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

Re: Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"

Dear Ms. Countryman:

INTRODUCTION

I am an upper level law student studying both Business Organizations and Administrative law, with a tax background--both educationally and professionally. I am also an investor who understands the world of digital wallets and staking. I am indebted to the SEC for allowing my comments to appear on such a forum and for keeping investors safe since 1934.

This Comment Letter supports the proposed expansion of "exchange" and support for the establishment of a comprehensive regulatory framework for cryptocurrencies, with a concurrent suggestion that "investment token" be defined and distinguished from "utility token".

BACKGROUND

Here, the SEC seeks to capture more entities and compel them to register under Reg ATS, as an exchange, or as a broker-dealer. Thus, bringing all forms of blockchain, digital asset transactions and fintech platforms within its jurisdiction.

This Comment Letter specifically addresses the first two questions posed by the Proposal: 1. Should the Commission amend Exchange Act Rule 3b-16 as proposed? Should the Commission adopt a more expansive or limited interpretation of the definition of "exchange"? Do commenters agree that, in the current market, Communication Protocol Systems function as marketplaces that conduct similar activities as exchanges do? Would any systems that conduct

similar activities as exchanges that should be included in proposed Rule 3b-16 be excluded? Are there any asset classes or types of securities that should be excluded from the definition of exchange? If so, why?

2. What are commenters' views on the potential consequences of expanding or limiting the definition of "exchange" under Exchange Act Rule 3b-16? What are commenters' views on how changing Rule 3b-16 could benefit or harm investors and market participants?

The SEC's current "case by case" approach to identifying investment tokens has done much good in forcing registration and weeding out scams[1]. But the approach needs to adapt. The rapid growth and widespread adoption of digital assets has brought about numerous benefits, but has also raised significant concerns regarding investor protection, market integrity and overall financial stability. Cryptocurrencies, blockchain technology, and related assets have demonstrated immense potential for innovation and economic growth. However, the lack of clear regulatory guidelines has resulted in an environment prone to fraudulent activities, market manipulation and other illicit practices. Without proper oversight, even the most skilled investors may fall victim to scams and the reputation of the entire crypto industry could suffer. It is essential to explore how the SEC defines "securities" and whether that definition can encompass crypto assets. The Securities Act of 1933 and the Securities Exchange Act of 1934 provide definitions for securities--such as stocks, bonds, and investment contracts. Including cryptocurrencies in the definition is not as straightforward. The SEC has been refining its guidance and approach over time. This fluidity is an important consideration in the implementation of all cryptocurrencies as securities given their unique characteristics and unprecedented intricacies. One way of achieving the goals set out by the SEC involve the

[1] SEC v. LBRY, Inc., 1:21-cv-00260, (D.N.H.)

separating of investment tokens from utility tokens. Investment tokens give rights of ownership, whereas utility tokens are unable to be mined and do not represent an investment. Investment tokens are considered a form of digital money and utility tokens are better described as pieces of software that perform specific actions within a specific network. Distinguishing between investment tokens and utility tokens would allow for the market to ebb and flow based on tactical and formulaic protections—not merely blanket rules that integrate all crypto assets. Heavy regulation on investment tokens would be a welcome advantage to both investors and issuers. Applying the same standard to utility tokens would prove costly and set into motion ramifications for stifling growth and fair competition. The Commission is proposing to eliminate the exemption under Rule 301(a)(4) of Regulation ATS, which exempts from the definition of an "exchange" under Section 3(a)(1) of the Exchange Act an ATS that is operated by a registered broker-dealer or a bank that solely trades government securities or repos.[2] The Commission is also proposing to amend Rule 301(b)(1) of Regulation ATS, which currently requires an ATS to register as a broker-dealer under Section 15 of the Exchange Act,[3] distinguishing established financial institutions from cryptocurrency exchanges. This poses several challenges to the expanding crypto market. To address these challenges, I urge the SEC to develop a regulatory framework that balances innovation with investor protection.

There are differing mechanisms for regulating digital assets by the financial institutions spearheading the crypto movement. SRO "self-regulatory organization" membership is not

---

[2] See 17 CFR 240.3a1-1(a)(3) and 17 CFR 242.301(a)(4).

[3] 15 U.S.C. 78o.

required for a bank or other financial institution that registers as a government securities broker or dealer.[4] This is applicable when examined beside cryptocurrency platforms. The SEC should note whether cryptocurrency exchanges would potentially qualify for this SRO exemption in the future. The Commission believes it is important for an ATS "alternative trading systems" to be a member of an SRO, and unlike registrants under Sections 15 and 15C(a)(1)(A), a bank or other financial institution that registers under Section 15C(a)(1)(B) is not required to be a member of an SRO.[5] This importance should be carefully defined by regulations that apply a fair standard between financial institutions working with invested/paper money or financial institutions working with digital tokens.

SUBSTANCE

The Howey Test, established by the Supreme Court in 1946 from the case SEC v. W. J. Howey Co.[6], has served as a cornerstone for determining whether a transaction involves an investment contract and falls within the realm of securities regulation. To meet the Howey Test, the SEC should ensure that there is a financial investment present--again separating utility tokens from *investment* tokens--prove that there is a shared enterprise and ensure that an expectation of profits is derived from the work of a third-party. The Howey Test can be very broad and when used to its full capacity, can take the range of securities within the SEC's jurisdiction to unimaginable levels. The evolving nature of cryptocurrencies and the diverse range of activities conducted on crypto platforms has created uncertainty regarding their classification. Employing

---

[4] 15 U.S.C. 78c(a)(5)(C)(i)(II).

[5] See Exchange Act Sections 3(a)(6) and 3(a)(46)

[6] SEC v. W. J. Howey Co., 328 U.S. 293 (1946)

the Howey Test would help determine whether an investment qualifies as a security. The test examines whether an investment involves an investment of money in a common enterprise with an expectation of profits primarily from the efforts of others. Applying this test to crypto assets can be complex, as some tokens may exhibit characteristics of traditional securities, while others may have utility or consumptive purposes. Given the unique characteristics of cryptocurrencies and the decentralized nature of many platforms, there is a need for specific guidance that application of the Howey Test can provide. This would determine whether a particular cryptocurrency or token qualifies as a security. Clear criteria would assist market participants in understanding their legal obligation and responsibilities. While working against fraudsters, the Howey test could also turn some protocols into exchanges. Thus, if expanding Rule 3b-16, there needs to also be exemptions for coins or tokens not used for investment purposes.

Comments from Commissioner Hester Peirce highlight the need for balance in refining rule 3b-16:

> The staff is also recommending an amendment to the definition of "exchange" in Exchange Act Rule 3b-16. Unexpectedly for me—and perhaps for many in the market—this proposed amendment goes far beyond the scope of the concept release that was issued with the initial September 2020 proposal. What the staff is recommending for our consideration today is an expansion in the definition of exchange that would apply to any trading venue, including so-called communication protocol systems, for any type of security, not just for government or fixed-income securities. This change could deter innovation and dissuade new entrants from entering the market for trading venues and execution services, but communication protocol services have become more sophisticated and now play a significant role in the trading of certain types of securities. I could have supported a proposal that allowed for careful consideration and informed comment on how this change would affect innovation and competition in this space.

Further, the application of the Howey Test is not always clear. The Comment Letter from Jones Day highlights this:

> Perhaps most significantly, the inclusion of "communications protocol systems" within the definition of "exchange" may also bring platforms facilitating blockchain and digital asset transactions within the regulatory ambit of the SEC. If the system using a

> communications protocol "makes available" (such as by routing to) a platform through which parties can agree to the terms of a trade, this arguably could constitute an "exchange" under the amended rule. Pursuant to this expansive new definition, providing information concerning AMM contracts or participating as a liquidity provider with respect to a particular AMM pool may constitute a communication protocol subject to registration and reporting obligations. Because Bitcoin does not appear to be considered a security, this expansive proposal likely does not interfere with the current Bitcoin ecosystem. But any attempt to regulate communication protocols that interact with Bitcoin could elicit legal challenges on many bases. These include challenges grounded in administrative law, as well as ones potentially invoking the associational and expressional freedoms of the First Amendment.

Thus, a "safe harbor" that distinguishes investment token from utility token is necessary. This will appropriately ensure that the SEC is operating on behalf of market participants, given the increasing demand for their facilitation on investment tokens. This will also ensure that the SEC does not take on too much with the regulation of utility tokens that offer significantly less risk to investors. Deluding their efforts by enjoining the two would allow for instability in the market.

CONCLUSION

In conclusion, my Comment Letter supports the proposed expansion of “exchange” and support for the establishment of a comprehensive regulatory framework for cryptocurrencies, with a concurrent suggestion that “investment token” be defined and distinguished from “utility token”. If the SEC heeds this advice, the reception will be one of gratitude from investors who are interested in a fair market, but who do not want to restrict innovation.

I appreciate the SEC’s commitment to staying informed about developments in the crypto space and its dedication to protecting investors. I respectfully urge the commission to issue comprehensive guidance distinguishing cryptocurrencies based on the function of the respective token and the application of the Howey Test, considering the complexities of this rapidly evolving industry. I would like to express my support for the SEC’S efforts in recognizing the

benefits of tokenized assets. I would also like to highlight the SEC's commitment to striking a balance between regulatory oversight and allowing for innovation and capital formation. This is a positive step towards creating a clear and predictable regulatory environment. Thank you for the opportunity to provide my comments on this significant matter.

Sincerely,

Heather Raiser