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By Email: crypto@SEC.GOV

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

Re: Crypto Lending, Questions 33 and 34

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

On behalf of The Digital Chamber ("**TDC**"), we respectfully provide this submission in response to Commissioner Hester M. Peirce's February 21, 2025 statement soliciting public input on regulatory issues related to blockchain technology and crypto assets (the "**Statement**").[1] This letter addresses Questions 33 and 34 of the Statement and offers TDC's view on certain "lending" transactions involving crypto assets and suggests the basis for guidance and rule amendments that the U.S Securities and Exchange Commission (the "**Commission**") could issue and adopt to clarify how the Commission should approach various types of transactions that may be characterized as "crypto lending."

TDC is the world's largest digital asset and blockchain trade association. It represents more than 200 diverse members of the blockchain sector globally, including startups, software companies, leading financial institutions and investment firms, and other participants in the digital asset economy. Guided by the principle of industry compliance with applicable law, TDC seeks to foster a legal and regulatory environment in which digital asset users can enjoy regulatory certainty as they apply blockchain technologies to an array of commercial, technological, and social purposes. TDC encourages industry compliance with the federal securities laws through initiatives like the Token Alliance, a network of 400+ thought leaders and technologists that has developed numerous tools and resources for industry participants and policymakers as they engage with the token economy.

Question 33

How should the Commission approach various crypto lending concepts in a way that doesn't stifle the potential opportunities they provide?

[1] Comm'r Hester M. Peirce, *There Must Be Some Way Out of Here*, U.S. Sec. & Exch. Comm'n (Feb. 21, 2025).

Summary Response:

The Commission should only exercise jurisdiction over transactions that include lending of securities and should clarify what assets are and are not securities. The Commission should likewise revisit and clarify prior public statements and settlements establishing that certain "lending" transactions create securities, or require businesses engaged in lending of crypto assets to register with the Commission.

1. The Commission Should Take a Balanced Approach, Mindful of the Impacts of Regulation on the Development of Technology and the Limits of Its Jurisdiction

TDC encourages the Commission to strike a balance between encouraging innovation by market participants and its central mission: to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. TDC suggests that the Commission act cautiously in regulating "crypto lending," respecting the limitations of its jurisdiction and recognizing the importance of technical innovation.

There are generally two circumstances wherein the Commission's jurisdiction should be asserted with respect to "crypto lending":

1) if the assets involved in the lending transaction are securities; and

2) if the "crypto lending" transaction creates a security, is itself a security, or results in the creation of an entity that engages in acts that require registration with the Commission.

To determine if a security is involved in a "crypto lending" transaction, the Commission should consider the assets at issue, transactions at issue, the role of technology in the transactions, and the legal rights, if any, of the party or parties to the transactions.

The Commission should be careful not to stifle innovation with respect to "crypto lending" transactions that do not meet one of the two prior criteria to ensure that it is only regulating securities rather than regulating other non-securities assets, or technology. If the assets or transactions at issue do not involve a security, create a security, or involve an SEC-regulated entity, the Commission should not exercise jurisdiction over these transactions. Further, where certain transactions resemble those over which the Commission might have jurisdiction but historically has not asserted that jurisdiction, we urge the Commission not to alter its approach merely because the transaction involves crypto assets. The Commission should also be cautious not to extend securities lending regulations to practices that are not legally recognized as lending. If the transaction at issue is not a loan, it should not be regulated as a loan.

Where "crypto lending" products do implicate federal securities laws, the Commission should take a sensible and practical approach. Depending on the nature of the transactions, products, and aspects of federal securities laws that are implicated, if the Commission seeks to regulate certain types of "crypto lending" transactions, it should establish clear and workable guidelines around disclosure, collateral treatment, and capital requirements for crypto lending platforms. Where necessary, the Commission should implement through Commission statement or rulemaking a practical, tailored path to registration for platforms or ventures that lend crypto assets

that are securities or that create securities. A general policy of flexible, context-specific regulation should be prioritized around any such action.

2. The Scope of SEC-Regulated "Crypto Lending" Should Be Limited

"Crypto lending" is an undefined term potentially encompassing a variety of transactions that, in many instances, vary materially from traditional lending. These transactions may differ as to the assets, technology, and structures used to provide "lending" services and products, and whether those transactions actually involve legally recognized "lending." In many cases, the technology used in "crypto lending" is novel, and provides new and innovative benefits to transacting parties, including additional operational transparency and open access, while providing traditional benefits of lending such as facilitating liquidity and providing holders of crypto assets with access to yields.

a. Examples of "Crypto Lending"

"Crypto lending" potentially includes many types of assets, transactions, products, and business models, potentially including direct lending, lending platforms, lending protocols, flash loans, certain types of staking, etc. Understanding and distinguishing among the various assets, transactions, products, and business models is foundational to a principled and coherent regulatory approach and necessary for the Commission to determine both whether it has jurisdiction to regulate a particular transaction and, if so, how to regulate it.

To assist the Commission, we provide a noncomprehensive analysis of six types of products, services, and transactions that could be described as "crypto lending," including a brief discussion of the features, the operations, and the functionality of those types of "crypto lending,"[2] in the attached Exhibit A.

b. When Does "Crypto Lending" Implicate the Federal Securities Laws?

The threshold issue to determine whether the Commission has jurisdiction over a given asset or transaction is the existence of a security as defined under federal law.

a. The Commission Should Clarify What Crypto Assets Are Securities Under Federal law

The question of what crypto assets are securities remains unsettled but has been the subject of vigorous discussion and frequent litigation for nearly a decade. The Commission has, until recently, advanced evolving, sometimes novel theories as to how crypto assets could be securities. Those theories have been tested via enforcement actions and subjected to judicial scrutiny, which has failed to provide consistent outcomes and resulted in a lack of clarity for market participants. The Commission's position has recently been refined to suggest that, although some crypto assets may be securities, while other crypto assets and transactions of crypto assets may be considered

[2] Discussion of staking is intentionally omitted as a fulsome discussion of staking requires consideration of a number of variations, including direct staking, delegated staking, managed staking, restaking, liquid staking tokens, etc., which are beyond the scope of this letter.

not to be securities,[3] crypto assets should not be considered to be securities merely for their inclusion in an investment contract transaction.[4] However, this position has not been established by any law or rule.

Likewise, the Statement proposes a new four-part taxonomy to distinguish among various types of crypto assets. That taxonomy, however, creates new questions, including:

- How does a crypto asset "have intrinsic characteristics"?
- What "characteristics" are material to determine whether a crypto asset is a security beyond whether the applicable legal test has been met?
- What is a "tokenized security"?
- Is a tokenized security merely a security offered in the form of a token, or a digital asset that is intended to provide the legal rights or economics of another security?

As TDC has recommended in other letters submitted in response to the Statement, the Commission should provide a clear test via rulemaking or Commission statement to establish which crypto assets are and are not securities.[5]

Certain transactions that do not involve securities have been alleged to create transactions or entities over which the Commission may exercise jurisdiction. The Commission has taken the view in prior enforcement actions that transactions that do not necessarily involve securities may be investment contracts[6] or may result in the creation of investment companies,[7] and thus that offerors of investment contracts or administrators of those investment companies would be subject to registration and ongoing compliance obligations under the federal securities laws. As discussed further below, the Commission should expressly disclaim positions it has taken in prior orders in settlement of enforcement actions to clarify that certain products are not securities, and that technology constructs used by third parties to engage in peer-to-peer transactions should not be considered to be investment companies.

As noted above, many crypto "lending" products or services are not, as a matter of law, engaged in transactions that are legally defined as lending. A loan is defined as a binding promise

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[3] *See* Division of Corporation Finance, *Staff Statement on Meme Coins* (Feb. 27, 2025), at https://www.sec.gov/newsroom/speeches-statements/staff-statement-meme-coins; Division of Corporation Finance, *Statement on Certain Protocol Staking Activities* (May 29, 2025), available at https://www.sec.gov/newsroom/speeches-statements/statement-certain-protocol-staking-activities-052925.

[4] *SEC v. Binance Holdings Ltd.*, No. 1-23-cv-01599-ABJ, D.E. 237-1 (D.D.C. Sept. 27, 2024) at 24 n.6.

[5] *See* Letter from Jonathan Schmalfeld, Daniel McAvoy, and Stephen Rutenberg, Polsinelli PC, on behalf of The Digital Chamber, Scoping Out, June 27, 2025, https://www.sec.gov/files/ctf-written-input-jonathan-schmalfeld-daniel-mcavoy-stephen-rutenberg-polsinelli-pc-062725.pdf.

[6] *In re: Blockfi Lending LLC*, Administrative Proceeding File No. 3-20758 (Feb. 14, 2022).

[7] *In re: BarnBridge Dao*, Administrative Proceeding File No. 3-21817 (Dec. 22, 2023) ("*BarnBridge*").

to repay an amount of money to another person.[8] In the cases discussed below, many "crypto lending" systems or products are not actually engaged in "lending" as defined by law.

In some cases, a user engages with and receives services from technology, rather than that user being engaged with a legal counterparty and expecting performance or forbearance of performance from that legal party. Under these circumstances, the transactions at issue are not loans as a matter of law and should not be subject to regulatory requirements that attach to loans, even if the assets at issue in the transactions are securities. For example, users of non-custodial credit protocols are not interacting with other users when they deposit crypto assets into pools, or when they transmit crypto assets to the control of a smart contract and receive the technical power to withdraw assets from pools. In these transactions, there is no creditor, no debtor, no binding promise to repay any amount of money, and no money involved in the transactions. Users of those protocols are interacting with code, not other users. The Commission should not regard these transactions as loans.

Likewise, users of collateralized debt position systems do not interact with other legal parties when they surrender control of crypto assets to smart contracts in exchange for the power to withdraw other assets from smart contracts. Transactions by users of these products, as a matter of law, are not loans, and should not be treated as loans.

Other transactions are not loans as a matter of law because they do not involve an agreement to lend or repay money. State lending statutes generally require a loan to include a monetary obligation.[9] Although direct lenders may offer loans of U.S. dollars and take crypto assets as collateral, a significant amount of "crypto lending" is crypto asset for crypto asset—for example, loans of stablecoins with other crypto assets provided to the lender as "collateral."[10] To date, crypto assets have not been given legal status equivalent to money under any U.S. legal authority. Here, crypto asset-for-crypto-asset transactions appear closer to repos or reverse repos, or various transactions that are generally regulated by the Commodity Futures Trade Commission, than they do typical lending. These transactions are unlikely to be recognized as "loans."

Transactions that function like loans but either (a) do not involve bilateral, legally recognized relationships between legal persons or (b) do not involve U.S. dollars should not be considered loans, and if those transactions include securities, they should not be subject to the same legal requirements as securities lending.

3. Crypto Lending Should Be Addressed by the Commission Based Upon the Specifics of the "Lending" Transactions

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[8] *Black's Law Dictionary* defines a "loan" as "[t]he creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor . . . ." *Loan*, *Black's Law Dictionary* 936 (6th ed. 1990).

[9] *See, e.g.*, Tex. Fin. Code Ann.§ 301.002(a)(10) ("'Loan' means an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligator has an obligation to pay the creditor.").

[10] Although systems differ, in many cases, assets offered as "collateral" are subject to loss by automated liquidation but are not the subject of legally enforceable security interests that create the legal relationship of "collateral" as defined under the Uniform Commercial Code at Art. 9-102(12).

The Commission's authority should only extend to lending that includes loans of securities and lending transactions that create securities. The first category—loans of securities—should be handled similarly to existing securities lending, with adjustments for the differences in technology. The second category—transactions or structures that create securities—requires regulatory clarification.

The Commission should decline to act or exercise jurisdiction over the following types of "crypto lending" transactions, as described in greater detail below:

a. direct lenders taking crypto assets that "are securities" as collateral but who do not loan crypto assets that are securities;
b. peer-to-peer lending platforms;
c. non-custodial lending platforms ("NCLPs");
d. collateralized debt positions; and
e. flash loans.

Direct lenders who lend dollars, not securities, are generally regulated by state lending laws, not by the Commission, even if they take an interest in securities as collateral. The Commission should abide by existing practices as to this type of lending and decline to exercise jurisdiction over direct lenders or these transactions.[11]

Operators of peer-to-peer lending platforms should not be regulated by the Commission unless the transactions engaged in by those users themselves create securities. While platform-user transactions may or may not be securities transactions, depending on the crypto assets at issue, the platforms should not be required to register as broker-dealers or as exchanges, provided the platform is not the issuer of the securities in question.

The peer-to-peer lending platforms described in Exhibit A operate differently than peer-to-peer loan marketplaces that have previously been regulated by the Commission, e.g., Prosper "Lending Clubs."[12] The Lending Clubs matched "individuals who wish to borrow money, or 'borrowers,' with individuals or institutions who wish to commit to purchase loans extended to borrowers, referred to on the platform as 'lenders.'"[13] The Lending Clubs listed borrowers who sought fixed term, fixed rate unsecured U.S. dollar loans for set amounts, typically between $1,000 and $25,000, by posting "listings" that could be viewed by potential lenders on the platform.[14] The Lending Clubs would rate borrower creditworthiness using a proprietary rating system that assigned a grade to the borrower. Potential lenders would bid on funding loans sought by borrowers on the platform at specified interest rates, which were usually higher than "rates available from depository accounts at financial institutions."[15] In the case of the platforms provided by Lending

[11] Should a direct lender entering into the transactions as noted above subsequently lend or rehypothecate crypto assets that are securities it receives as collateral, that transaction may be viewed as a securities loan and be subject to SEC jurisdiction. These transactions should be evaluated on a case-by-case basis.
[12] *See In re Prosper Marketplace, Inc*., File No. 3-13296 (SEC Nov. 24, 2008) ("Prosper").
[13] *Id*. at 2.
[14] *Id.*
[15] *Id*.

Clubs, lenders did not actually lend money directly to the borrower; rather, the borrower received a loan from a bank that was contracted to the Lending Club. The interests in that loan were then sold and assigned through the Lending Club to the lenders, "with each lender receiving an individual non-recourse promissory note."[16] The Lending Clubs continued to service the loans, to refer delinquent loans to collections, and to sell delinquent loans. The Commission ultimately determined that, based on this fact pattern, the Lending Clubs were offering notes as investments and thus that the notes were securities that the Lending Clubs were required to register.[17]

Unlike the Lending Clubs, crypto asset peer-to-peer lending platforms providing "crypto loans" are truly peer-to-peer; the crypto asset peer-to-peer platforms do not package loans, rate borrowers, service, sell, or send any peer-to-peer transactions to third parties for collections.[18] The terms of any transaction are determined by the platform users only. Platform users may enter into contractual agreements with each other or may simply rely on smart contracts to determine what they can and cannot do with crypto assets involved in their transactions. In this case, the peer-to-peer lending platform providers are technology providers, not issuers of securities.

Given the significant differences between the peer-to-peer platforms and Lending Clubs, the Commission should not view the peer-to-peer transactions as transactions giving rise to securities and should not require the peer-to-peer lending platform providers to register as broker-dealers or exchanges.

The remaining "crypto lending" transaction types can be thought of as allowing users to engage in "alegal" transactions because users of those systems do not enter into agreements with legal counterparties and, in some cases, do not transact with another legal person or entity when using the technology services provided. Thus, the federal securities laws applicable to securities lending should not be applied to transactions by users of the below discussed "alegal" technology systems.

Users of NCLPs, for instance, do not enter into legal relationships with any legal party, and thus cannot, as a matter of law, be engaged in lending. NCLP users do not make any promise to any other person to obtain the benefit of the transaction. NCLP users alternatively transact crypto assets to the control of a pool,[19] or transact crypto asset "collateral" to the control of a smart contract, to gains access to other assets controlled by a pool. These users do not agree with any other legal person to enter into those transactions. In many cases, NCLP users do not know the legal identity of any other user of that same NCLP. NCLP use does not create any legal

[16] *Id*.
[17] *Id*., at 4-6.
[18] Peer -to -peer lending marketplaces that engage in transactions of crypto assets that are securities are subject to SEC regulation based on a number of platform-specific factors, including if they provide additional services beyond technology services and the manner of fees collected. However, providing mere technology services allowing third parties to engage in securities transactions does not inherently require the technology service provider to register as a broker-dealer or exchange. *See generally Charles Schwab*, SEC No-Action Letter (Nov. 27, 1996); *S3 Matching Technologies LP*, No-Action Letter (July 19, 2012).
[19] As used herein, "pools" refer to smart contracts that control crypto assets that may be transacted to others as part of the transactions discussed herein.

relationships, much less the relationships required to create a legally enforceable loan.[20] Because no legal rights are created during the use of an NCLP, the federal securities laws applicable to securities lending should not apply to these transactions even if they include securities.[21] Further, as there is no entity counterparty to any transaction conducted using an NCLP, there is no party who may be compelled to comply with the obligations imposed by the securities laws.

Similarly, the Commission should decline to exercise jurisdiction over either collateralized debt positions or flash loans. Collateralized debt positions are technology services that allow a user to surrender control of an asset (termed the "collateral") subject to potential liquidation, and to obtain access to another asset, according to a set ratio based upon the price of those assets. The asset made available to a user is generally a stablecoin that does not fluctuate in value. If the price of the collateral asset drops such that the ratio of the price of the collateral crypto asset and the price of the crypto assets withdrawn by the user falls outside of a specified limit, the collateral crypto asset may be subject to liquidation to rebalance the position. Like NCLPs, users of collateralized debt positions use technology services when they transact. These users do not interact with any counterparty, and do not enter into any legal agreement with any counterparty. Users of NCLPs cannot be said to be "lending" as understood by the law.

Flash loans are unique technology transactions that allow a user to withdraw crypto assets from a pool provided those assets are returned to that pool, along with a small percentage-based fee, within the same transaction. If the amount withdrawn plus the fee is not paid back in the same transaction, then the transaction is reverted, including the initial withdrawal of crypto assets from the pool, along with any other transactions intended. The result is that borrowers can access capital with zero default risk. There is no legal counterparty to a flash loan—the user obtains crypto assets from a pool, programmatically. Likewise, a user of a flash loan does not enter into any agreement with any legal counterparty—all interactions are conducted programmatically by code.

The above "alegal" lending protocols or services should not be subject to the federal securities laws applicable to securities lending as they cannot, as a matter of law, be deemed to be lending. Likewise, in each of the "alegal" lending protocols, there is no identifiable counterparty to a user transaction that may be tasked with compliance obligations arising under the securities laws.

4. Guidance and Settlements Asserting That Certain "Crypto Lending" Practices Create Securities Should Be Rescinded

The Commission has asserted through settlements of enforcement actions brought against specific enforcement targets that providers of certain types of "crypto lending" and pools of crypto

[20] Likewise, any suggestion that the pool or platform should be deemed a joint venture or general partnership should be avoided given that pools are not people or legal entities; they are mere software constructs. Further, in most cases, users do not enter into any agreement when transacting assets to pools, much less agreements with others, including others who have transacted assets to the control of the pool. Generally, users who transact assets to pools are not aware of the identity of others who have transacted assets to that pool.

[21] *Howey* requires representations with the offer and sale that would cause a purchaser to expect a return. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

assets may create entities or transactions that are subject to the securities laws. The Commission should re-evaluate its conclusions and rescind the settlements asserting these positions.

In determining whether other "crypto lending" transactions that do not involve categories of "securities" that are specifically enumerated under the definitions thereof under the Securities Act of 1933, as amended (the "Securities Act"), the Securities Exchange Act of 1934, as amended (the "Exchange Act"), the Investment Company Act of 1940, as amended (the "ICA"), and the Investment Advisers Act of 1940, as amended (the "IAA"), one of two tests should be applied. First, if the "crypto loan" involves a "note," the Commission should apply the test articulated in *Reves v. Ernst & Young*, 494 U.S. 56 (1990). Second, if the "crypto loan" does not involve a "note," the Commission should apply the test to determine if there is an "investment contract" under *Howey*. For the reasons stated below, the vast majority of "crypto lending" transactions would not create securities and thus would not be subject to the Commission's jurisdiction.

A. Centralized Lenders Should Not Be Deemed as Issuers of Securities, and the Commission Should Recede from or Distinguish Its Analysis in *Blockfi*

Custodial Crypto Lending Platforms ("CCLPs") offer a valuable and familiar service that is not unlike a savings account for their crypto assets to users who provide liquidity to the platform. Products providing these transactions to users are not issuing "investment contracts" as defined by *Howey* and should not be regulated under the federal securities laws.

Certain lending transactions may include "notes" that are typically analyzed under *Reves*. Despite this, however, the Commission used the *Howey* test to analyze the blockchain interest accounts offered by Blockfi. Thus, we analyze CCLPs under both *Howey* and *Reves*.

Reves Analysis

Deposits in Custodial Crypto Lending Platforms Resemble Commercial Transactions.

Assuming that users who deposit crypto assets in a CCLP receive a "note" promising repayment of their deposit, such a note is not necessarily a security.

User deposits in this context bear a significant resemblance to non-securities commercial transactions. While users may hope to earn a return on their deposits, CCLPs accept user deposits, not to fund the platform's own business operations or finance its own investments, but to "advance some other commercial purpose."[22] Customers are not investing in the CCLP, hoping to profit from the platform's own success as a business.[23] A user's sole interest in the CCLP's success is that it

[22] *See Reves v. Ernst & Young*, 494 U.S. 56, 66 (1990).
[23] *See id.* at 67–68.

continues to operate well enough to distribute interest payments. However, that interest does not transform the customer's deposit into an "investment" in the CCLP.[24]

Even if transactions whereby users deposit assets in CCLPs do not bear a family resemblance to other notes that are not generally considered to be securities, there are other compelling reasons to not treat them as securities.

While CCLPs are typically offered to the public broadly, there is no common trading for speculation or investment in the "notes." Users of CCLPs cannot freely transfer their deposits—they are generally limited to withdrawal only. Thus, the "plan of distribution" does not support that user deposits in CCLPs are securities.

Next, though the application may vary between specific CCLPs, the public is not likely to expect that such platforms are offering securities. From the public's point of view, CCLPs function like an interest-bearing savings account for crypto assets, i.e., a place to deposit assets while earning returns based on the institution's loans to third parties. CCLPs may contract with regulated financial institutions to custody user deposits and borrower collateral. Recent federal developments clear the way for banks and other financial institutions to act as cryptocurrency custodians.[25] The Office of the Comptroller of Currency ("OCC") and Federal Deposit Insurance Corporation ("FDIC") have made clear that they will continue to supervise these institutions to ensure that crypto asset activities are conducted in a safe, sound, and fair manner. Thus, in appropriate circumstances, the need to apply federal securities law to CCLPs may be reduced.[26]

Finally, many CCLPs require borrowers to collateralize their loans. The "existence of collateral is a significant risk-reducing factor," which further counsels against applying federal securities law to CCLPs.[27]

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[24] *See Robyn Meredith, Inc. v. Levy*, 440 F. Supp. 2d 378, 386 (D.N.J. 2006) (rejecting argument that note was an "investment" in business because "the repayment of any loan rests on the business or consumer successfully operating at a level that enables it to service the entity's other priorities.")

[25] *See* 17 C.F.R. 211, Staff Accounting Bulletin No. 122, https://www.sec.gov/rules-regulations/staff-guidance/staff-accounting-bulletins/staff-accounting-bulletin-122 (rescinding SAB 121); Office of the Comptroller of Currency, Interpretive Letter 1183 (Mar. 7, 2025), https://occ.gov/topics/charters-and-licensing/interpretations-and-actions/2025/int1183.pdf (rescinding preapproval requirement for banks to engage in crypto asset activities); Office of the Comptroller of Currency, OCC Bulletin 2025-4, *Bank Supervision: Removing References to Reputation Risk* (Mar. 20, 2025), https://www.occ.treas.gov/news-issuances/bulletins/2025/bulletin-2025-4.html; Federal Deposit Insurance Corporation, Financial Institution Letter 16-2022 (Apr. 7, 2022), https://www.fdic.gov/news/press-releases/2025/fdic-clarifies-process-banks-engage-crypto-related-activities (rescinding prior notification requirement for FDIC-supervised institutions to engage in crypto asset activities), Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, "Crypto-Asset Safekeeping by Banking Organizations," July 14, 2025); https://www.federalreserve.gov/newevetns/pressreleasesa/files/bcreg20250714a1.pdf (discussing how existing laws, regulations, and risk management principles apply to safekeeping digital assets without imposing any new supervisory expectations).

[26] *See Banco Espanol de Credito v. Sec. Pac. Nat'l Bank*, 973 F.2d 51, 55 (2d Cir. 1992) (finding "application of the securities laws was unnecessary" where OCC purported to regulate the activity).

[27] *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577, 586 (6th Cir. 2000).

Howey Analysis

Assuming that the CCLPs are not deemed to issue notes to lenders who provide crypto assets to the CCLP, it may be appropriate to analyze transactions entered into by users with CCLPs under the *Howey* test.

No Investment of Money. To be an investment contract, *Howey*'s first prong requires an "investment of money" as part of the transaction, meaning an investor "provide[d] the capital."[28] An "investment of money" further "requires that the investor commit his assets to the enterprise in such a manner as to subject himself to financial loss."[29]

Users who provide liquidity to CCLPs generally do not "g[i]ve up" their crypto assets as consideration or "commit [their] assets to the enterprise." Many CCLPs require no commitment, and permit customers to withdraw the full value of their deposits at any time. This feature underscores that the assets are not "capital." Customers lend their assets to be used in lending transactions, not spent to launch or sustain the CCLP's operations. Deposits in a CCLP are no more an "investment" than leasing a lawn mower to a landscaping company.

No Common Enterprise. For a "common enterprise," element to be satisfied, federal courts require that there be either "horizontal commonality" or "vertical commonality."[30]

In a typical CCLP, there is no horizontal commonality among users who provide crypto assets. The interest any one user earns has no impact on the interest any other user earns. Instead, a user's interest payments depend on the use of their assets by the CCLP, regardless of whether their assets are only part of the assets in a given loan or the entire loan comprises their assets.[31]

CCLPs typically do not involve "vertical commonality" because the success of the platform has no bearing on the success of its users. Whether the CCLP earns $1 or $100 million in profits does not affect the interest paid to users who provide liquidity to the CCLP. In some cases, interest rates are set at the time of the transaction of the crypto asset to the CCLP. In other cases, interest rates are generally based on the supply and institutional borrower's demand for the deposited assets, not the CCLP's overall success.

No Managerial or Entrepreneurial Efforts. Because interest paid to users who provide liquidity derives from market demand for the aggregated assets provided to the CCLP, there is no expectation of profits derived from managerial or entrepreneurial efforts of others. Nothing a

[28] 382 U.S. 293, 301 (1946).
[29] *S.E.C. v. Coinbase, Inc.*, 726 F. Supp. 3d 260, 300 (S.D.N.Y. 2024) (voluntarily dismissed).
[30] *Revak v. S.E.C. Realty Corp.*, 18 F.3d. 81, 87-88 (2d Cir. 1994).
[31] *See Wals v. Fox Hills Dev. Corp.*, 24 F.3d 1016, 1019 (7th Cir. 1994) (finding no horizontal commonality, and thus no investment contract, where agreement permitted a condo developer to rent out the unit and the owner of the condo to receive the rent payments minus a fee, reasoning that "[the owner] owns his condominium, and if it is rented out for him by the developer he receives the particular rental on that unit rather than an undivided share of the total rentals of all the units that are rented out. The nature of his interest thus is different from that of a shareholder in a corporation that owns rental property").

CCLP does drives the interest rates customers receive. In the typical model, a CCLP coordinates account creation, provides technical services, custodial services, contracts with borrowers, and distributes interest. These activities, while important, are at most ministerial or administrative.[32]

The SEC's recently published *Statement on Certain Proof of Work Mining Activities* provides further support that no securities transaction results from merely coordinating the use of individuals' property to generate revenue for them.[33] Operating a mining pool typically requires facilitating account creation, preparing appropriate documentation, vetting the quality of miner resources, and taking custody of and distributing mining rewards. Yet, a pool operator's "using the combined computational resources of participating miners primarily are administrative or ministerial in nature."[34] CCLPs are no different; they coordinate unrelated individuals but are still using the combined crypto asset resources of participating customers to generate interest.

Thus, under both *Howey* and *Reves*, CCLPs do not implicate the federal securities laws. Under Howey, CCLPs are not issuing investment contracts. Under Reves, even if the transactions between users and CCLPs amount to notes, those transactions should not be considered to be securities and should not implicate the securities laws.

B. Crypto Asset Pools Should Not be Considered to be Investment Companies Under the Investment Companies Act of 1940

Platforms that rely on users to contribute crypto assets into pools and that allow other users to withdraw from those pools should not be regarded as "investment companies" within the meaning of Section 3 of the ICA and should not be subject to legal registration and ongoing compliance obligations pursuant to the ICA. While the pools created in non-custodial liquidity protocols, like *BarnBridge*, as discussed below, may be viewed as potentially creating an investment company, the lack of legal relationships created through participation in the pools suggest that the securities laws should not be applied. The Commission should expressly recede from its conclusion in *In re: BarnBridge* or should qualify the conclusion as applicable only to the specific facts in *BarnBridge*.

In *BarnBridge*, the Commission expressly held that the pools controlling crypto assets in that case were unregistered investment companies, and treated all assets held in those pools – without differentiation – as securities. In concluding that the pools operated by BarnBridge were unregistered investment companies, the SEC asserted that "[T]he only assets held in the SMART

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[32] *See SEC v. Life Partners, Inc.*, 87 F.3d 536, 547–48 (D.C. Cir. 1996) (finding defendant's sales of fractional interests in life insurance policies ("viatical settlements") were not investment contracts where defendant's efforts "to locate insureds and to evaluate them and their policies, as well as to negotiate an attractive purchase price" was ministerial and "length of insured's life [was] of overwhelming importance to the value of the viatical settlements"); *see also Noa v. Key Futures, Inc.*, 638 F.2d 77, 79–80 (9th Cir. 1980) (*per curiam*) (finding promoter's efforts to identify silver bars for investment, locate prospective investors, store the bars after purchase, and repurchase them at a published spot price at any time without charging a brokerage fee did not satisfy "efforts of others.").

[33] Division of Corporation Finance, *Statement on Certain Proof-of-Work Mining Activities* (Mar. 20, 2025), https://www.sec.gov/newsroom/speeches-statements/statement-certain-proof-work-mining-activities-032025.

[34] *Id.*

Yield Pools were investment securities, held for the purpose of generating the returns to pay SMART Yield Pool investors, and constituted more than [40%] of the value of each Pool's total assets." This language suggests that, in the view of the Commission, every asset held in the Pool was an investment security. Although the *BarnBridge* settlement order does not specifically list each asset held in the Pools at issue, the order indicates that DAI was held in the subject pools, and materials published on the BarnBridge website suggest that ether and certain liquidity provider tokens ("LP Tokens") received from the pools' deployment of crypto assets in other protocols were held in the subject pools. Thus, the Commission suggests that certain stablecoins, ether, and LP Tokens issued by other pools are securities, without explaining its analysis. As discussed above, there is little clarity as to what crypto assets are securities and which are not; to minimize the confusion, the Commission should expressly address the treatment of this issue in *BarnBridge*.

Likewise, the Commission should expressly clarify that pools like those used in crypto lending are not investment companies within the meaning of the ICA. An investment company, subject to specifically enumerated exceptions, is defined as:

> "any issuer which (a) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; (b) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or (c) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis."[35]

The pools relied upon by users of NCLPs, CDPs, and flash loans should not be considered to be investment companies because they do not issue securities, they are not "in the business of investing, reinvesting or trading in securities," and certain pools will not "own[] or propose[] to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets."

However, even if a given pool does hold more than 40 per centum of the value in the form of securities, including crypto assets that are securities, those pools should not be considered to be investment companies. Pools are generally not legal entities; they are software constructs that are available to be used in various ways defined and limited by the code implementing the pool.[36] Software has not been recognized as a legal thing under relevant law in the United States. Therefore, software cannot be an issuer of a security, and cannot be said to "engage in the business of investing, reinvesting or trading in securities."[37] Finally, software cannot exercise legal property

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[35] 15 U.S. Code § 80a-3(a)(1-3).

[36] Some pools are immutable and cannot be changed; others are subject to governance by third parties.

[37] 15 U.S.C. § 80a-2(a)(22) ("(22) 'Issuer' means every person who issues or proposes to issue any security, or has outstanding any security which it has issued."). Person is defined as "an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term 'trust' shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security." *See* 15 U.S.C. § 77b(2).

rights or enter into legal contracts, and thus pools cannot "own[] or propose[] to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets."

In *BarnBridge*, the Commission equated the acts of a DAO, which itself was substantially dominated by founders of BarnBridge, as the sponsor of the pools which it deemed to be Investment Companies. The Commission found that the BarnBridge DAO, in furtherance of maintaining the pools, "used the revenue from the [sale of "Bonds"] to pay salaries to [the founders],…to pay operations teams hired and led by [the founders], to pay programming development teams, to pay for website hosting, to pay blockchain-related transaction fees, and to pay individuals involved in communications and marketing." Indeed, the Commission found that the founders were very much involved in day-to-day operations, including acting as the DAO's "de facto executives," overseeing "the operation of BarnBridge's website, development of [the Pools] and hir[ing] programmers on BarnBridge's behalf to write, test, and audit the code for SMART Yield smart contracts," among other things.

The facts in *BarnBridg*e are not typical of pools. Not all pools are subject to external governance, and for those that are subject to external governance, the range and scope of that governance varies materially. The Commission should expressly distinguish *BarnBridge* on its facts and clarify that in the absence of that clear control by an identifiable person that pools used in "crypto lending" are not automatically investment companies or clarify that its settlement with BarnBridge did not suggest that all pools operated by NCLPs, CDPs, or flash loans are investment companies.

C. Transactions Undertaken by Users of NCLPs Should Not be Considered to be Securities

NCLPs are a poor fit for the federal securities laws, all of which focus on ensuring there is full and fair disclosure by identifiable issuers. NCLPs, however, are architecturally distinct from most issuer offerings.

Users of NCLPs do not enter into any agreement with any party, form any contract, or engage in legally significant acts. These users are simply calling smart contract code to receive software services. These smart contracts are not legal entities and are not controlled by any third party; they are instances of code that can control and transact assets. Thus, there is no counterparty to "issue" offer or sell the security. Even though certain aspects of the functionality of NCLPs can be altered or upgraded by governance, which itself may be controlled by a distributed group of third party token holders, there is generally no single promoter or corporate entity "leading" a common enterprise for profit. There is no centralized entity "issuing" a crypto asset.

Further, while users generally access NCPLs through a "front end" or "interface" that simplifies access to and the use of the protocol, the underlying smart contracts that provide the "lending" services operate on the blockchain network itself. NCLPs do not operate or control the underlying blockchain networks. Technically proficient individuals can (and often do) access the NCLP's smart contract without the use of a front end interface. These front end interfaces typically

require users to agree to terms and conditions prior to use, but the front ends do not provide the transactional services of the NCLP, and the terms of use applicable to front end interface use do not apply to the actual transactions performed by the NCLP.

Although there is substantial variation among NCLPs, users who contribute crypto assets to NCLPs (e.g., "lenders") receive LP Tokens representing their share of the overall crypto assets deposited in the pool, but these LP Tokens do not confer an ownership stake in a common enterprise or rights to any corporate revenue stream. They strictly mirror deposits (similar to a bank deposit receipt), accruing interest paid by third party borrowers.

NCLPs do not involve underwriters or broker-dealers that distribute or market securities to investors. Instead, participation is user-driven, with individuals supplying and withdrawing crypto assets according to automated smart contracts. Users rely on the protocol's automated features to enforce commercial terms and interest rates, akin to a technology platform or marketplace. This is materially different from an issuer distributing "notes" that represent a debt security in the sense anticipated by the Securities Act.

The Securities Act envisions a framework where an issuer discloses financial statements, management structure, and future plans. NCLPs are software, with operational parameters publicly viewable on-chain. Transactions by NCLP users are publicly viewable on-chain in real time. The protocol's "health" (e.g., total value locked, interest rates, outstanding loans, collateralization) is fully viewable on-chain in real time. Thus, the harms sought to be avoided by the typical disclosure-based investor protection model are not at issue for most NCLPs. Nor is there generally an identifiable issuer or controlling entity that can be compelled to register and abide by disclosure obligations.

NCLP core operations do not align well with the definitions and objectives outlined in the Securities Act. There are no legal relationships formed by users of NCLPs, and the transactions enabled by NCLPs are programmatically exercised by transparent, publicly viewable code. Thus, the transactions conducted by users of NCLPs should not be regarded as, or subject to the same disclosure standards required for, typical securities transactions.

5. The Underlying Technology Facilitating "Crypto Lending" Should Not be Subject to SEC Regulation

Underlying technology providers and systems (e.g., blockchains, smart contracts, self-custodial wallets, protocol front ends, validators/miners, etc.) should not be regarded as entities subject to the securities laws and any registration or compliance obligations merely because they are relied upon in "crypto lending" transactions, even if the loan transaction involves securities or transactions that are regulated under the securities laws, unless the facts and circumstances of a specific transaction trigger a registration requirement. Most blockchains are general purpose technology systems that are not designed specifically to facilitate lending transactions, and most intermediaries involved in these systems have little to no insight or visibility into user transactions. The Commission has previously provided no action relief for internet service providers that allow parties to communicate securities transactions but which themselves only facilitate communication

by those parties.[38] The Commission should publish specific guidance expressly exempting such general purpose blockchain technology infrastructure providers from the securities laws. Such guidance may include interpretive letters or updates to no-action letters issued related to various internet service providers.

Question 34

Participation in traditional securities lending programs, such as fully paid securities lending programs offered by broker-dealers, generally does not represent a new securities transaction or implicate Investment Company Act registration requirements. How are crypto lending programs similar to or different from traditional securities lending programs?

Although few "crypto lending" ventures resemble securities lending programs, both transactions are frequently used for a similar purpose – to allow the temporary transaction of assets for use by a borrower in exchange for payment of additional value to the lender. As noted above, there are many different models of "crypto lending" which, in many cases, do not resemble securities lending from an asset, legal, or structural perspective.

As noted above, there is no singular definition of "crypto lending," and we have outlined six different transaction types that may be called "crypto lending" but which have different technical, circumstantial, and legal characteristics. On the other hand, Exchange Act Rule 10c-1a, with a current compliance date of January 1, 2026, defines a "covered securities loan" as a "transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person," and "covered securities" generally including those that are part of the Consolidated Audit Trail. We note that the focus of a "securities loan" generally is the nature of what is being loaned, whereas in many instances of "crypto lending," the "crypto" is the collateral being provided for a borrower to receive the loan, not the asset received by the borrower.

Collateralized debt positions, in particular, and fully paid securities lending share some common features and attributes. They are both generally overcollateralized and subject to potential liquidation to reduce lender risk. They both involve the lender charging interest or fees. In each case, what is being loaned is something other than cash. Like securities lending, certain crypto lending ventures (for instance, flash loans, discussed above) are designed for short-term transactions of assets.

That said, despite some facial similarities in some cases, we believe there are far more differences than similarities between securities lending and most varieties of "crypto lending."

- Typically, the main purpose of a securities loan is to temporarily receive a certain security, often to cover a position. The main purpose of a crypto loan in most instances is for the borrower to get liquidity, not to get access to a particular crypto asset to cover

[38] *See*, *e.g.*, *Charles Schwab*, SEC No-Action Letter (Nov. 27, 1996).

a position. Flash loans, however, are a notable example of a type of "crypto loan" that is frequently used to liquidate CDPs or other leveraged positions.

- Typical securities lending programs offer loans of securities with money or other securities offered as collateral; most crypto assets being loaned in "crypto lending" transactions are unlikely to be securities, and most "crypto lending" does not involve U.S. dollars.

- Unlike "crypto lending," securities lending programs executed by registered broker-dealers have the benefit of long-established frameworks and rules that were designed for transactions specifically in securities.

- Typical securities lending programs are offered by registered broker-dealers and rely on other regulated intermediaries like clearinghouses. In most cases, crypto lending products are not offered by broker-dealers, often because of the inability of broker dealers to obtain approvals from both the Commission and FINRA to provide services involving crypto assets. Crypto lending may be offered by a variety of different types of actors, including identifiable legal persons, programmatic software, or platforms facilitating peer-to-peer transactions. In some forms of crypto lending, software takes the place of intermediaries, providing programmatic efficiency and transparency.

- Securities loan markets have been opaque, with the Commission and the public generally having little to no knowledge about the market or securities loan transactions, although this is intended to be addressed by Exchange Act Rule 10c-1a, if and when compliance is required. Many "crypto lending" transactions create publicly viewable records, as described in further detail in Exhibit A, allowing both regulators and the public to see what transactions are occurring via public blockchain.

- Typical securities lending programs use legal agreements with legal counterparties; in many cases, "crypto lending" may not include any legal agreement, or any legal counterparty to a "lending" transaction.

- Typical securities lending programs rely on custodians to hold the underlying securities and or collateral; many crypto lending arrangements are self-custodial or may rely on code to control assets offered by a borrower as "collateral."

- Securities lending programs allow users who wish to lend their securities to receive payment by receiving fees charged to borrowers by the broker-dealer; some, but not all, "crypto lending" transactions include a similar fee structure.

- Securities laws applicable to reporting agents require that collateral be maintained in a separate account for each customer, while many crypto lender transactions result in commingled collateral, or collateral held in commingled pools.

- Crypto lending structures may be programmatically or self-liquidating, which is not characteristic of securities lending programs.

- Securities lending collateral is generally not held on the balance sheet of the broker and typically would not be considered to be part of a broker's bankruptcy estate, while in some "crypto lending" transactions, borrower collateral, when held by an entity, may be on the entity's balance sheet, and thus may be part of the entity's bankruptcy estate.[39]

- Certain "crypto lending" transactions include novel technology-specific risks that do not exist in traditional securities lending, including novel cybersecurity risks, technology risks, custodial risks, transparency risks, and disclosure risks. Some crypto lending ventures rely on programmatic smart contracts for various executory tasks which can create efficiency and offer greater transparency.

The Commission should decline to treat "crypto lending" like securities lending unless the transaction itself meets the definition of a "covered securities loan" and the transaction includes a "covered person."[40] That said, for the reasons articulated in our response to Question 33 above, we believe that the vast majority of "crypto lending" transactions still should not represent a securities transaction or implicate ICA registration requirements.[41]

"Crypto lending" includes new and novel risks including, among other things, underlying technology risks, custodial risk, transparency risks, disclosure risks. In crypto lending, decentralized platforms may bypass intermediaries by relying on blockchain-based smart contracts. By removing intermediaries and the transaction costs they impose, crypto lending returns value to both lenders and borrowers. Further, despite the lack of regulatory clarity, market participants can become comfortable with the risks posed by crypto lending platforms by independently verifying that the smart contract code will autonomously execute transactions as intended. Therefore, the risks posed by crypto lending – namely, operational, security, and technology risks – call for a different, narrowly tailored regulatory focus than that of traditional securities lending.[42]

* * *

TDC acknowledges the significant efforts of Matthew Comstock, Wilkie Farr & Gallagher LLP, Daniel MacAvoy, Stephen Rutenberg, and Jonathan Schmalfeld, Polsinelli PC, and Eric Hall,

[39] As was alleged in *SEC v. Genesis Global Capital LLC*, Case No. 1:23-cv-00287, D.E. 1 (S.D.N.Y., Jan 12, 2023), at 23 ("Crypto assets not loaned to Institutional Borrowers or used for collateral were held by Genesis on its balance sheet in an effort to provide Genesis with liquidity to meet potential demand for loans as well as to repay the investors in its crypto asset program…")

[40] To the extent a "crypto loan" does meet the definition of "covered securities loan," the Commission should provide guidance adjusting the format and manner of reporting of required information to the extent such information is already otherwise available on a public blockchain.

[41] To the extent that any crypto lending is deemed to be securities lending akin to fully paid securities lending, the Commission should provide guidance and direct FINRA to amend, clarify, extend, or update FINRA Rule 4330 (Customer Protection — Permissible Use of Customers' Securities) to generally clarify requirements of registrants, and to specifically address this rule in the context of crypto lending.

[42] While not specifically asked in the Statement, we also urge the Commission to consider amending the definition of "eligible asset" under ICA Rule 3a-7 so crypto asset loans with characteristics similar to traditional collateralized loans can be securitized, even though they don't necessarily convert into cash within a finite period of time.

DLA Piper LLP (US), toward the preparation of this letter. TDC also thanks the many members who contributed their time and expertise toward the development of this letter.

If you have any comments or questions relating to foregoing or would like to arrange a meeting to discuss further, please do not hesitate to contact the undersigned.

Regards,

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