

June 13, 2023

*By electronic submission*

Vanessa Countryman, Secretary  
United States Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-0609

**Re: Comments to Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities Proposed Rule, [Release No. 34-94062; File No. S7-02-22; RIN 3235-AM45]**

Dear Ms. Countryman,

We thank the staff of the U.S. Securities and Exchange Commission (“SEC”) for inviting industry comments to inform their proposed amendments to Rule 3b-16 under the Securities Exchange Act of 1934 (“Exchange Act”). The proposed rule defines certain terms used in the statutory definition of “exchange” under Section 3(a)(1) of the Exchange Act to include systems that offer the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities.

GBBC Digital Finance (“GDF”) is the leading global members association advocating and accelerating the adoption of best practices for crypto and digital assets. GDF’s mission is to promote and facilitate greater adoption of market standards for digital assets through the development of best practices and governance standards by convening industry, policymakers and regulators. GDF leads the global financial service sector as part of the Global Blockchain Business Council (“GBBC”), the largest and leading industry association for the blockchain technology and digital assets industry with more than 500 institutional members, and 231 Ambassadors from across 109 jurisdictions and disciplines.

GBBC and GDF offer the following comments in response to the SEC’s proposed rule entitled, “Amendments Regarding the Definition of ‘Exchange’ and Alternative Trading Systems (ATs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities,” released on January 26, 2022 (the “Proposed Rule”).<sup>1</sup>

**I. Proposed Rule Background**

The Proposed Rule seeks, among other things, to amend the Rule 16-16 of the Exchange Act to incorporate into the definition of “exchange” under Section 3(a)(1) of the Exchange Act to include systems that offer the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities. The new requirement would not only bring decentralized finance activity within its authority, but it could also bring under its domain myriad actors in the digital asset ecosystem including decentralized trading venues, node validators, and issuers and holders of governance tokens, among many, many others. This is problematic because the Proposed Rule would have the practical effect of shutting down decentralized finance activity in the U.S. and driving it offshore. We do not believe this helps the SEC to achieve its three-part mission: to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

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<sup>1</sup> SEC, Proposed Rule, *Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities*, Release No. 34-94062; File No. S7-02-22 (SEC Jan. 26, 2022), <https://www.sec.gov/rules/proposed/2022/34-94062.pdf> at p.526-527. Please note that the comment period associated with the Proposed Rule was reopened by the SEC on April 14, 2023, as evidenced here: <https://www.sec.gov/news/press-release/2023-77>

## **II. Fungible Tokens May Not Be Securities And, Therefore, The Protocols that Enable Decentralized Finance Activities Should Not Be Regulated By The SEC.**

Chairman Gensler has stated that fungible digital assets are securities. But *Howey* jurisprudence has yet to support the proposition that fungible digital assets are securities.<sup>2</sup> The status of fungible digital assets is equally unclear. Neither the courts nor Congress has spoken definitively on the issue. The Chair of the SEC and the Chairman of the CFTC have different views on the characterization of many fungible digital assets, with 'ether' being the most prominent. Notably, when questioned during a recent Financial Services Committee Hearing in the US Congress, Chair Gensler declined to characterize ether as either a security *or* a commodity, testifying that such a determination can only be made after there has been an examination of the facts and circumstances.<sup>3</sup> The regulatory guidance regarding when a fungible digital asset may be deemed to be security is murky at best. Without regulatory clarity, developers, end-users and others would have difficulty determining when a "communication protocol system" is transacting with securities and, thus, covered by the rule.

## **III. The Proposed Rule Will Stifle Innovation and Drive Dollars Offshore**

The most likely effect of the broadened definition of "exchange" will not be an expansion of exchange registrations with the SEC, but rather a flight of capital and innovation from the U.S. to foreign markets. SEC Commissioner Peirce's dissent of the Proposed Rule warns that the SEC "propose[s] to embrace stagnation, force centralization, urge expatriation, and welcome extinction of new technology."<sup>4</sup> It would also have effect of leaving the status quo untouched while at the same time preventing new and emerging technologies from taking root in the United States. In particular, under the Proposed Rule, a third party would need to be responsible for compliance of decentralized finance projects. This would defeat the very notion of decentralized software-based systems. Further, American businesses and individuals will be negatively impacted as market actors take their capital, jobs, and innovation to foreign markets that take a nuanced approach to regulating digital assets.

## **IV. SEC Should Delay Adopting The Proposed Rule**

Until there is more certainty, adoption of the Proposed Rule would be premature. The treatment of fungible digital assets under the law remains unclear. There are still too many unknowns regarding how the Proposed Rule will be applied to the range of participants in the digital asset market. For example, it is unclear whether the SEC will seek to impose liability on blockchain validators (miners) because their activities give rise to decentralized networks that allow decentralized finance platforms to exist. Similarly, it is unclear whether the SEC will bring enforcement actions against holders of governance tokens because they can effectively determine what upgrades should be made to decentralized trading platforms, among many other types of decisions. These same questions could be asked about liquidity providers, un-hosted wallet providers, coders, and other participants whose contributions to decentralized systems enable them

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<sup>2</sup> See Lewis Cohen et al., *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities* (Nov. 10, 2022) (providing an exhaustive review of every relevant federal appellate case to have applied the *Howey* test to establish that no such authority exists for the notion that "an asset that is the object of an investment contract transaction [e.g., a token] is itself a security").

<sup>3</sup> When asked repeatedly whether ether is a security during the Congressional House Financial Services Committee on 18 April 2023, SEC Chairman Gary Gensler declined to answer.

<sup>4</sup> <https://www.sec.gov/news/statement/peirce-rendering-innovation-2023-04-12>

to flourish. Until those questions are considered and addressed, we ask the SEC to delay adoption of the Proposed Rule.<sup>5</sup>

## VII. Conclusion

At a time when it has become imperative to clarify the regulatory perimeter for centralized crypto exchanges, the undertaking for which will require significant regulatory and industry resources, the Proposed Rule appears to be premature, a much lower regulatory priority, and out of line with the way other major jurisdictions are thinking about legal frameworks for decentralized finance.<sup>6</sup> We do not believe that the Proposed Rule will have the stated effect of protecting investors, facilitating capital formation, and maintaining orderly markets. Rather, the adoption of the Proposed Rule would leave the traditional financial rails intact, depriving market participants in the United States from the opportunity to innovate using digital assets and decentralized technology.

Thank you for the opportunity to present our views.

Sincerely,

*Andrea Tinianow*

[Andrea Tinianow \(Jun 13, 2023 13:54 EDT\)](#)

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<sup>5</sup> Considering the lack of concrete direction from the SEC regarding the impact that the Proposed Rule will have as it is applied across the marketplace, the adoption of the Proposed Rule may raise questions under Procedures Act of 1946.

<sup>6</sup> At the very least, the SEC should delay adoption of the Proposed Rule until the IOSCO final report on DeFi is issued at the end of the year to harmonize global regulatory standards.