 39.

[56] An exception to this may be crypto assets of classes that have already developed a fairly consistent definitional usage, such as "stablecoin" instead of "digital money."

[57] A similar concept could also be applied to fractionalized assets, as the terms tokenized and fractionalized are often conflated. While frequently effected through similar means and sometimes at the same time, "tokenized" just means the asset has a digital representation on blockchain, while "fractionalized" means the asset is being split into numerous pieces to be held by a larger number of people.

may also be used as it had been by the Commission – to denote crypto assets that it was wish-thinking were securities).

The Commission should ensure that any newly proposed or amended regulations, as well as issued guidance, are neutral both as to existing and future technologies. Any taxonomy has the potential to both be a help and a hinderance to this goal. While any taxonomy must necessarily be principles-based to some extent, the terminology used must be consistent enough that the Commission, market participants, and the courts all have absolute surety that they are talking about the same thing. There are two areas where a taxonomy would be particularly helpful, and one additional area where a change in process might help refine that taxonomy.

First, to facilitate communication, there should be a consistent set of words used to describe digital assets with the same characteristics, while acknowledging that not every digital asset is capable of being described by such a term. Further, any broad-based taxonomy should remain consistent with current common understandings to the extent that the phrase regards a long-standing asset class that is merely represented in a new way.

Second, to establish certain bright lines, there should be specific categories of digital assets that fall into safe harbors or are subject to special rules. For example, we welcome the Division of Corporation Finance's efforts to define "Covered Stablecoins" as stablecoins with a specific set of characteristics. This level of specificity allows market participants to understand exactly what will fall into a safe harbor, but does not stifle further innovations in products or services that are adjacent to (but not cleanly within) a particular enumerated safe harbor.[58]

Similarly, the attempt to define "Protocol Staking" is helpful in allowing the industry to know where there are some bright lines, even if it does not necessarily cover all current or future staking activities.[59] Some of these bright line taxonomies are discussed in greater detail in our response to Question 5 above.

To the extent that any digital asset taxonomy will very likely have cross-jurisdictional applications, we urge the Commission to coordinate with the CFTC in its development given the potential overlap between transactions that could be deemed securities transactions and those that could be deemed commodities transactions. Further, to the extent Congress enacts its own digital asset taxonomy, the Commission should make every effort to ensure that its own taxonomy does not conflict with a Congressionally mandated taxonomy.

[58] *Statement on Stablecoins, supra* note 3
[59] *Statement on Staking, supra* note 3

Digital assets and digital asset activities with certain common characteristics should be defined to allow for safe harbors where appropriate to allow for the improvements to efficiency and safekeeping that can benefit consumers in digital securities. Above, we have discussed NFTs, stablecoins and wrapped tokens in great detail. The Commission has also put forth statements with respect to certain kinds of mining activities[60] and staking activities.[61] Having a bright line is especially important for regulated entities such as investment advisers and broker-dealers, where the lack of a clear well-defined safe harbor has had a chilling effect on what otherwise should be completely legal activities, to the detriment of consumers. While not addressed here, the Commission could also provide tailored, informal guidance with respect to many other classes of digital assets, such as governance tokens, in-game currencies, digital collectibles, liquid staking tokens, foreign-denominated stablecoins, and yield-bearing stablecoins.

Additional Areas for Consideration

It is our view that the line of communication between the Commission's division staff and digital asset market participants is unfortunately broken. While great strides toward clarity and consistency have been made by the Crypto Task Force, the ability to obtain relatively uniform informal guidance at the division staff level is almost nil.

No-action letters have a time and a place, but at this point obtaining no-action relief typically requires hundreds of thousands of dollars in attorneys' fees and hundreds of hours of work. In addition, the iterative process of obtaining a no-action letter can take many months, and many are hesitant to even seek a no-action letter because of the potentially negative consequences to the requested if relief is not granted.[62]

While TDC is very appreciative of the thoughtful, proactive guidance that has been released over the last several months, that comes with the hindsight of years of unproductive interactions between the digital asset industry and the Commission, and at the expense of many businesses that simply had the unfortunate luck of catching the attention of the Commission for

[60] *Statement on PoW, supra* note 3

[61] *Statement on Staking, supra* note 3

[62] As noted above, for years there has been confusion over what encompasses the term "investment contract." Despite this considerable confusion on whether the sale of a particular product or service constitutes a securities transaction, CorpFin has only issued fourteen no-action letters in the last decade on Section 2(a)(1)'s definition of a security. There have certainly been more than fourteen companies which would have benefited from formal Commission guidance as to the products or services they intended to sell in the past ten years, and would have availed themselves to obtaining such guidance but-for the costs and risks associated with obtaining no-action relief from the Commission.

being innovators in an industry that drew the ire of the Commission.[63] If there is a way out of here, open discourse must light the path.

Accordingly, we propose that the Commission formalize a process for the industry to ask, and Commission staff to respond to, questions that apply to a large number of market participants seeking guidance. The updated Commission website has a button in the upper right-hand corner to "Submit a Tip or Complaint".[64] The Crypto Task Force website has links to provide written input or request a meeting.[65] The Commission website now also has a much more prominent button to submit a comment for SEC rulemaking.[66] Nowhere is there an easy, consistent way to request informal guidance from the Commission staff, nor is there a way for the staff (or the public) to know the questions commonly shared with market participants in real time.

The Commission should be approachable and should attempt to come up with solutions to common problems relating to securities laws that affect a large number of market participants. Formal rulemaking (and requests for the same) are not nearly efficient or expedient enough to be the sole means for businesses to obtain guidance on issues affecting many. TDC suggests that next to the "Submit a Tip or Complaint" button there should also be a "Submit a Question or Feedback" button. TDC also suggests that such added functionality include the ability for users to submit questions and feedback on a named, pseudonymous, or anonymous basis, and that users can decide to make a submission confidentially or publicly. This could include a requirement to select particular categories of inquiries so that they are directed to the proper divisions of the Commission.

TDC also proposes that the Commission institute a policy where, if it receives enough legitimate inquiries with respect to a specific subject matter, the Commission will undertake to publicly provide a response to the question, even if that involves a request for additional information. While this might not have the force of law or even the level of reliance associated with a formal no-action letter, this would provide the industry with a greater level of clarity and transparency than publishing guidance in a speech or bringing an enforcement action against someone who has no reason to believe they're violating the law (or who are discouraged from doing something otherwise completely legal due to outdated regulations). The Commission's disclosure regime is foundational to the U.S. securities regulatory framework and ensures that investors have access to material, accurate, and timely information. It is incumbent upon the Commission to be as open and transparent in its deliberative process and its interactions with

[63] Comm'r Hester M. Peirce, *Overdue: Statement of Dissent on LBRY,* U.S. Sec. & Exch. Comm'n. (Oct. 27, 2023, https://tinyurl.com/4vfjfuk9 (last visited June 27, 2025).
[64] Sec. and Exch. Comm'n, https://tinyurl.com/bddnm3dt (last visited June 27, 2025).
[65] Sec. and Exch. Comm'n: Crypto Tax Force, https://tinyurl.com/4jhaedjf (last visited June 27, 2025).
[66] Sec. and Exch. Comm'n, *supra* note 64.

market participants as the Commission demands from businesses seeking to register with the Commission.

We understand that, if not done correctly, this could create undue strain on the staff or otherwise might not have the intended effects. Accordingly, we propose that using this new system for intaking questions and suggestions be a 'beta test' of sorts for the Commission to stress test this model as it works through issues related to digital assets. If effective, it can be expanded to all areas within the Commission's purview to make the Commission more user friendly and better able to serve its actual and prospective constituencies. We do not anticipate this would replace other methods of seeking informal guidance like seeking no-action letters, but there needs to also be something faster and less expensive. For the past couple decades, the Congressionally-mandated trend in securities laws has been to democratize access in a thoughtful manner that protects investors while fostering capital formation. It is long overdue that the Commission try to do the same with respect to its own processes.

TDC has been greatly encouraged by the extremely transparent and welcoming approach taken by the Crypto Task Force both with respect to submission of written communications and ease of setting up in person meetings. The ongoing issuance of thoughtful, balanced and critically important market guidance has also led to a significant advancement towards building a culture of trust between the Commission and the digital asset industry in the United States.

TDC (and the digital asset industry generally) would next welcome the promulgation of well-conceived, thoughtful digital asset-specific formal rulemaking, coupled with specific, proactive binding interpretive guidance that the industry can feel safe relying upon for the long-term.

CONCLUSION

TDC acknowledges the significant efforts of attorneys Jonathan Schmalfeld, Daniel McAvoy, and Stephen Rutenberg of Polsinelli PC towards the preparation of this letter. TDC also thanks the many members that contributed their time and expertise towards the development of this letter, including but not limited to Lee Schneider, General Counsel, Ava Labs, Alex Levine, General Counsel, Dapper Labs, and Josh Lawler, Partner, Zuber Lawler LLP.

TDC thanks the Crypto Task Force for its consideration of these matters. We would be delighted to provide any additional information that would be helpful as a supplemental analysis, upon your request. If you have any comments or questions relating to the request or would like to arrange a meeting to discuss further, please do not hesitate to contact the undersigned Daniel McAvoy at dmcavoy@polsinelli.com.

Sincerely,

Jonathan Schmalfeld, Daniel McAvoy and Stephen Rutenberg

Cc: Cody Carbone, Chief Executive Officer, The Digital Chamber
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