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June 13, 2023

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street NE., Washington, DC 20549

Release #	Proposed Rules / Amendments	File No.	RIN
34-97309	[1] Reopening Release for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"	S7-02-22	3235-AM45

Dear Ms. Countryman:

On behalf of Data Boiler Technologies, I am pleased to provide the U.S. Securities and Exchange Commission (SEC) with our comments on the above reopening release that *"reiterated the applicability of existing rules to platforms that trade crypto asset securities, including so-called 'DeFi' systems, and provides supplemental information and economic analysis for systems that would be included in the new, proposed exchange definition"*.

A. Context of the Problem – cross-border issues and subjective judgement by ruler's taste

First, we would like to recap and refer to the various comment letters we have submitted to Policer Makers around the World on the same and relevant topics in 2022, these include:

- April 18, 2022, comment letter[2] to the SEC on release 34-94062 [3] concerning Investor Protections in Communication Protocol Systems (CPSs) and Alternative Trading Systems (ATSs), and the same proposed amendments of this reopening release to Exchange Act Rule 3b-16 regarding the Definition of "Exchange".
- August 8, 2022, comment letter to the Department of Treasury regarding Responsible Development of Digital Assets.[4]
- April 18, 2022, comment letter to the European Securities and Markets Authority (ESMA)[5] in EU, and a comment letter on November 11, 2022, to the Financial Conduct Authority (FCA)[6] in UK regarding Trading Venue Perimeter (TVP).

Second, we applaud the Commission for attempting to provide additional information in the reopening release where we sought better clarifications. It shows the willingness of the SEC in considering alternatives to the original proposed terms, such as "make available" and "communication protocols". On the face of the reopening release, it narrows the gaps of regime differences between the US and the EU that we have identified.[7] However, the reopening release does not provide explicit exemptions equivalent to, for examples:

- Inward looking OMS or Bulletin Board that the functioning of the arrangement met all 3 characteristics (Recital 8 MiFIR)
  - Consist of an interface that only aggregates & broadcasts buying & selling interests in financial instrument;
  - Neither allows for the communication or negotiation between advertising parties nor imposes the mandatory use of tools of affiliated companies;

[1] https://www.sec.gov/rules/proposed/2023/34-97309.pdf
[2] https://www.databoiler.com/index_htm_files/DataBoiler%20SEC%20ATS%2020220418.pdf
[3] https://www.sec.gov/rules/proposed/2022/34-94062.pdf
[4] https://www.databoiler.com/index_htm_files/DataBoiler%20Treasury%20Digital%20Assets%20202208.pdf
[5] https://www.databoiler.com/index_htm_files/DataBoiler%20ESMA%20Trading%20Venues%20202204.pdf
[6] https://www.databoiler.com/index_htm_files/DataBoiler%20FCA%20Trading%20Venues%20202211.pdf
[7] https://www.linkedin.com/pulse/trading-venue-perimeter-between-rock-hard-place-kelvin-to/

  - No possibility of execution or the bringing together of buying and selling interests in the system.
- Negotiated transactions benefited from a European waiver under MiFIR Article 4(1)(b).
- Pre-arranged transactions benefits from a European waiver under MiFIR Article 4(1)(c).
- Transactions met conditions for waivers from pre-trade transparency in Article 9(1) of MiFIR.
- 'General-purpose communication system' that does not fit the definition of a 'system' or 'trading facility' and would not reach out to other clients to find a potential match when receiving an initial buying or selling interest and have no genuine trade execution.

As mentioned in my Press Interview and series of articles in: WatersTechnology,[8] Traders Magazine,[9] the TRADE News,[10] Benzinga[11] and other media[12], we think the 591-pages under release no. 34-94062 in the US looks blurry and cumbersome. The precise and absolute terms in the 34-pages Consultation Paper[13] (or the 42-page final report)[14] European version may sound appealing to those who do not operate close to the edge (grey areas). Yet, the EU requirements come along with clear definitions that can hurt the industry negatively (e.g. OTF operator which is usually a broker-dealer, would be prevented from trading against its capital may lead to drying up of market liquidity detriment to institutional investors).

The EU is not proposing to establish a threshold-based regime for OTFs, while the proposals under release no. 34-94062 in the US afford such leeway. In the UK, the handbook for Recognized Investment Exchange (RIE)[15] and MAR 5AA guidance[16] on multilateral systems is helpful for the industry to comply with related FCA's requirements. In general, the FCA's proposed Guidance on the TVP is not as strict or rigid as the EU requirements. Amid we are unsure if the FCA will adopt a threshold-based regime like the US, we believe fewer entities would be brought within scope in the UK than the EU and US. Keep in mind that firms may re-domicile, and among them there could be formal or informal alliances, as well as possible collusion. People would find way(s) to arbitrage, exploit, or circumvent these cross-border rules.

A jurisdiction or sovereign state may apply judgements for the most suitable, efficient, and effective ways to govern and regulate the orderly functions of society. However, the difference this time pertains to the characteristics or principles in determining when a "subject" or "object" meeting certain condition(s) would be considered "what". The definition of "Exchange" or TVP involving 'DeFi'/ Crypto/ Digital Assets is a complex global matter rendering further talks among Policy Makers to consider 'who should supervise what in digital assets' and harmonization of regime differences.

Subjective judgements by a ruler's taste may lead to disputes and arguments detrimental to the productivity of our industry. Alleged violations would not reach definitive conclusions. More cases[17] end up in settlement without identifying the victims. In turn, settlement fines are divided among regulators. Officials craving for evermore powers may lead to unethical behaviors in exploiting the governed. It is a slippery slope when deviating from an objective basis in establishing clear boundaries between prohibited and permissible activities to delineate rights and obligations.

[8] https://www.waterstechnology.com/regulation/7947581/is-an-ems-an-exchange-vendors-alarmed-by-scope-of-reg-ats-amendments
[9] www.tradersmagazine.com/departments/commentary/trading-venue-perimeter-whose-interest-being-protected-under-ats-reform/
[10] https://www.thetradenews.com/blog/trading-venue-perimeter-us-vs-eu-differences-but-equally-unpopular
[11] https://www.benzinga.com/22/06/27801486/trading-venue-perimeter-related-market-data-issue-and-a-viable-alternative
[12] https://tabbforum.com/opinions/an-alternative-to-the-secs-trading-venue-perimeter-rule-a-market-data-discussion/
[13] esma70-156-4978_consultation_paper_on_the_opinion_on_trading_venue_perimeter.pdf (europa.eu)
[14] https://www.esma.europa.eu/sites/default/files/library/ESMA70-156-6383%20Final%20Report%20on%20ESMA%27s%20Opinion%20on%20the%20trading%20venue%20perimeter.pdf
[15] https://www.handbook.fca.org.uk/handbook/REC.pdf
[16] https://www.handbook.fca.org.uk/handbook/MAR/5AA.pdf
[17] https://www.finra.org/sites/default/files/2022-03/deutsche-bank-awc-030722.pdf

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B. Casino Law versus Securities Law

Reference to our comment letter to the US Treasury,[4]

- Sport bets, lottery, or other forms of consumer goods and services that provide "**entertainment**" or "**use value**" (tangible features of a "**commodity**") other than having resale or for commercial purposes, or motives or the pursuit of capital accumulation, then such buy, sell, or borrow activities over digital assets should be guarded under **Casino and consumer rights laws** rather than subjected to investor protection rules.
- For **consumption** of digital assets that warrant the government protection of **consumer rights**, the digital assets must be a **commodity** worthy of its use-value or worth in comparison to other **commodities** that can satisfy some human requirement, want or need. Consumer Financial Protection Bureau (CFPB) and Commodity and Future Trading Commission (CFTC) may be in better position than the SEC to supervise these consumption activities.
- Businesses, including not-for-profit entities (NPE), holding or engaging in digital assets transactions for **resale or for commercial purposes** should not be protected by consumer rights laws. Whether digital assets transactions for businesses should be classified as investing, financing, or operating activities, we think the logic in IAS7 [18] should apply:
  - The acquisition and disposal of long-term assets and other investments not included in cash equivalents are considered **investing activities**;
  - Activities that result in changes in the size and composition of the contributed equity and borrowings of the entity are considered **financing activities**;
  - Principal revenue-producing activities of the entity and other activities that are not investing or financing activities are considered **operating activities**.

It is probably overkill for the government to monitor card game or other recreational tournaments (e.g. mahjong) played with family and friends at home, and we do not think the SEC would go to the extreme in prosecuting someone who wears a T-Shirt that republishes code.[19] However, for the matter of "who should supervise what in digital assets",[20] there are merits to consider what may be better to regulate under Casino Laws than Securities Laws, see below analysis:

#	Regulated Market, Multilateral System	Casino Gaming Operator	Digital Asset Platform
a	Fair Access	Accepts open bets	Anyone joining a DLT chain
b	Illiquid assets versus marketable securities where price is reflected in fiat currency	Non-cashable gambling chips versus cashable tokens, electronic cash, credits, or cards for the purpose of (i) making wagers on games, (ii) redeeming for cash, or (iii) making a donation to charitable entities.	Non-security crypto assets versus securities, Stable Coins, Fungible, Non-fungible tokens, Central Bank Digital Currencies (CBDC), and more
c	Investing, proprietary trading versus market-making (both involve taking principal position, except market-makers are required to stand ready in both good and bad times to make continuous quotes at reasonable spreads)	Antes versus Blinds in Poker, involve risking capital in hopes of making a profit	User versus Consumer versus Investor (see our comment letter[4] pages 2-3 to the US Treasury) Automated Market-Makers (AMMs)

[18] https://www.ifrs.org/content/dam/ifrs/publications/pdf-standards/english/2021/issued/part-a/ias-7-statement-of-cash-flows.pdf
[19] https://twitter.com/HesterPeirce/status/1646941263566872587
[20] https://www.spglobal.com/_division_assets/images/articles/regulating-crypto/regulating-crypto-final.pdf

#	Regulated Market, Multilateral System	Casino Gaming Operator	Digital Asset Platform
d	SWAPs, Security-based SWAPs, and transactions that are SWAPs or security-based SWAPs such as insurance products Pairs trade strategy uses statistical and technical analysis to seek out potential market-neutral profits	'Swap hands' card allows a player to trade cards with opponent in a UNO game, and/or other playing methods permitted by a CASINO	'Pairs trading' involves two crypto assets (which may or may not be securities) that can be exchanged directly for each other using their relative price.
e	Non-discretionary methods dictating the terms of trading among buyer and sellers on system	Game rules	Protocols
f	Discretionary methods	House Edge[21]	Hard forks
g	OTC (pre-arranging system not capable of formalizing transaction) Single dealer, bilateral quotes binding system not bringing together third-party interests and is required to take market risk and trades on own account	Side bets Earned commission by Casino for games played against other players, such as Poker Dealer's advantage such as Players play out hand before the dealer in Blackjack, and if both bust, the dealer wins	Smart contracts
h	'Bulletin Board', 'Inward looking OMS' - functioning of the arrangement met all 3 characteristics (Recital 8 MiFIR)	Payouts (not betting odds) / tracker of winnings and bonus information	Digital Asset News, chat, message service, or other media
i	'Extension of the trading venue', such as negotiated transactions benefited from a waiver under MiFIR Article 4(1)(b) or Pre-arranged transactions benefits from a waiver under MiFIR Article 4(1)(c), or transactions that met conditions for waivers from pre-trade transparency in Article 9(1) of MiFIR.	Linked licenses gambling software[22] Linked licenses gaming machine technical[23] Remote casino game host operating license[24] Actions that do not require a linked license, such as changing a power supply unit, fuses, the front display, cleaning the machine, clearing coin jams, etc.	Software, Hardware, Hosting, Cloud, APIs, User Interface
j	Geopolitical issues, harmonization of regulatory frameworks internationally and across asset classes Pre-arranging system demonstrates compliance with securities rules and assurance by trading venues that pre-arranged transactions comply with regulations, including those concerning market abuse and disorderly trading.	Remote casino operating license[25] American Gaming Association's responsible gaming status and regulation guide[26] Unlawful Internet Gambling Enforcement Act that prohibits funding of unlawful internet gambling[27]	Everything Everywhere All At Once

[21] https://www.casino.org/features/house-edge/
[22] www.gamblingcommission.gov.uk/licensees-and-businesses/licences-and-fees/non-remote-linked-licences-gambling-software
[23] www.gamblingcommission.gov.uk/licensees-and-businesses/licences-and-fees/remote-linked-licences-gaming-machine-technical
[24] www.gamblingcommission.gov.uk/licensees-and-businesses/licences-and-fees/remote-casino-game-host-operating-licence
[25] www.gamblingcommission.gov.uk/licensees-and-businesses/licences-and-fees/remote-casino-operating-licence
[26] https://www.americangaming.org/wp-content/uploads/2019/09/AGA-Responsible-Gaming-Regs-Book_FINAL.pdf
[27] http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title31-chapter53-subchapter4&edition=prelim

#	Regulated Market, Multilateral System	Casino Gaming Operator	Digital Asset Platform
k	Odds in investors' favor in the long term; capital being allocated and/or invested by the person or entity comes with the expectation of a future financial return and/or to gain an advantage	Odds in casino operators favor Gaming as a form of entertainment, promote tourism and assist economic development, while minimizing the potential for risky or problem gambling	Odds unknown, risk of redemption run and vulnerabilities, lack of transparency of custody platforms outside the US[28]

As illustrated above, and point #b about 'coin issuance' in particular, Casino Laws seem to be a better fit to regulate many of the digital asset activities than the Securities Laws.

We can comprehend the good intentions of the Commission and the foreign regulators attempting to better oversee the DeFi and crypto space after the digital asset crash last year, the FTX downfall in particular. We are aware that this year the SEC has several high-profile charges against crypto trading platforms (Beaxy,[29] Bittrex,[30] Binance,[31] and Coinbase[32]) for allegedly operating Unregistered Exchanges. Yet, **attempts to modify the existing time-tested Exchange Act** to accommodate nuances with digital assets will not yield fruitful results.

It **is a** "**Double-Edged Sword**" if the Commission is overly aggressive in deterring Digital Assets players by enforcement. Not only would it hinder market innovations, but we are also concerned that some players would be able to "buy" their ways towards becoming Exchanges or ATSs. Too many of them will be brought within scope. When "**everybody is a trading venue, nobody is a trading venue**". It increases costs to connect with additional venues for BestEx compliance.

We counter suggest that regulators may indeed ask Digital Asset Platforms to apply for licenses under Casino Laws, and then wait for these platforms to **demonstrate that the 'winning odds' are in favor of investors** in the long-term before permitting them to apply and register as a National Securities Exchange or complying with the conditions of Regulation ATS. This stackable approach would create a **2 tier hierarchy**. It would **avoid attaching a fiat currency price or valuation to some unknown non-security crypto assets**. Financial instruments priced in Fiat currency would NOT and should NOT be compatible with non-security crypto assets. 'Funny money' is more akin to 'non-cashable gambling chips'. Our suggestion would confine all Exchanges and ATSs traded financial instruments to be 'securities' within the definition of the 1933 Securities Act. It will make things **simple and clear cut**.

Our suggested stacking of Casino Laws with Securities Laws would afford the US Federal and State Governments the flexibility to consider both offense and defend strategies. It will provide a **viable path in responsible development to Digital Assets**. At the same time, the Commission can access whether the existing Exchanges and ATSs have long-term 'winning odds' in whose' favor.

In the US, we have more than enough markets but not enough diversified "farmers" to work in the field.[33] Market participants are required to comprehend various order types and functions of different lit and dark venues. These middlemen (trading venues, TCA, liquidity sourcing, outsourced execution tools and smart order routers) do not care about eroding market efficiency. Instead they profit from an ever more fragmented market. The capital markets need a **mechanism to upgrade or downgrade a platform in limiting the numbers of qualified National Securities Exchanges and ATSs**, as well as maintaining appropriate balance between DeFi and CeFi.

[28] https://www.fsb.org/wp-content/uploads/P160222.pdf
[29] https://www.sec.gov/news/press-release/2023-64
[30] https://www.sec.gov/news/press-release/2023-78
[31] https://www.sec.gov/news/press-release/2023-101
[32] https://www.sec.gov/news/press-release/2023-102
[33] https://www.linkedin.com/pulse/smile-curve-changes-securities-value-chain-evolves-kelvin-to/

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C. Exchange Activity Involving Crypto Asset Securities

If a CPS or an ATS prefers to not register as an Exchange in the US, the only escape they have to avoid falling within the SEC Rule 3b-16(a) is – restricting their system to display bona fide non-firm trading interest, or by not establishing rules or operating a trading facility. It seems **contradictory** with the broadest possible definition of "bringing together buyers and sellers" if the SEC's proposal is adopted. This reopening release did NOT address this issue.

Also, even absent of rules which facilitate interaction of trading interests, ESMA has stated that whether a firm "would reach out to other clients to find a potential match when receiving an initial buying or selling interest, would also be characterized as a system". The SEC seems to be NOT applying the same or similar judgement, but merely stating that *"If electronic messages constitute a firm willingness to buy or sell a security, including a crypto asset security, the messages would meet the definition of orders under Existing Rule 3b-16(c)."*

So, based on the above, we think the Commission is NOT really offering any workable choice for a system that trades crypto asset securities to either register as a national securities exchange or comply with the conditions of Regulation ATS under the proposed New Rule 3b-16(a). In turn, they will likely defer registration until they are told, or the burden would force them to either "pay" their way toward compliance or shut down their operation.

D. Exchange Activity using DLT, including "DeFi" Systems

The use of Automated Market-Makers (AMMs) alone, is similar to 'Blinds in Poker Game' in our analysis in section B. The SEC proposal seems to apply **similar** judgement as the ESMA's opinion about *"trading interests are 'brought together …' being one of the criteria to qualify as 'multiple third party buying and selling interest' of a multilateral system"*; which is point (b) in 3.9 of the FCA's guidance on TVP[34].

The FCA emphasis on whether the arrangement is "**bringing about**' the transaction. We think the UK '**Blocking onto trading venues**' approach is simpler and more effective than the EU's reliance on Article 4(1)(c) waiver for pre-arranged equity transactions benefits from a Large-in-Scale waiver and its reliance on waivers from pre-trade transparency in Article 9(1) of MiFIR for non-equity transaction that met certain conditions.

That being said, is it worthwhile to produce a more exhaustive list of "**relevant characteristics**" when enforcement agencies do not have the resources to sweep the entire universe to check each system qualifying as "multilateral system" or to check if, for example, service of a "voice broking" or communications tool goes beyond providing information and allows trading to take place? Often, regulators rely on someone filing a complaint before they launch an investigation. So, unless policy makers want and can implement some kind of annual "car inspection" system, it is **impractical to administer the enforcement** under the Securities Law.

E. Performs Functions Commonly Performed by a Stock Exchange

Reference to section B of this comment letter, the *"functions commonly performed by a Stock Exchange"* that fall within the criteria of the existing Exchange Act 3b-16(a) or Rule 3b-16(a) as proposed to be amended, to a large extent is identical or indistinguishable with many Casinos and linked license vendors, except that trading (betting) interest may or may not be a "financial instrument". Would Casinos, Sport Betting, and other affiliates be within scope if this reopening release is adopted? Therefore, we counter suggest stacking of Casino Laws with Securities Laws to regulate the Digital Asset space.

[34] https://www.fca.org.uk/publication/consultation/cp22-18.pdf

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F. Makes Available Non-Discretionary Methods

The proposed term – *"makes available"* may imply that one may no longer be able to keep the method being used "private and confidential". Keeping proprietary methods secretive other than essential limited access by a regulatory body could help preserve intellectual property (IP) rights free from copycats. There is a clear difference with the original language – "uses". We believe regulators do not like "black box", yet the proposed redefinition if adopted will hinder IP development and market innovations.

We applaud the willingness of the SEC to consider alternatives to the terms "make available", it provides relief to some of the IP confidentiality concerns. However, our preference is to keep the original language – "uses" without the added language *"whether by providing, directly or indirectly, a trading facility …"* What constitutes as "indirectly"? Would those qualified as '**an extension of the trading venue**' benefit from a waiver under Article 4(1)(b), 4(1)(c), and waivers from pre-trade transparency in Article 9(1) of MiFIR in Europe be brought within scope in the US? It could be quite subjective, and the scope is still overly board.

Please see point #i under section B about 'linked licenses' and 'actions that do not require a linked license', as well as the 5th bullet under section J of this letter. We think Casino Laws may be a better fit than the Securities Laws to regulate the "affiliates" of Digital Asset Platforms.

G. Communication Protocols

We concur with Former SEC Deputy General Counsel Mr. Andrew N. Vollmer's comment, cited *"The SEC does not have power to expand the statutory definition of an exchange to reach actions not within the scope of Congress's decision to regulate… The authority to define technical, trade, and accounting terms does not permit the SEC to redefine a critical concept Congress put at the heart of the Securities Exchange Act. The SEC needs statutory authorization from Congress for the definition of exchange to include communication protocol systems. Even if the SEC believes that it has the necessary statutory authority, the better policy approach is to defer and obtain statutory approval because of the significance of the matter."*

The trimmed language of *"buyers and sellers interact"* can mean anything. Taking out the words *"… such orders … entering such orders agree to the terms of a trade"* from the original version of Rule 3b-16(a)(2) will cause additional confusion.

We applaud the willingness of the SEC to consider alternatives to the terms "communication protocols". We get that the Commission is trying to craft rules similar to the European version of *"possible for members to act upon trading interests and match, arrange and/or **negotiate** on essential terms (price, quantity) with a view to dealing"* to constitute as *"Trading interests are able to interact in same system or facility"*.

If the Commission is going to apply similar judgement to the FINRA response in footnote 17 of this,[35] *"where the parties to a trade, aggregate individual prices obtained from a pricing list or service without further negotiation, it would not be considered within the scope of the rule"*, then the industry should welcome the alternate term "**negotiation protocols**". However, the definition of "negotiation protocols" under this reopening release state "how the trading interest is used by participants to **interact and negotiate** a trade." We would prefer if the Commission took out the words "interact and" and simply used "negotiate a trade" in this definition.

[35] https://www.sec.gov/rules/sro/finra/2022/34-94365.pdf

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H. Exclusion from Exchange Act Rule 3b-16(a)

Reference to Q.17 of this reopening release that states, *"The use of OEMS technology, however, like other types of technology, could be used, in certain circumstances, to perform exchange activities …"* Rather than rely on subjective judgement for what "**circumstances**", and for the shake of harmonizing international rules, we recommend the Commission grants explicit exemptions to "Inward looking OMS" and "Bulletin Board" that the functioning of system or facility's arrangement met all three characteristics per Recital 8 MiFIR.

Also, we concur with SIFMA and ICI that the existing ETF portals setup by entrenched players *"enable registered broker-dealers that serve as an ETF's authorized participants to communicate creation or redemption requests for an ETF… do not create a market place for secondary market trading activity … because they are used by ETF sponsors for the specific purpose of creating and redeeming their own issued securities."* If any future setup of ETF portals can be binding to the same conditions, then we think granting of appropriate exemption is justified.

I. Compliance Date for Implementation of Proposed Amendments to Rule 3b-16

It is pre-mature to talk about compliance date at this time. We wish this reopening release was a concept release instead. Again, the SEC should NOT rush to modify the existing time-tested Exchange Act to accommodate nuances with digital assets. It is a "Double-Edged Sword" if the Commission is overly aggressive in deterring Digital Assets players by enforcement. Not only would it hinder market innovations, but we are also concerned that some players would be able to "buy" their way toward becoming Exchanges or ATSs. Too many of them will be brought within scope. When "everybody is a trading venue, nobody is a trading venue". It increases costs to connect with additional venues for BestEx compliance.

J. Reiterating our key concerns and arguments

- Data Boiler **disagrees** with the Commission's focus on the "**expectations of the participants**". The Commission's comment of *"orders instruct a trading system to carry out the intention of participants in accordance with programmed trading procedures, orders, along with established, non-discretionary methods, contribute to how trading system participants could understand and expect to receive an execution"* is merely a general description of "order execution process" that could basically apply to any order for any product or service. Mixing up the concept may result in countless disputes similar to the "**sushi or sashimi**, diabetic discrimination" case.[36] Hence, the Commission's statement does not qualify as relevant supporting arguments putting an entity within the Exchange Act Rule 3b-16(a).
- **Dark venue is NOT more akin to exchange functions than broker-dealer functions**. The temptation to regulate ATSs and CPSs as Exchanges may be convenient in terms of applying fair access rules and other transparency requirements. Again, we remind the Commission that when "**everybody is a trading venue, nobody is a trading venue**". It costs more to connect with additional venues for BestEx compliance. The proposed BestEx Rule[37] that goes along with this proposal of redefinition of "Exchange" where the term "market" is expansive. The SEC seems aggressive in broadening their span of controls. The proposed new rules and amendments by this administration of the SEC are like a knife above every vendor's head. *"Rule by fear"*[38] would never solidify civil obedience to a police-state. It is a **slippery slope**

[36] https://www.findlaw.com/legalblogs/law-and-life/diabetic-sues-all-you-can-eat-sushi-discrimination/ - The "sushi" place closed as a result of this case. Ever since then, all-you-can-eat buffet restaurants impose surcharge on food wastage to deter "tossing out the rice of sushi' situation. Consumers generally get lower quality of fish if they order sushi instead of sashimi. One dispute caused all buffet eaters to suffer. Policy Makers should carefully draw the line between Consumer's rights versus Free Enterprise rights.
[37] https://www.sec.gov/rules/proposed/2022/34-96496.pdf
[38] https://www.jstor.org/stable/2215084

when deviating from an objective basis in establishing clear boundaries between prohibited and permissible activities to delineate rights and obligations.

- We think the 5% **fair access** threshold for NMS stocks and 3% threshold for U.S. Treasury Securities are appropriate. Extending the 5% threshold to equity securities that are not NMS stocks, corporate bonds, or municipal securities might be a challenge because they are not as liquid as NMS stocks. It would make the US rule as rigid as the EU if these thresholds are eliminated. Smaller ATSs need sufficient nimbleness to reach market segments that would otherwise not be reachable by larger trading venues.

  Imposing fair access rules is not necessarily the most efficient way to get current non-participants to trade securities or non-security crypto asset at ATSs. There are legitimate reasons why current non-participants are unable to reach commercially viable deals with ATSs. If track records show one's order flow as being toxic, an ATS should have the right and/or discretion to revoke the eligibility of that participant or impose surcharge. This would help avoid the fair access rule being exploited where it would be a detriment to market efficiency and capital formation.

- Regulators and SROs have responsibilities to conduct evaluations of potential **conflict of interest** and draw the line between the permissible use of one's "economy of scope/ scale" to discover new revenue streams and the potential prohibited action(s) that generates a spectrum of adverse effects inflicting damage onto others. Given that an ATS must register as a broker-dealer and become a member of an SRO, and SROs must set the standards of conduct for its members and administer examinations for compliance with these standards, then wouldn't it be a supervisory failure if the SRO(s) failed to curb conflicts of interest activities or other alleged misconducts of the ATSs?

  The public relies on the market regulators and the SROs to assure that they are not scammed in the open market. Such a market is called the Exchange. Otherwise, civilians are left with reading all the "small print" (Form ATS, ATS-N, ATS-R, ATS-G and other enhanced disclosures) on their own and taking on the risk of engaging with a trading partner or counterparty. These are called bilateral deals or multilateral trade agreements. The trade terms and corresponding recordkeeping are subject to privacy protection. Regulators should refrain from intervening in legitimate private practices.

- The SEC should work with the Department of Justice (DOJ)/ Federal Trade Commission (FTC) to conduct assessment(s) to scrutinize on any potential illicit activities under the federal **price discrimination** statutes (including the Robinson-Patman Act.[39] **Bundling** offers (e.g. using **affiliated** clearing services in attempt to create lock-in) could possibly be a form of price discrimination. Business practices that **threaten to undermine the competitive processes** in an affected market and otherwise meet the specific criteria (i.e., the simultaneous, ongoing sale of the same or similar products to commercial customers at different prices in transactions that implicate interstate commerce) should be examined.

  We thank the Commission for pointing out in footnote 65 of this reopening release about the United States Court of Appeals for the District of Columbia Circuit in the case – Intercontinental Exch., Inc. v. SEC, 23 F.4th 1013, 1024 (D.C. Cir. 2022)[40] held that the term '**group of persons**' "*certainly includes closely connected corporate affiliates"* and noted that *"[w]hether two or more persons are or may be acting in concert is likely the key consideration"* in determining whether two or more entities may constitute a 'group of persons' for purposes of the statute. In addition, the court stated that it was *"not suggest[ing] the term 'group of persons' is synonymous with corporate affiliation"* and that *"one*

[39] https://www.morganlewis.com/-/media/files/publication/morgan-lewis-title/white-paper/busguidetorobinson-patmanact_edwards_2010.ashx

[40] https://case-law.vlex.com/vid/intercontinental-exch-inc-v-899911901

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corporation that is affiliated with but not controlled by another may or may not, depending upon the circumstances, be considered a 'group of persons'" for the purposes of section 3(a)(1) of the Exchange Act.

In view of London Metal Exchange (LME)'s trading halt and cancel trade decisions in Nickel trading,[41] we think there are legitimate concerns about who may be exerting influence[42] and how market integrity could be weakened. The Commission should adopt a definition of "**affiliate**" for purposes of Part III to be consistent with other SEC Rules, such as the Dodd-Frank Volcker Rule.

Despite that the Commission said *"custodial services is generally not relevant to Exchange analysis"*, the proposed Safeguarding Advisory Client Assets rule[43] would extend the arm of the SEC to regulate custodian indirectly, including but not limited to, a registered futures commission merchant and certain Foreign Financial Institutions (FFI). Some digital assets custody platforms are operated outside of the US jurisdiction's regulatory perimeter, there can be potential for concentration of risks, as well as underscores the lack of transparency on the activities. Referencing to section F of this letter, it could be quite subjective to determine what constitute as "indirectly". The scope in this reopening release is still overly board.

- Data Boiler understands the nature of bringing ATSs for other types of securities to be in synch with ATSs that trade NMS stocks, yet Data Boiler opposes the requirements about "reasonable written standards for granting, limiting, and denying access to ATS services that must be established, and applied, and among other things, justify why each standard is fair and not unreasonably discriminatory" that only benefits the big law or consulting firms, citing the 2008 Société Générale $7.2 billion loss which trader Jérôme Kerviel scorned at the CEO Daniel Bouton[44] as a reference.

K. Conclusions + Other Remarks

The reopening release narrows the gaps[2] of regime differences between the US and the EU that we have identified. However, the scope is still too broad. It is a "Double-Edged Sword" if the Commission is overly aggressive in deterring Digital Assets players by enforcement. Not only would it hinder market innovations, we are concerned about "everybody is a trading venue, nobody is a trading venue". It increases costs to connect with additional venues for BestEx compliance.

Despite that the Commission said *"custodial services is generally not relevant to Exchange analysis"*, the proposed Safeguarding Advisory Client Assets rule[43] would extend the arm of the SEC to regulate custodian indirectly. What constitute as "indirectly"? Casino Laws that have existing perimeter to oversee online gaming, Linked licenses gambling software, Linked licenses gaming machine technical, Remote casino game host operating license, specified what 'actions' do not require a linked license. Instead of reinventing the wheel to add and/or modify existing Securities Laws to accommodate nuances with digital assets, why not let Casino Laws could be the first gatekeeper in supervising crypto?

As illustrated in section B of this letter, and point #b about 'coin issuance' in particular, Casinos have existing governance provisions over non-cashable gambling chips versus cashable tokens, electronic cash, credits or cards for the purpose of (i) making wagers on games, (ii) redeeming for cash, or (iii) making a donation to charitable entities. It is good fit comparable to non-security crypto assets versus securities, Stable Coins, Fungible, Non-fungible tokens, CBDC, etc.

The *"functions commonly performed by a Stock Exchange"* that fall within the criteria of existing Exchange Act 3b-16(a) or Rule 3b-16(a) as proposed to be amended, to a large extent is identical or indistinguishable with many Casinos and linked

[41] https://www.yahoo.com/entertainment/fca-bank-england-investigate-london-084118528.html
[42] www.linkedin.com/posts/kelvin-to-9125955_london-nickel-market-freeze-extended-to-sort-activity-6907790483070820352-Q_v0/
[43] https://www.sec.gov/rules/proposed/2023/34-97141.pdf
[44] http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5241263/Societe-Generale-chairman-Daniel-Bouton-to-step-down.html

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license vendors, except trading (betting) interest may or may not be "financial instrument". Financial instrument priced in Fiat currency would NOT and should NOT be compatible with non-security crypto assets. 'Funny money' is more akin to 'non-cashable gambling chips'.

We counter suggest that regulators may indeed ask Digital Asset Platforms to apply for licenses under Casino Laws, and then wait for these platforms to demonstrate that the 'winning odds' are in favor of investors in the long-term before permitting them to apply and register as a National Securities Exchange or complying with the conditions of Regulation ATS. This stackable approach would create a 2 tier hierarchy. It would afford the US Federal and State Governments the flexibility to consider both offense and defend strategies. It will provide a viable path in responsible development to Digital Assets. At the same time, the Commission can access whether the existing Exchanges and ATSs have long-term 'winning odds' in whose' favor.

The existing time-tested Exchange Act should not be changed. We concur with the Former SEC Deputy General Counsel Mr. Andrew N. Vollmer's comment, cited *"The SEC does not have power to expand the statutory definition of an exchange to reach actions not within the scope of Congress's decision to regulate…"*

Last but not least, foreign adversaries may like to see the US engage in "unhealthy" competition to erode the US's prominent market position, such as:

- The US domestic fight over who should supervise what in digital assets;
- The entrenched players ('Corpo') claim to be 'Nomads' to rent seek from DLT infrastructure;
- In the cyberpunk era, who has the sophistication to Gamma squeeze the hedge funds, mobilize the naïve to move prices (the gag would have been prohibited if it occurred at a broker-dealer), lambast the top market-makers to advance controversial agenda on payment for order flow. 'Street Kid' may not be the underserved and the most vulnerable that people stereotyped. Be mindful of these insurgents.

DeFi and De-dollarization movements are on the rise and reap benefits out of chaos. Policy Makers should collaborate and leverage the inverse relation between DeFi and CeFi to create a healthy competition between the two.

Please consider adopting our recommendations to stack Casino Laws with Securities Laws to effectively and efficiently regulate Digital Asset space. Thank you and we look forward to engaging in any discussions and/or opportunities where our expertise might be helpful.

Sincerely,

Kelvin To

Founder and President

Data Boiler Technologies, LLC

CC: The Honorable Gary Gensler, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
Dr. Haoxiang Zhu, Director, Division of Trading and Markets

This letter is also available at:
https://www.DataBoiler.com/index_htm_files/DataBoiler%20SEC%20Exchange%20Definition%2020230613.pdf