

August 5, 2025

Chairman Tim Scott
U.S. Senate Committee on Banking,
Housing and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Elizabeth Warren
U.S. Senate Committee on Banking,
Housing and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

Re: Preliminary Response to Discussion Draft¹ and Request for Information²

Dear Chairman Scott, Ranking Member Warren, and other Members of the Committee,

The Healthy Markets Association writes to offer our preliminary response to the release of the Discussion Draft and the Request for Information related to the regulation of digital assets.

The Healthy Markets Association is a non-profit member organization focused on improving the transparency, efficiency, competitiveness, and fairness of the capital markets. Our members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms.³ Our members collectively have over a trillion dollars of investments in stocks, bonds, US treasury securities, private equity funds, and other “traditional” assets. Some of our members also have exposure to digital assets, like Bitcoin, as well as investments in digital asset market participants, such as crypto exchanges. Every day, we work with chief investment officers, portfolio managers, trading desk heads, operations teams, risk managers, data analysts, compliance officers, and other professional investment team staffers engaged in the investment process. Our expertise and focus is on capital markets plumbing across asset classes.⁴

Regrettably, given the length and extremely complex nature of the Discussion Draft and the more than seventy multi-faceted questions posited in the RFI, we will be unable to comprehensively and thoughtfully respond within the initially allotted 14 days. We assume that you understand our challenge, given Chairman Scott’s longstanding interest in ensuring that

¹ *Discussion Draft: Responsible Financial Innovation Act of 2025*, U.S. Senate Cmte on Banking, Housing, and Urban Affairs, available at https://www.banking.senate.gov/imo/media/doc/senate_banking_committee_digital_asset_market_structure_legislation_discussion_draft.pdf (last viewed August 2, 2025).

² Senate Banking Committee, *Senate Banking Committee Digital Asset Market Structure Request for Information*, available at https://www.banking.senate.gov/imo/media/doc/market_structure_rfi.pdf (last viewed July 30, 2025).

³ To learn more about HMA, please visit <https://healthymarkets.org>.

⁴ HMA has submitted over one-hundred comments on rulemakings and petitions to capital markets regulators. We have testified before Congress and appeared at regulatory roundtables. Our comments have been cited hundreds of times on final rules by the SEC, CFTC, and other regulators. In addition to our members’ expertise, HMA’s staff includes individuals who have served in senior positions in government, as well as as General Counsel of a boutique investment bank focused on capital formation, the head of trading at a large retail broker-dealer, and Vice-Chairman of a stock exchange.



market participants have adequate time to identify, assess, and appropriately respond to requests related to major capital markets policy changes.⁵

We are working diligently to respond to your Request for Information, and anticipate providing a more detailed response in the days ahead.

In the interim, we wish to flag that the Discussion Draft and changes contemplated in the RFI would go well beyond regulating digital assets, and instead dramatically change the authority for the Securities and Exchange Commission and the application of rules underpinning the traditional capital markets. Right-sizing the scale and scope of the legislation to limit its impact on traditional capital markets is critical to maintaining investor confidence and avoiding unintended disruptions of those essential markets. Further, new digital asset legislation should be proportionate, enforceable, and aligned with broader financial market objectives. “Tokenized” versions of traditional assets should not be treated fundamentally differently than their economic equivalent assets. For example, as Commissioner Hester Peirce flagged in her recent public statement, tokenization isn’t regulatory magic:

Market participants who distribute, purchase, and trade tokenized securities also should consider the nature of these securities and the resulting securities laws implications. For example, depending on the particular facts and circumstances, a token could be a “receipt for a security,” which is itself a security but is distinct from the underlying security held by the distributor of the token. Alternatively, a token that does not provide the holder with legal and beneficial ownership of the underlying security could be a “security-based swap” that cannot be traded off exchange by retail persons. ***While blockchain-based tokenization is new, the process of issuing an instrument representing a security is not. The same legal requirements apply to on- and off-chain versions of these instruments.***⁶

Unfortunately, the Discussion Draft, similar to the legislation that recently passed the House of Representatives, would upset that regulatory parity and legal clarity.

Please do not undermine the integrity or stability of the traditional capital markets upon which millions of American families and businesses rely by creating “tokenized” loopholes. We understand that the Senate Banking Committee and the Commission are both wrestling with

⁵ Press Release, *Scott to SEC Chair Gensler: “I have serious concerns with the way you are leading the SEC.”*, U.S. Senate Banking Cmte on Banking, Housing, and Urban Affairs Minority, Sept. 12, 2023, available at <https://www.banking.senate.gov/newsroom/minority/scott-to-sec-chair-gensler-i-have-serious-concerns-wi-th-the-way-you-are-leading-the-sec>.

⁶ Statement of Hon. Hester Peirce, *Enchanting, but Not Magical: A Statement on the Tokenization of Securities*, SEC, July 9, 2025, available at <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-tokenized-securities-070925> (emphasis added).



whether to do so. In that regard, HMA,⁷ SIFMA,⁸ Citadel,⁹ and other market participants have all expressed to the SEC leadership grave concerns about potentially treating “tokenized” versions of traditional equity securities differently.

Unfortunately, we understand that you are contemplating going much further than simply creating a loophole around existing securities trading rules, and also considering revisions to the well-established, decades-old definition of a “security.” The current definition of a security has been interpreted and applied quite literally millions of times by market participants and courts. There are hundreds of decisions spanning decades forming a deep body of applicable legal precedent.¹⁰ The proposed changes would create chaos in the capital markets upon which millions of American families and businesses rely, including the markets for not just publicly-traded equity securities, but also corporate bonds, US treasury securities, and more.

We urge you to revise the Discussion Draft to much more narrowly focus on the regulation of digital asset markets. We further urge you to continue the general practice of regulating the economic interests and principles – and not the specific technologies. While technology changes rapidly, the general economic principles of capital markets activities generally don’t. An equity swap should be treated as an equity swap, whether marketed and sold as a “token” or not.

As the Flash Crash of May 6, 2010 and the collapse of Archegos Capital Management clearly demonstrate, failures to adequately regulate equity derivatives markets can lead to massive manipulations and catastrophic losses for investors in the underlying markets. Once you treat equivalent economic interests similarly, and narrow the scope of your work to just digital assets, the scope of the needed regulatory reforms shrinks significantly.

Market participants, regulators, and Congress have developed the current rules and best practices for trading financial assets – whether they are treasuries, corporate debt securities, equities, options, swaps, physical commodities, or digital assets – from trial and error. Nearly all of the rules in the equities and derivatives trading markets have arisen to address specific problems or crises.

⁷ Letter from Tyler Gellasch, HMA, to Hon. Paul Atkins, SEC, July 24, 2025, *available at* https://healthymarkets.org/wp-content/uploads/2025/07/Ltr_to_SEC_re_Tokenization_7-24-25-final_2_.pdf (attached as **Exhibit 1**).

⁸ Letter from Kenneth Bentson, Jr., SIFMA, to Vanessa Countryman, SEC, June 30, 2025, *available at* <https://www.sec.gov/files/ctf-written-input-sifma-063025.pdf>.

⁹ Letter from Stephen Berger, Citadel Securities, to Vanessa Countryman, SEC, July 21, 2025, *available at* <https://www.sec.gov/files/citadel-securities-response-crypto-task-force-072125.pdf>.

¹⁰ For example, Section 303 of the House-passed CLARITY Act amends the core definition of “exchange” – a definition that has been repeatedly supported by the Commission, Congress and the Courts and has been unamended for more than 90 years – in a manner expressly altering its existing application in the “securities” markets, not simply with respect to digital commodities or permitted stablecoins. (CITE Section 303(b) and (c) of the Clarity Act). It is not clear that the broad ramifications of this foundational change for traditional finance and investors has been assessed.

For example,

- the national market system and clearing rules were created in response to the Paperwork Crisis;
- the consolidated tapes were created to address massive price dislocations across different trading venues and structured to promote availability of consolidated data on fair, reasonable and non-discriminatory terms;
- the Limit Up Limit Down Plan was adopted in response to the May 6, 2010 Flash Crash;¹¹
- the Market Access Rule was in response to risks and manipulative trading arising from unfettered access to our markets with the rise of high-frequency trading; and
- Regulation SCI was adopted in response to a wave of exchange outages caused by “glitches.”

Congress should start with existing market rules as the base text, and then tweak them to address the unique nature of digital assets (for example, with respect to clearing and settlement), and not start with a blank slate. We include as **Exhibit 2** our recent suggestions as to the substance of some of the rules that should be replicated for digital asset markets.

Lastly, we note that your efforts to provide clear rules for crypto that improve the native market’s competitiveness, efficiency, integrity, fairness, and stability would be welcome. The digital asset markets lack clear regulatory protections and guidelines for trading – such as best execution obligations, conflicts of interests and cross trading rules, data access requirements, and clear custody protections – which are a material barrier for many institutional investors. While some intrepid entities are undoubtedly brushing aside the heightened risks, many others are effectively compelled by their fiduciary duties or state law to either eschew digital assets altogether or, alternatively, obtain digital asset exposures only through traditional securities products, such as a Bitcoin Exchange Traded Product from a registered investment adviser.

If you seek to provide a regulatory framework for the US to become the crypto capital for the world, we urge you to learn from your successes in making the US stocks, bonds, and treasuries markets the best in the world. And while we hope you will improve the crypto markets with thoughtful regulation, we are extremely concerned that the Discussion Draft will materially undermine the other essential markets upon which our members – and millions of American families and businesses – rely.

¹¹ See, *Annual Report for 2024 of the Operating Committee of the Plan to Address Extraordinary Market Volatility*, Operating Committee of the Limit Up, Limit Down Plan, available at <https://cdn.luldplan.com/reports/LULD-2024-Annual-Report.pdf>.



We continue to work on our responses to the RFI, and look forward to working with you in the weeks ahead. If you have any questions or would like to follow up in the interim, please feel free to reach out to me at ty@healthymarkets.org or (202) 909-6138. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tyler Gellasch', written in a cursive style.

Tyler Gellasch
President and CEO

July 24, 2025

Via Electronic Mail and Web Submission

Hon. Paul Atkins, Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Tokenization of Securities

Dear Chairman Atkins:

The Healthy Markets Association writes to share our concerns regarding the Commission's consideration of the regulatory parameters for "tokenized" securities.¹ While blockchain technology offers opportunities for advancements in the plumbing of capital markets, and is already delivering advances in some areas, the appropriate regulation of tokenized securities is entirely separate from the discussion itself.

We understand from press reports and industry discussion that some market participants are offering tokenized US equity securities, and at least one has asked the Commission and staff for an exemptive order or no-action relief from the application of the securities laws and otherwise applicable rules.

We have profound concerns with the lack of enforcement of the applicable federal securities laws and rules, as well as the processes through which exemptions from them are being sought. We urge you to apply the law and reject the requests.

Substantive Concerns

In May, it was reported that Kraken would begin selling tokens of US equity securities in "select markets."² In June, it was reported that Coinbase is seeking relief from the SEC to offer "tokenized" US stocks.³ In July, Robinhood announced that it would offer derivatives of both

¹ HMA is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. We promote these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and seek to promote robust public markets. Our members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms.

² *Kraken launches tokens to offer 24/7 trading of U.S. equities*, Reuters, May 22, 2025, available at <https://www.reuters.com/business/autos-transportation/kraken-allow-trading-apple-tesla-nvidia-shares-digital-tokens-wsj-reports-2025-05-22/>.

³ Hannah Lang, *Coinbase seeking US SEC approval to offer blockchain-based stocks*, Reuters, June 17, 2025, available at <https://www.reuters.com/business/coinbase-seeking-us-sec-approval-offer-blockchain-based-stocks-2025-06-17/>.



public and private equity as “tokens” in Europe.⁴ We understand that several other firms are either providing similar products, or are in the process of developing them.

It is not entirely clear how each of these equity derivative products is legally structured, or the extent to which each is complying with existing US or foreign law. Nor is it entirely clear what, if any, exemptions or “no-action relief” is being sought by these and other firms related to tokenized securities.

It appears as though the Commission is faced with essentially two broad-based questions.

First, are “tokens” of US equity securities within the definition of securities? Of course, tokens of securities are securities.

Second, given the answer to the first question, then what rules should be applied to those securities and those who engage with them?

Depending upon how tokens of securities are structured, they are generally either some form of collective investment fund or derivative (such as a security-based swap). We were heartened by Commissioner Hester Peirce’s short statement declaring – contrary to the assertions of some in the digital asset industry – that the federal securities laws haven’t magically been suspended, and decades of legal precedent into what constitutes a security still exist. As she explained:

Market participants who distribute, purchase, and trade tokenized securities also should consider the nature of these securities and the resulting securities laws implications. For example, depending on the particular facts and circumstances, a token could be a “receipt for a security,” which is itself a security but is distinct from the underlying security held by the distributor of the token. Alternatively, a token that does not provide the holder with legal and beneficial ownership of the underlying security could be a “security-based swap” that cannot be traded off exchange by retail persons. While blockchain-based tokenization is new, the process of issuing an instrument representing a security is not. The same legal requirements apply to on- and off-chain versions of these instruments.⁵

With that statement, we suspect that a majority of the Commission likely believes that tokenized financial products that are directly tied to securities (like equities) are securities. And we agree. However, resolving the question of whether the financial products are securities – and therefore subject to jurisdiction by the Commission – doesn’t answer the equally important question of what rules apply to them.

⁴ Press Release, *Robinhood Launches Stock Tokens, Reveals Layer 2 Blockchain, and Expands Crypto Suite in EU and US with Perpetual Futures and Staking*, Robinhood Markets, Inc., June 30, 2025, available at <https://newsroom.aboutrobinhood.com/robinhood-launches-stock-tokens-reveals-layer-2-blockchain-and-expands-crypto-suite-in-eu-and-us-with-perpetual-futures-and-staking/>.

⁵ Statement of Hon. Hester Peirce, *Enchanting, but Not Magical: A Statement on the Tokenization of Securities*, SEC, July 9, 2025, available at <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-tokenized-securities-070925>.



We might hope that the Commission's default approach would be to apply the general rules that apply to the underlying securities or otherwise economically equivalent financial products. The Commission has learned time and again that it must carefully construct rules that work together for financial products that are directly related to each other.

For example, the May 6, 2010 Flash Crash involved the trading of equity derivative securities that were subjected to one set of trading rules (overseen by another regulator), triggering a catastrophic collapse in equities and other equity derivatives that were subjected to different trading rules overseen by your agency.

In the years after that event, the Commission worked with its fellow regulators, registered securities exchanges, investors, brokers, and other market participants to implement coordinated market safeguards to protect against catastrophic collapses like that one.⁶

Similarly, the March 26, 2021 explosion of Bill Hwang's Archegos Capital Management involved the trading of equity derivative securities that were subjected to a different set of trading rules than the equities themselves. Archegos engaged in highly leveraged and concentrated equity derivatives trades, and when it was unable to meet its margin calls, its bank counterparties raced to unwind their trades and exposures as quickly as they could. As that happened, the banks' fire sales of those positions severely depressed prices in a number of stocks, including ViacomCBS and Discovery.⁷ In addition to the turmoil in the stocks of innocent companies and unrelated investors, some of the banks suffered enormous losses as well.⁸

This incident raises several points relevant to the tokenization discussion, all of which relate to the importance of Commission rules that acknowledge the integration of related financial products. For example, after more than a decade of statutorily-directed rulemaking and implementation, the Commission's security-based swaps rules still didn't adequately address the risks. Further, the concentration of positions exposed a significant weakness in position reporting. If Form 13F filings included equity derivatives and shorts, as HMA first suggested

⁶ See, e.g., *Order Approving, on a Pilot Basis, the National Market System Plan to Address Extraordinary Market Volatility by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.*, SEC, Exch. Act Rel.No. 67091, May 31, 2012, available at <https://www.sec.gov/files/rules/sro/nms/2012/34-67091.pdf> (now operating as the Limit Up, Limit Down Plan, available at <https://www.luldplan.com/>).

⁷ See, Erik Schatzker, Sridhar Natarajan, and Katherine Burton, *Bill Hwang Had \$20 Billion, Then Lost It All in Two Days*, Bloomberg, Apr. 8, 2021, available at <https://www.bloomberg.com/news/features/2021-04-08/how-bill-hwang-of-archegos-capital-lost-20-billion-in-two-days>.

⁸ See Takashi Nakamichi, Cathy Chan, and Sridhar Natarajan, *Credit Suisse, Nomura Slump as Banks Tally Archegos Damage*, Bloomberg, Mar. 29, 2021, available at <https://www.bloomberg.com/news/articles/2021-03-29/credit-suisse-nomura-face-losses-as-banks-tally-archegos-damage> and Robin Wigglesworth, *Archegos poses hard questions for Wall Street*, Financial Times, Mar. 29, 2021, available at <https://www.ft.com/content/89b560ec-212c-4e82-b52e-c3e1408a9e6b>.



well-before the Archegos collapse,⁹ then Archegos' counterparties could have seen the customer's concentrated holdings, and would have more effectively managed not only their own risks, but also those to the underlying equities (well before the risks and impacts grew so large).

Further, the exemption for "family offices" that allowed Archegos to avoid some regulatory oversight and obligations highlights why the Commission should be reluctant to recreate a similar exemption for entities trading in other equities derivatives (irrespective of whether they are "tokenized").¹⁰ There are also other important lessons from the Archegos experience.

For example, the securities laws allow the Commission to protect the markets from bad actors. Prior to the Archegos collapse, Hwang settled an enforcement action for insider trading, and was barred from associating with registered brokers, dealers, transfer agents, and other SEC-regulated entities. Unfortunately, the Commission subsequently granted Hwang's request to lift the ban prior to Archegos' collapse. While the Commission sadly chose to expose the markets to a known bad actor in this instance, it could have stopped it. The Commission should carefully consider whether to allow bad actors to enter our markets through a tokenized back door.

We also note that Archegos' trading was subjected to reporting rules, custody obligations, and many other clearly defined rules (including bankruptcy preference rules). These rules allowed regulators and market participants to identify what went wrong, and mitigate the damages in ways that would be simply impossible for tokenized securities without significantly greater rulemaking.

We would be extremely concerned for the integrity and stability of the traditional securities markets (including equities, US treasuries, and others assets), if financial firms touching tokenized securities (including brokers and trading venues) were not compelled to be registered with the Commission, or otherwise comply with all of their applicable rules. These rules might include requiring FINRA registration, as well as compliance with broker sales practice protections, best execution obligations, reporting rules, custody protections, net capital requirements, and more.

As the Flash Crash and Archegos demonstrate, a failure to align regulations would create massive risks of not just investor protections for the people trading them, but for everyone trading in the underlying stock and markets, too. It wasn't just the trading firms that caused those crises that suffered.

We agree with SIFMA that:

Facilitating transactions in equity securities outside of [existing rules] raises fundamental questions as to how investors would be protected and more

⁹ Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, at 10, Aug. 28, 2020, *available at* <https://www.sec.gov/comments/s7-08-20/s70820-7717968-222993.pdf>.

¹⁰ See, e.g., Benjamin Bain, *Archegos Shows Need to Monitor Family Offices, Regulator Says*, Bloomberg, Apr. 1, 2021, *available at* <https://www.bloomberg.com/news/articles/2021-04-01/archegos-shows-need-to-monitor-family-offices-berkovitz-says> (citing former CFTC Commissioner and SEC General Counsel Dan Berkovitz).

generally whether the SEC would have the authority to oversee unregistered entities offering tokenized equity trading to investors. Even if the entity were required to register as a broker-dealer, there is the question of whether it would also be required to be a member of FINRA; the lack of such a requirement would mean that investor protections under FINRA rules would not automatically extend to such entities.¹¹

Similarly, we agree with Citadel Securities that:

While targeted refinements may be required to a limited set of Commission rules and regulations to accommodate specific immutable characteristics of a tokenized U.S. equity, the overarching objective should be to treat tokenized U.S. equities in the same manner as traditional equity securities from a regulatory perspective—particularly when it comes to bedrock principles such as best execution, fair access, and pre- and post-trade transparency.¹²

In equity securities, the rules applicable to trading have developed over decades of trial and error. They are exceedingly complex and interrelated. They are also promulgated by multiple regulators, including over a dozen registered securities exchanges and FINRA. If the Commission excuses one rule, it will have ripple effects throughout the others.

Also, the mere existence of tokenized US equity securities will further exacerbate many of the current concerns in the equities markets, most notably excessive fragmentation and complexity. We have seen no meaningful discussion of these problems by the Commission, its staff, or the proponents seeking to offer the products.

That said, our concerns go well beyond the tokenization of US public equity securities. For example, the largest, most critical financial market in the world is for the trading of US treasury securities. The integrity and stability of that market is unquestionably essential – for both the operation of our government and our economy. At a time of growing concerns regarding the vibrancy of support for treasury auctions, and concerns with liquidity, we do not believe that fragmenting that liquidity through a potentially infinite array of related tokens is wise. If “tokenized” versions of US treasury securities are essentially permitted to escape transparency and other rules, these markets are put at grave risk.

It is ludicrous to have highly complex rules regulating order submissions, trade increments, fees, reporting, and more in one set of financial products, and then create a parallel universe to trade economically equivalent financial products without those same sets of protections for the integrity and stability of the markets. That isn’t innovation. It’s regulatory arbitrage. The Commission should not create a two-tiered regulatory system for economically equivalent securities, whether public US equity securities, US treasury securities, or other securities.

¹¹ Letter from Kenneth Bentson, Jr., SIFMA, to Vanessa Countryman, SEC, June 30, 2025, *available at* <https://www.sec.gov/files/ctf-written-input-sifma-063025.pdf>.

¹² Letter from Stephen Berger, Citadel Securities, to Vanessa Countryman, SEC, July 21, 2025, *available at* <https://www.sec.gov/files/citadel-securities-response-crypto-task-force-072125.pdf>.



Process Concerns

Tokenization represents a significant change in policy, market structure, operations, and risk management across several securities markets. The Commission cannot reasonably rely on exemptive authority or “no-action” relief to create a new regulatory regime for tokenized securities.

The regulatory treatment of tokenized securities is a significant policy issue that warrants full agency consideration, including notice, solicitation of public comments, thorough analysis, and adequate time to adjust the impacted systems.

The Commission and your fellow regulators,¹³ as well as Congress, have spent years contemplating and seeking to structure an appropriate regulatory regime for native digital assets. And we understand that the Commission’s Task Force has recently solicited feedback on how to adjust the agency’s rules for digital assets.

The Commission has not clearly articulated the policy issues to be addressed in its proposed regulatory changes. It has not identified the relevant facts, nor engaged in any reasonable analysis of those facts, nor identified a reasonable regulatory “solution” to address the identified problems.¹⁴

As you know, the US Supreme Court has recently materially curtailed agencies’ discretion to interpret their statutory authority and directions.¹⁵ But even prior to that decision, the federal courts have looked dimly upon similar Commission actions in the recent past.

The courts have articulated a relatively robust standard for the Commission’s appropriate exercise of its exemption power, for example.

The Commission has authority under existing law to “exempt any person, security, or transaction . . . from any provision” of the Exchange Act “to the extent that such exemption is necessary or

¹³ In April, HMA joined a Crypto Task Force Roundtable to stress the importance of digital assets trading occurring in regulated environments like registered securities exchanges by registered financial institutions, such as registered brokers, for the benefit of investors like registered investment advisers. However, our remarks were confined to native digital assets, and not to the current efforts to essentially recreate an un- or under-regulated parallel alternative to the capital markets upon which millions of American families and businesses rely. See also, Letter from Tyler Gellasch, HMA, to Hon. Hester Peirce, Apr. 11, 2025, available at <https://www.sec.gov/files/ctf-input-gellasch-hma-041125.pdf>.

¹⁴ We note that you have repeatedly stated that “capital formation” plays the central role in your agenda-setting for the agency, as of July 21st, not a single one of the over 125 letters in the comment file appears to have been submitted by a business seeking to engage in capital formation.

¹⁵ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), available at https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf (opinion also applied to *Relentless, Inc. et al. v. Dep’t of Commerce*, 22-1219, 62 F.4th 621 (1st Cir. 2023), which had been consolidated with *Loper Bright* for review by the Supreme Court) (overturning *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), noting that the Administrative Procedure Act “makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. The APA’s history and the contemporaneous views of various respected commentators underscore the plain meaning of its text.”).

appropriate in the public interest, and is consistent with the protection of investors.”¹⁶ That power – which requires a vote of the Commission under the law – is generally treated as “an exercise of informal adjudication.”¹⁷ In exercising that power, the agency “must explain why it decided to act as it did by providing a statement of reasoning rather than a mere conclusion.”¹⁸

In 2023, the Court of Appeals for the District of Columbia Circuit vacated a 2020 Exemptive Order by the Commission on the grounds that the Commission, amongst other things, “failed adequately to explain its rationale and failed to consider an important aspect of the problem.”¹⁹

The court also noted that “[i]f the SEC wanted to rely on MGEX’s analyses to connect the grant of exemptive relief with the goal of promoting competition, it needed to critically review and adopt MGEX’s submissions or perform its own comparable analysis.”²⁰ The Commission needed to clearly articulate its own analysis or, if it was relying on others, explain why it found that analysis persuasive.²¹ The Commission could not demonstrate “unquestioning reliance” on the “self-serving views of a regulated entity.”²²

More broadly, the court found that the Commission had previously said why its rules were important, and didn’t clearly explain why the exemption was necessary. The court reasoned that the Commission:

needed to “acknowledge” and “offer a reasoned explanation” for its evident change of perspective in the Exemptive Order — which, in contrast with the previous order, effectively discarded the Disclosure Statement requirement for a product meeting the statutory definition of a security future. Neither the Exemptive Order nor the record, however, contains any mention of [those rules].

²³

Some have argued that the Commission staff could achieve a similar result to an Exemptive Order through “no-action” relief. It cannot.

The Commission has a clear, statutorily-defined process for exempting products, activities, and actors from the application of its various laws and rules. That’s the exemptive process.

No-action letters, by contrast, are intended to be effectively staff-level guidance and interpretations, not exemptions from the application of the law or rules. No-action letters can be effectively, incrementally used by agency staff to inform and guide industry best practices.

¹⁶ 15 U.S.C. § 78mm(a)(1).

¹⁷ See, e.g., *CBOE Futures Exchange, LLC v. SEC*, 77 F.4th 971, 979 (D.C. Cir. 2023).

¹⁸ *Id.*, at 979-980.

¹⁹ *Id.* at 977.

²⁰ *Id.* at 979.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 980.



But no-action letters are not substitutes for rules or law. In general, no-action letters are, by design, not actions by the Commission; and, historically, have not been viewed as final agency actions that may be challenged in court for violating the Administrative Procedure Act.²⁴

For example, a recent no-action letter from the Commission's Division of Corporation Finance staff illustrates the appropriately narrow scope of such letters, which are typically, "based on the facts and representations" from the specific request:

This letter reflects the views of the staff of the Division. It is not a rule, regulation, or statement of the Commission, and the Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person. Because the Division's views are based on the representations in your letter, any different facts or conditions might require the Division to reach a different conclusion.²⁵

In general, no-action letters have not been viewed as binding other divisions of the agency, much less the Commissioners (the only people statutorily empowered to direct agency action).²⁶ Further, they have historically been viewed as revocable at any time for any reason. Accordingly, these letters are often requested, analyzed, and granted without any solicitation of public comments or public analysis. To the contrary, requests and staff determinations (to grant or decline) are typically publicized at the same time, and neither typically identifies all the key issues, facts, or analysis. These documents are typically just a few pages long, and generally bereft of robust data or analysis, although such information may separately be secretly shared between the requesting party and the Commission staff.

At the same time, no-action letters may be accurately viewed, at times, as attempts by the agency's Chairman and staff to grant permission for market participants to engage in an activity (or not meet a regulatory requirement), which would otherwise violate the law.

Further, despite often claiming that the no-action relief can only be relied upon by the requesting party, the Commission leadership has over the past few years nevertheless directed staff to issue no-action letters to industry trade groups with the intention of permitting widespread

²⁴ See 5 U.S.C. § 704 ("[F]inal agency action[s] for which there is no other adequate remedy in a court are subject to judicial review.").

²⁵ Letter to Alexander R. McClean, Harter Secrest & Emery LLP, from Luna Bloom, SEC, June 30, 2025, *available* [at https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/birchbiomed-063025](https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/birchbiomed-063025).

²⁶ As a practical matter, no-action letters typically reflect little more than the views of the agency Chairman, who has the power to hire, fire, and direct the agency staff. That said, over the years, Commissions have delegated some powers to the agency staff. However, the Commissioners nevertheless retain the rights to effectively overrule the staff, including by calling back up for a vote on actions taken by the staff via delegated authority. 17 CFR 201.431. See also, Letter from J. Matthew DeLesDernier, SEC, to Faisal Sheikh, FINRA, Aug. 26, 2023, *available* [at https://www.sec.gov/files/rules/sro/finra/2023/34-98212-letter-deputy-secretary-08252023.pdf](https://www.sec.gov/files/rules/sro/finra/2023/34-98212-letter-deputy-secretary-08252023.pdf) (notifying FINRA that an approval order granted the day earlier by the Commission staff had been stayed pending a review and vote of the Commission).



industry practices. For example, in 2017, the SEC provided no-action letters to securities industry trade groups related to compliance with requirements for investment research payment practices and trading obligations.²⁷ In these circumstances, the no-action relief appears to have crossed the boundary from offering guidance on compliance with the law to instead granting broad exemptions from it – but without complying with the agency’s statutory requirements for providing such exemptions.

We understand why Commission staff, individual Commissioners, or even a majority of the Commission, may seek to fundamentally change the application of the agency’s rules without undertaking the often years-long effort to propose a change, seek comments, undertake extensive analysis, and then adopt a final rule. We understand why even an exemptive order could be viewed as a substantively and procedurally daunting endeavor. Obviously, both types of agency actions could be readily challengeable in court. No-action relief may be viewed as a quicker, and more flexible alternative to achieve the desired change in the rules. It isn’t.

The law demands substantive and procedural accountability from the Commission for rules changes.

While the Commission may – like other agencies – generally view no-action letters as readily subject to modification, suspension, or rescission, that is not always the case. And while no-action letters are often viewed by the Commission as legally non-binding, that isn’t always the case.

The Commission could theoretically bring an enforcement action against a party to whom its staff previously granted no-action relief. However, we suspect the courts would determine that the enforcement action was improper, if the target of the enforcement action had reasonably relied upon the letter. Frankly, we suspect the Commission’s General Counsel would also caution against such an enforcement action, based on fundamental fairness, laches, and other similar principles.

A 2023 decision in the Fifth Circuit Court of Appeals illustrates the Commission’s dilemma.²⁸

In 2014, the Commodity Futures Trading Commission awarded academic researchers affiliated with Victoria University of Wellington in New Zealand²⁹ a no-action letter that essentially permitted them to operate a website that allows for wagers on U.S. election outcomes.³⁰ That letter asserted that the division (not agency) staff “will not recommend enforcement action to the CFTC for failure to comply with a specific provision of the Act or of a Commission rule,

²⁷ See, e.g., Letter to Steven Stone, Morgan Lewis & Bockius, from Elizabeth Miller, SEC, Oct. 26, 2017, available at <https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm> (subsequently permitted to expire); see also, Letter to Timothy W. Cameron Lindsey Weber Keljo, SIFMA AMG from Heather Seidel, SEC, Oct. 26, 2017, available at <https://www.sec.gov/divisions/marketreg/mr-noaction/2017/sifma-amg-102617-28e.pdf>.

²⁸ *Clarke v. Commodity Futures Trading Comm’n*, 74 F.4th 627 (5th Cir. 2023).

²⁹ *Clarke*, at 633.

³⁰ Victoria University, CFTC No-Action Letter, CFTCLTR No. 14-130 (Oct. 29, 2014), available at <https://www.cftc.gov/csl/14-130/download> (*PredictIt No-Action Letter*).

regulation, or order,”³¹ provided that PredictIt would abide by certain self-imposed limitations on how it operated, such as maintaining nonprofit status and allowing researchers access to the data.³²

The PredictIt No-Action Letter (like many others) declared that it:

- “represent[ed] the views of [one division of the agency] only,”
- “d[id] not necessarily represent the positions or views of the Commission,” and
- could be subsequently modified, suspended, or terminated at the staff’s discretion.³³

In reliance upon the letter, the recipients and several third parties essentially created a business to engage in political wagering.

In August 2022, the CFTC staff rescinded the no-action letter, stating that the recipient had “not operated its marketplace in compliance with the terms.”³⁴ In September 2022, some of the third-parties that had relied upon the letter sued the CFTC in the Fifth Circuit Court of Appeals, claiming that rescission was arbitrary and capricious.³⁵

In defending its rescission, the CFTC relied upon decades of legal precedent in which no-action letters “have been regularly found to be non-binding and devoid of legal authority,” and are not “final” “agency actions” subject to the APA.³⁶ That reliance was misplaced.

Instead, the court found that the PredictIt No-Action Letter was a “license” within the meaning of the Administrative Procedure Act and as a result, its rescission was also agency action.³⁷ The court also determined that the rescission was “final” because it was unappealable,³⁸ and its rescission forced the plaintiffs to choose between changing their conduct or exposing themselves to liability.³⁹ Going further, the court explicitly rejected the CFTC’s defense that no-action letters are akin to agency decisions not to prosecute or enforce and, therefore, are unsuitable for judicial review.⁴⁰

Put simply, if the Commission staff were to offer “no-action” relief that would effectively act as a license to engage in operations that would otherwise be illegal, that decision-making process must still comply with the APA. There is simply no way that can be done on the current public record. Lastly, we note that courts may permit a legal challenge on APA grounds by anyone “adversely affected or aggrieved by agency action.”⁴¹ When it comes to carving “tokenized”

³¹ *Clarke*, at 633.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*, at 644.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*, at 639.

⁴¹ *Id.*, at 640.



securities out of traditional market and investor protections, that could be a very, very large group of potential plaintiffs.

We also suspect that no-action relief will quickly be viewed by even the beneficiaries as inadequate for their purposes. Historically, no-action relief has provided market participants with comfort in situations in which the Commission's staff determines that it would not recommend that the Commission take enforcement action against the requestor based on the facts and representations described in the individual's or entity's request. Put simply, the letter is a promise by the appropriate division staff of the Commission that it would not recommend that the Commission pursue an enforcement action.

But the Commission staff doesn't speak on behalf of private parties and potential litigants. Many of the implicated federal securities laws and rules independently allow for private causes of action against issuers and underwriters. Without a guarantee of protection, the no-action relief would not convey to the market the level of certainty from liability that the Commission may hope to convey.

Lastly, a no-action letter-based process would be effectively initiating an experiment of unknown size and import. It could impact the trading of hundreds, or even thousands of securities.

However, as the Commission was painfully recently reminded by the Court of Appeals for the District of Columbia Circuit's decision vacating the "Transaction Fee Pilot," the agency cannot engage in widespread "pilot" programs or "sandboxes" without engaging in a thorough collection of relevant facts and deeper analysis.⁴² The Court of Appeals unambiguously explained:

Nothing in the Commission's rulemaking authority authorizes it to promulgate a "one-off" regulation ... merely to secure information that might indicate to the SEC whether there is a problem worthy of regulation. "Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'"⁴³

That stark warning is unquestionably applicable to the agency's consideration of a regulatory "sandbox" for tokenization.

Conclusion

Tokenization of assets presents opportunities for market improvements that the Commission and Congress should explore. At the same time, regulators and Congress should proceed carefully, and avoid multi-tiered market structures that would not just create significant

⁴² *New York Stock Exchange, LLC v. SEC*, 962 F.3d 541 (D.C.Cir. 2020), available at <https://law.justia.com/cases/federal/appellate-courts/cadc/19-1042/19-1042-2020-06-16.html>.

⁴³ *Id.* (citing *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000))).



regulatory uncertainty, but also pave the way for undetectable insider trading, money laundering, market manipulations, self-dealing, and catastrophic market failures.⁴⁴

If you have any questions, please contact me at (202) 909-6138 or ty@healthymarkets.org.

Thank you for your consideration.

Sincerely,

President and CEO

cc: Hon. Hester Peirce
Hon. Caroline Crenshaw
Hon. Mark Uyeda

⁴⁴ We are concerned that legislation that recently passed the US House of Representatives as well as similar legislation being considered in the Senate would require the Commission to establish entirely new rules for tokenized securities. As drafted, that legislation would effectively “lock in” loopholes that would materially undermine our traditional capital markets, including fragmenting the National Market System. See, H.R. 3633, *Digital Asset Market Clarity Act of 2025*, 119th Cong. (2025), available at <https://www.congress.gov/119/bills/hr3633/BILLS-119hr3633eh.pdf> and *Responsible Financial Innovation Act of 2025*, 119th Cong. (2025), available at https://www.banking.senate.gov/imo/media/doc/senate_banking_committee_digital_asset_market_structure_legislation_discussion_draft.pdf (committee discussion draft).

April 11, 2025

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

Re: Submission to the Securities and Exchange Commission Crypto Task Force Roundtable -
Between a Block and a Hard Place: Tailoring Regulation for Crypto Trading

Dear Commissioner Peirce and Crypto Task Force,

The Healthy Markets Association appreciates the opportunity to appear before you today to discuss the trading of digital assets.

My name is Tyler Gellasch. I am the President and CEO of Healthy Markets Association, a non-profit member organization focused on improving the transparency, efficiency, competitiveness, and fairness of the capital markets. Our members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms.¹

Every day, we work with chief investment officers, portfolio managers, trading desk heads, operations teams, risk managers, compliance officers, and other professional investment team staffers engaged in the trading process. Our expertise and focus is on market plumbing.²

At risk of burying the lede, let me start with our key takeaways:

- ***Writing new rules for crypto trading shouldn't be a "blank slate" exercise.***
- ***The trading of financial assets – whether they are treasuries, corporate debt securities, equities, options, swaps, physical commodities, or digital assets – involves many similar economic functions.***
- ***The high level of competition, efficiency, integrity, and fairness of the US capital markets is because of thoughtful regulation – and not in spite of it – as nearly all capital markets rules were created and revised to address specific market weaknesses and failures.***
- ***Promoting competitive, efficient, high-integrity, and fair digital asset markets will necessitate adopting many similar rules as those imposed on the trading of other financial assets.***

¹ To learn more about HMA, please visit <https://healthymarkets.org>.

² HMA has submitted over one-hundred comments on rulemakings and petitions to capital markets regulators and Congress on trading-related policies, copies which are available on our website.

This won't be a shock to anyone – even if it may be a disappointment to some. As I'll explore in greater detail below, many of the leading brokers, market makers, exchanges, and data firms in the digital asset industry are staffed by seasoned veterans from the securities trading markets. So while the digital asset class may be newer, the issues, and frankly, many of the individuals involved are not.

Of course, to the extent that Congress may determine digital assets are not securities, or the SEC uses its exemptive powers to make a similar determination, then I suspect this agency will have limited oversight of the industry. However, to the extent that digital assets remain within the definition of securities or are conditionally exempted by Congress or the SEC, we hope any such exemptions will be conditioned upon compliance with minimum market competition, efficiency, integrity, and fairness requirements.

For guidance on the contours of what should be required, we urge you to start, like many of the folks in the digital asset industry have, with lessons from the equities and commodity derivatives trading markets. Nearly all of the rules in the equities and derivatives trading markets have arisen to address specific problems or crises. For example, the consolidated tapes were created to address massive price dislocations across different trading venues; the Limit Up Limit Down Plan was adopted in response to the May 6, 2010 Flash Crash; the Market Access Rule was in response to risks and manipulative trading arising from unfettered access to our markets with the rise of high-frequency trading; and Regulation SCI was adopted in response to a wave of exchange outages caused by “glitches.”

Neither Congress nor the SEC should ignore the many painfully learned lessons from other financial asset markets – or the rules that arose from them. Rather, the SEC should start with those rules as the base text, and then tweak them to address the unique nature of digital assets (for example, with respect to clearing and settlement).

We also wish to emphasize that there is a lack of clear regulatory protections and guidelines for trading in native digital asset markets – such as best execution obligations, conflicts of interests and cross trading rules, and clear custody protections – which are a material barrier for many institutional investors. Some intrepid entities are undoubtedly brushing aside the heightened risks. However, more cautious firms, such as public pensions, endowments and other institutional investors may be effectively compelled to either eschew digital assets altogether or, alternatively, obtain digital asset exposures only through traditional securities products, such as a Bitcoin Exchange Traded Product from a registered investment adviser.

We urge the digital asset industry and this agency to recognize that while digital asset fortunes may favor the bold, so do catastrophic losses. And the digital asset industry has seen a lot of both. Professional investors with fiduciary responsibilities to their customers or beneficiaries generally won't or cannot take those unnecessary risks.

Accordingly, if the SEC is to best promote the competitiveness, efficiency, integrity, and fairness of the markets, it must apply the tried-and-true rules that have arisen from decades, and even centuries, of trading experience in other financial asset markets.

Finally, while far from comprehensive, below I outline five minimum requirements for a healthy, robust native digital asset market structure.

Minimum Requirement #1: Asset Manager Obligations

As with other financial assets, there are investing experts in digital assets. While some investors may choose to invest in digital assets on their own, many others are likely to entrust professionals to manage their digital asset portfolios. Regulators should seek to identify the key functions performed by such asset managers, as well as their risks, and borrow heavily from the existing regulatory regime for registered investment advisers and registered investment companies. This should include the filing of Forms ADV, as well as N-PORT and key fund disclosure forms, ranging from prospectuses to account statements. Below, we outline some key regulatory elements for these asset managers and funds.

1. Registration of Managers and Digital Asset Funds with the Appropriate Regulator.

US capital markets regulators and market participants alike are very accustomed to registration requirements to engage in particular market activities. The Commodity Futures Trading Commission and Securities and Exchange Commission have parallel regimes, and while the details vary, both essentially require professional asset managers to register with the agencies and meet minimum standards. They also both impose obligations on the funds (or commodity pools) managed by those entities. These obligations should be applied to those performing this function for digital assets.

While we generally believe that digital asset managers should be subject to the same requirements as registered investment advisers, and their funds subject to the requirements applicable to registered investment companies, below is a non-exhaustive list of some key elements of an appropriate regulatory framework.

2. Fiduciary Duties.

Common law agency principles, state laws, and Commission rules and guidance clearly impose fiduciary duties upon asset managers of securities.

For example, in 2019, the SEC released a *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, which details the agency's expectations for investment advisers' fiduciary duties of care and loyalty to their customers.³ Those obligations – which include a duty of best execution – should be explicitly extended to asset managers for digital assets.

3. Custody.

Custodians serve an essential investor protection function in the securities markets, essentially acting as a “check” on the risks posed by an asset manager. Without that check, investors may have limited ability to identify when and how their assets may be otherwise used, put at risk, or lost. The basic custody and protection rules of funds in securities should be extended to funds for digital assets.

4. Operational Resiliency.

Asset managers for registered investment companies are generally expected to have:

- robust operational resilience, including practices for maintaining information security, including to guard against hacks;
- clear disclosures of the operations and risks of their products and services; and
- basic continuity plans, in potentially adverse market or physical environments.

These expectations should be extended to digital asset managers and funds.

5. Know the Customer and Products.

Asset managers of securities are obligated to have a reasonable understanding of their customers, including their identities. The requirements serve multiple purposes, including for appropriate risk management and compliance with fiduciary obligations. They can and should also be used to help execute anti-money laundering policies and procedures. Those same considerations apply in digital assets as they do in securities, and so these expectations should be extended to digital asset managers.

Asset managers of securities are obligated to have a reasonable understanding of products they offer or recommend. This obligation should be extended to include digital assets. This obligation could be potentially satisfied by searching on-chain and reputable off-chain sources of information related to the digital assets.

³ *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC, Rel. No. IA-5248, June 5, 2019, available at <https://www.sec.gov/files/rules/interp/2019/ia-5248.pdf>.

6. Holdings, Valuations, and Performance Disclosures.

Asset managers for registered investment companies and their funds are generally obligated to disclose their holdings, use fair market valuations, and disclose this information as well as performance data in standardized and comparable ways.

Standardized holdings, valuations, and performance disclosures should be mandatory for initial investments and for an ongoing basis for digital asset managers.

7. Fee and Expense Disclosures.

Asset managers for registered investment companies and their funds are generally obligated to disclose their fees and expense information in standardized and comparable ways. Standardized fee and expense disclosures should be mandatory for initial investments and thereafter on an ongoing basis for digital asset managers.

Minimum Requirement #2: Broker and Market Maker Obligations

1. Registration With Appropriate Regulator.

US capital markets regulators and market participants alike are very accustomed to registration requirements to engage in particular market activities. As previously stated, the Commodity Futures Trading Commission and SEC have parallel regimes, and while the details vary, both agencies essentially require professional asset managers to register with the agencies and meet the minimum standards.

Notably, in addition to Commission oversight, securities brokers are obligated to register with the Financial Industry Regulatory Authority and meet FINRA's separate membership and regulatory expectations. Those Self Regulatory Organization-imposed rules are more detailed and prescriptive than the Commission's generalized rules. Those protections – many of which are built upon common law agency principles and business practices that have existed for decades, if not centuries – work to ensure competitiveness, market efficiency, market integrity, and fairness.

Further, given the lack of adequate SEC resources to effectively and timely examine all of its thousands of regulated entities, the SEC cannot reasonably be relied upon to police this new set of market participants without significant new resources.

Accordingly, extending to digital asset brokers and market makers requirements to register with regulators (and FINRA, in particular) is essential. This registration should entail the full panoply of regulatory expectations that apply to traditional securities brokers, but to the extent that the Commission or FINRA are considering modifications to those regimes, below we offer a non-exhaustive list of essential components.

2. Training and Expertise.

Securities brokers are expected to have staff fulfilling essential functions, such as Chief Compliance Officer, and key staff are obligated to have training and pass key FINRA competency examinations of substantive and procedural rules. There is value in having FINRA Series 7 and Series 63 examinations, for example. And simply performing these same or similar functions in digital assets doesn't make that expertise any less essential.

These obligations should be extended to digital asset brokers.

3. Custody and Capital.

Brokers in securities markets are subject to clear customer custody, segregation, and capital rules designed to minimize risks to investors of things they can't reasonably see or manage.

When a retail investor buys a financial asset, they typically focus on the risks of the instrument itself, and not necessarily the risks to them posed by the broker through which they acquired it. Many investors, for example, assume that because a digital asset may be acquired through an affiliate of a registered broker, that their rights will be the same.

There is no credible argument that digital assets somehow pose lesser custody, segregation, or custody risks for customers than traditional securities. In fact, given the prevalence of off-chain trading; lack of consolidated pricing, trading, and holdings information; and complex custody arrangements; these risks are likely heightened for digital assets.

The custody, segregation, and capital obligations of securities brokers should be extended to digital asset brokers.

One particularly confusing area is with respect to government insurance of customer assets. Interestingly, we've seen numerous instances where digital asset firms have claimed that customer assets are subject to protections provided by the Federal Deposit Insurance Corporation or Securities Investor Protection Corporation. In general, that's not the case for digital asset accounts. As SIPC explains on its website, "SIPC protects against the loss of cash and securities – such as stocks and bonds – held by a customer at a financially-troubled



SIPC-member brokerage firm.”⁴ Digital asset brokers should be subject to the same treatment as other SIPC-members if they are to receive the benefit of the government backstop.

4. Operational Resiliency and Records.

Securities brokers are required to have detailed written supervisory procedures covering nearly every aspect of their business. These procedures not only provide consistent guidance across a firm, but also allow for regulators to identify deficiencies. Digital asset brokers should be compelled to have the same types of comprehensive written supervisory procedures and recordkeeping obligations as securities brokers.

Securities brokers are expected to have informational security and routine maintenance and testing of their systems. In fact, they are required to have detailed business continuity plans. And brokers are not permitted to allow third parties generally unfettered access to the public trading markets, and must instead input operational controls to kill potentially disruptive or abusive trading.

All of these requirements are designed, once again, to protect investors and the markets from issues outside of their control. These obligations should be extended to digital asset brokers.

5. Best Execution and Order Handling.

Long before the SEC and FINRA existed, agents were generally imbued with a fiduciary duty to act in the best interests of their principal when working on their behalf. To modernize those obligations for a modern trading environment and ensure brokers effectively meet these standards, FINRA adopted detailed rules and guidance on order handling and best execution for securities trading.⁵

For example, FINRA noted that,

[A]ny broker-dealer, when acting as agent on behalf of a customer in a transaction, is under a duty to exercise reasonable care to obtain the most advantageous terms for the customer. In addition, best execution duties also arise when a broker-dealer is trading in a principal capacity with a customer. Broker-dealers that are FINRA members also have best execution obligations pursuant to FINRA Rule 5310.⁶

⁴ SIPC, What SIPC Protects, available at <https://www.sipc.org/for-investors/what-sipc-protects> (last viewed Apr. 9, 2025).

⁵ FINRA Rule 5310; see also, FINRA, *FINRA Reminds Member Firms of Requirements Concerning Best Execution and Payment for Order Flow*, Reg. Notice 21-23, June 23, 2021, available at <https://www.finra.org/rules-guidance/notices/21-23>; see also, FINRA, *Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets*, Reg. Notice 15-46, Nov. 20, 2015, available at <https://www.finra.org/rules-guidance/notices/15-46>.

⁶ FINRA, Reg. Notice 15-46 (internal citations omitted).

Securities brokers are expected, as part of their best execution analysis, to consider:

- (1) the size of the order;
- (2) the trading characteristics of the security involved;
- (3) the availability of accurate information affecting choices as to the most favorable market center for execution and the availability of technological aids to process such information; and
- (4) the cost and difficulty associated with achieving an execution in a particular market center.⁷

Perhaps most importantly, the best execution obligation for securities brokers under FINRA rules and guidance includes an expectation to exercise “reasonable diligence to ascertain the best market”⁸ to trade in for the customer’s orders, and to do that, the brokers must actually know what the order and executions look like in various markets for those securities. Nearly a decade ago, FINRA noted that a broker may be violating its duty of best execution, for example, if it uses the slower consolidated tapes to make trading and routing decisions for its customers while using exchanges’ faster proprietary data streams to make decisions for itself.⁹ In these instances, the differences in time may be measured by fractions of a second that are imperceptible to a human being.

Further, securities brokers are required to look back, and see how good of a job they did for their customers, and change their future practices to adjust for deficiencies.

None of these longstanding, basic protections in trading securities are consistently applied in the trading of digital assets.

To be clear, that’s also a major reason why the issue of securities regulation, broker registration, and FINRA membership are such hot button issues for the industry. At root, brokers and market makers’ failures to get customers the best prices are where they make a lot of their money.

There’s a reason digital asset trading is significantly more profitable per dollar value traded than the more regulated – and competitive, efficient, and fair – equities markets. And it should not be lost on anyone why experts in those more competitive equities markets have been so eagerly jumping into the digital asset trading markets – it’s not just significantly less regulated, but it’s also much less competitive, efficient, and fair. And their expertise is likely making them very

⁷ FINRA, Reg. Notice 15-46.

⁸ FINRA, Reg. Notice 15-46.

⁹ FINRA, Reg. Notice 15-46, n.12 (explaining that “[t]he exercise of reasonable diligence to ascertain the best market under prevailing market conditions can be affected by the market data, including specific data feeds, used by a firm. For example, a firm that regularly accesses proprietary data feeds, in addition to the consolidated SIP feed, for its proprietary trading, would be expected to also be using these data feeds to determine the best market under prevailing market conditions when handling customer orders to meet its best execution obligations.”).

successful at exploiting the digital asset markets' inefficiencies to extract economic rents. These inefficiencies aren't because of regulation, but rather because of a lack of regulation.

In the US equities markets, the SEC and FINRA have rules to keep investors from generally receiving executions at prices that are worse than the best protected prices on an exchange. Trading firms are competitively fighting over tiny fractions of a penny per share. Bid-ask spreads in many equities are a penny on exchanges – which is only a function of existing SEC rules – but less than that for off-exchange trading. And in equities, the SEC just recently adopted a rule that lowered the fee a registered national securities exchange can charge to access a protected quotation to 10 cents per 100 shares traded. And that inspired a lawsuit.

Meanwhile, if a digital asset investor goes to a broker today and submits an order to buy a digital asset, the broker may not survey the market for better prices. Or the broker may survey the market, give one price to its customer, and take a better price for itself – pocketing the difference.

As we discuss below, there is no regulated, consolidated tape to check. The broker may end up executing the other side of the trade itself, or let a third-party take the other side of the trade, perhaps in return for a kickback. And there is no backstop to ensure that the customer is getting the best available price. While trade-throughs in the equities markets give rise to exception reports and investors firing their brokers, in the digital asset markets, they are all-too-commonplace.

Further, in equities trading, brokers are obligated to provide trade confirmations to their customers, with standardized information. And securities brokers are also obligated by regulators to provide basic disclosures regarding how they route customers' orders, including with customer-specific information for large, not-held orders.¹⁰

These basic investor and market protections were so noncontroversial in the equities markets that they were adopted by a unanimous vote of the SEC during the first Trump Administration.¹¹ Similarly, the Commission has subsequently approved FINRA rules related to enhanced order routing disclosures regarding NMS and OTC stocks.¹²

Best execution obligations and trading-related disclosures akin to those imposed on securities brokers should be applied to digital asset brokers.

¹⁰ See, SEC Rule 606.

¹¹ *Disclosure of Order Execution Information*, SEC, 83 Fed. Reg. 58338 (Nov. 19, 2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-11-19/pdf/2018-24423.pdf>.

¹² *Order Approving a Proposed Rule Change To Adopt FINRA Rules 6151 (Disclosure of Order Routing Information for NMS Securities) and 6470 (Disclosure of Order Routing Information for OTC Equity Securities)*, SEC, 88 Fed. Reg. 53560 (Aug. 8, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-08-08/pdf/2023-16886.pdf>.

6. Know the Customer.

Securities brokers are required to know their customers for a number of reasons. They need to know who the customer is for anti-money laundering purposes, but also to appropriately assess risk tolerances and potential compliance with securities offering restrictions. Different levels of options trading are, by rules, restricted to those who have received significant disclosures and demonstrated capabilities and experience. Brokers are not allowed to simply open their trading pipes to the public securities markets. Rather, they have to protect the markets from potentially erroneous, abusive, or disruptive trading.¹³

All of the reasons why brokers are obligated to know their customers in the securities marketplace apply with equal force in the digital asset markets, and so the obligations – and uses of the information collected – should be the same.

7. Know the Product.

Brokers are obligated to have a reasonable understanding of the products they offer or recommend, or make markets in. This expectation should be extended to digital asset brokers. This obligation could be potentially satisfied by searching on-chain and reputable off-chain sources of information related to the assets. Further, brokers should be required to make this information readily available to investors in a standardized format to allow understanding and comparability.

Notably, this could be modeled on the requirements for brokers seeking to provide automated quotations in OTC equities.¹⁴ Markedly, then-Chairman Jay Clayton secured bipartisan Commission approval for modernizing the rule, arguing that:

The technological advancements that have taken place since the rule was last amended enable us to require that information in the OTC market be more timely, enabling investors to make better informed investment decisions, and reducing fraud in these markets where retail presence is significant and, unfortunately, pump-and-dump and other frauds are too common.¹⁵

The digital asset market trades in a remarkably similar manner, and should be subject to similar protections. And digital asset brokers should be subject to rules such as FINRA Rule 6432.

¹³ See, e.g., SEC Rule 15c3-5 (which requires brokers to establish, document, and maintain a system of controls and supervisory procedures reasonably designed to manage the financial, regulatory and other risks of their customers' market access).

¹⁴ SEC Rule 15c2-11.

¹⁵ Press Release, SEC Adopts Amendments to Enhance Retail Investor Protections and Modernize the Rule Governing Quotations for Over-the-Counter Securities, SEC, Sept. 16, 2020, *available at* <https://www.sec.gov/newsroom/press-releases/2020-212> (quoting Jay Clayton).

8. Compensation Disclosures.

As with any market intermediary, compensation should be transparent – to promote competition, efficiencies, integrity, and fairness. Republican and Democratic Commissioners of the SEC have long supported efforts to make broker compensation clear and transparent.

Obviously, for brokers, the compensation often comes in the form of a commission or through collection of a bid-ask spread. But it may also come in the form of compensation from third parties, including exchange rebates or routing incentives from third parties. It may also come from simply trading against the customer.

These rule guidelines are not just for equities. For example, pursuant to rules adopted during the first Trump Administration, FINRA and MSRB have, since 2018, required brokers to provide:

Disclosed mark-ups and mark-downs must be expressed as both a total dollar amount for the transaction and a percentage of prevailing market price (PMP). In addition, for all retail customer trades in corporate, agency and municipal debt securities (other than municipal fund securities), firms must disclose on the confirmation the time of execution and a security-specific link to the FINRA or MSRB website where additional information about the transaction is available, along with a brief description of the information available on the website.¹⁶

Digital asset brokers should be obligated to provide customers with detailed information regarding all forms of compensation derived from them in standardized formats that are akin to securities brokers.

Minimum Requirement #3: Trading Venue Obligations

1. Registration and Access to Information and Trading.

The effective oversight of trading venues is essential for maintaining competitive, efficient, fair, and high integrity markets. Trading venues for securities must register as national securities exchanges with the SEC and meet a plethora of requirements, or otherwise qualify for an exemption (and register as an Alternative Trading System, for example).

Exchange rules, including those related to its ownership, operations, access, and costs, must all be consistent with the principles laid out in the Exchange Act, including that they:

¹⁶ FINRA, *Fixed Income Mark-up Disclosure*, available at <https://www.finra.org/rules-guidance/guidance/reports/2021-finras-examination-and-risk-monitoring-program/fixed-income-markup-disclosure> (citing FINRA Rule 2232 and MSRB Rule G-15) (last viewed Apr. 9, 2025).

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”¹⁷
- not be “designed to permit unfair discrimination”;¹⁸
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;¹⁹ and
- be designed “to protect investors and the public interest.”²⁰

Those principles are essential to promote competition, efficiency, integrity, and fairness. For ATSS, the Commission has ensured that the venues are operated by registered broker dealers (and are thus subject to FINRA oversight and rules), and while subject to less direct regulation than exchanges, are still subject to material restrictions on potential conflicts of interest. Put simply, equity securities trading venues are registered and overseen by regulators, and that should be true for digital asset trading venues.

2. Operations Transparency and Conflicts.

Registered national securities exchanges are required to disclose their governance, operations, and other key information, including how they provide access to their quotations, and match orders. This information is included in filings with the SEC and in communications with market participants (including ATS subscribers).

Trading venues for digital assets – whether on- or off-chain – should be compelled to share their governance, operations, and other key information, akin to those in equities trading markets.

3. Operational Resiliency.

Trading venues play an essential role in promoting competitive markets, as they centralize orders to match and trade from various market participants.

But because of trading venues’ importance, they must also be hyper-vigilant to protect their own resiliency and informational security. Unfortunately, in the digital asset arena, hacks and data leaks are far too common. Often, it is because the systems and security measures are simply not up to snuff, as compared to those adopted by traditional financial institutions.

Similarly, the SEC and FINRA have adopted extensive rules to ensure that registered securities exchanges and brokers (including those that may operate ATSS or act as internalizers) have robust systems. Regulation SCI was adopted – like many other rules – in response to a market crisis wherein key venues had proven to be insufficiently diligent in protecting their own consistent operations. Running a key trading venue in a marketplace is like running an airline.

¹⁷ 15 U.S.C. § 78f(b)(4).

¹⁸ 15 U.S.C. § 78f(b)(5).

¹⁹ 15 U.S.C. § 78f(b)(8).

²⁰ 15 U.S.C. § 78f(b)(5).

You simply can't have a crash because of the often market-wide impacts. And with that in mind, the SEC set about making registered national securities exchanges as operationally robust as reasonably possible with the adoption of Reg SCI.²¹ While the specific requirements may be onerous in some respects, the gestalt of the regime is to protect the whole of the markets from the lack of adequate care by key players. For securities brokers, as discussed before, operational resiliency includes detailed business continuity plans. Again the regulatory intention is to protect other market participants from the inadequacies and failures of entities over which they have no control. These risks may be heightened, not lowered, in many digital assets, where trading may be heavily concentrated on one or a small handful of trading venues.

Lastly, customer order information can move markets, and can be easily misused – even if the information relates to long-ago trading. Unfortunately, over the past decade, we have seen equities ATs and internalizers misuse their customers' confidential order information, or otherwise not sufficiently safeguard it.²²

Operational resiliency obligations should be extended to all digital asset trading venues, whether centralized or decentralized.

4. Market Integrity and Stability Safeguards.

The SEC has directly adopted and directed self-regulatory organizations to adopt a collection of market integrity and stability rules that dramatically improve the competitiveness, efficiency, integrity, and fairness of the markets, including the Market Access Rule,²³ Position Limits, and the Limit Up Limit Down Plan.

For example, as FINRA explains, the Market Access Rule:

requires firms with market access or that provide market access to their customers to “appropriately control the risks associated with market access so as not to jeopardize their own financial condition, that of other market participants, the integrity of trading on the securities markets and the stability of the financial system.”²⁴

²¹ *Regulation Systems Compliance and Integrity*, SEC, 79 Fed. Reg. 72252 (Dec. 5, 2014), available at <https://www.govinfo.gov/content/pkg/FR-2014-12-05/pdf/2014-27767.pdf>.

²² See, e.g., Press Release, *SEC Charges ITG With Operating Secret Trading Desk and Misusing Dark Pool Subscriber Trading Information*, SEC, (Aug. 12, 2015); see also, *In the Matter of Credit Suisse Securities (USA) LLC*, SEC, Exch. Act Rel. No. 77062, (Jan. 31, 2016); Complaint, *SEC v. Virtu Financial Inc. and Virtu Americas LLC*, Civil Action No. 1:23-cv-8072, (S.D.N.Y. 2024), available at <https://www.sec.gov/files/litigation/complaints/2023/comp-pr2023-176.pdf>.

²³ Exchange Act Rule 15c3-5.

²⁴ *2022 Report on FINRA's Examination and Risk Monitoring Program*, FINRA, at 48 (Feb. 2022), available at <https://www.finra.org/sites/default/files/2022-02/2022-report-finras-examination-risk-monitoring-program.pdf>.

FINRA has similarly identified a number of considerations that brokers should consider when assessing the rule, including whether the broker:

has “reasonably designed risk-management controls and WSPs to manage the financial, regulatory or other risks associated with this business activity”;

If “highly automated,” seeks to “manage and deploy technology changes for systems associated with market access and what controls does it use, such as kill switches, to monitor and respond to aberrant behavior by trading algorithms or other impactful market-wide events”; and

appropriately adjusts “credit limit thresholds for customers, including institutional customers (whether temporary or permanent).”²⁵

Like most of the SEC’s rules, the Limit Up Limit Down Plan (“LULD”) was adopted in response to a market crisis. On May 6, 2010, the market experienced a “Flash Crash” – plunging around 1000 points (or 9%) within 15 minutes, and then mostly recovering over the next several minutes. After extensive investigations into the causes, market participants, exchanges, the SEC, and CFTC all worked collaboratively to understand what happened, and craft solutions to address the regulatory weaknesses.

The SEC explained that it was “concerned that events such as those that occurred on May 6, 2010 could seriously undermine the integrity of the U.S. markets.”²⁶ After initially adopting a pilot for single-stock circuit breakers, the exchanges (with the support of market participants) filed to create a market-wide LULD mechanism.

The SEC approved the LULD in 2012 on a pilot basis, and made it permanent during the first Trump Administration.²⁷ As constructed, the Limit Up Limit Down Plan “is designed to prevent trades in NMS Stocks from occurring outside specified price bands, which are set at a percentage level above and below the average reference price of a security over the preceding five-minute period.”²⁸

These types of protections for market integrity and stability should be extended to digital assets.

²⁵ *Id.*

²⁶ *Order Approving the Eighteenth Amendment to the National Market System Plan to Address Extraordinary Market Volatility by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The Nasdaq Stock Market LLC, NYSE National, Inc., New York Stock Exchange LLC, NYSE American LLC, and NYSE Arca, Inc.*, SEC, Exch. Act Rel. No. 85623, Apr. 11, 2019, available at <https://www.sec.gov/files/rules/sro/nms/2019/34-85623.pdf>.

²⁷ *Id.*

²⁸ Limit Up Limit Down Plan, available at <https://www.luldplan.com/> (last viewed Apr. 10, 2025).

Minimum Requirement #4: Market Trading and Holdings Transparency

1. Consolidated Public Tape of Orders and Executions.

For a market to be truly competitive, buyers and sellers should be able to see the prices for orders and executions. In equities, the consolidated tape plans collect and disseminate order and trade related information to the public in fractions of a second. This decades-old system is constantly being improved, and the Commission has – on a bipartisan basis – continued to push this public access to information. These regulated data streams also include off-exchange trading.

These tapes – and the private market competitors offered by exchanges and off-exchange trading venues – serve as a principal mechanism for brokers to fulfill their best execution obligations. If comprehensive order and trade information isn't publicly available, then brokers and other market intermediaries (including venues) will be able to continue to offer inferior trade execution quality to their customers.

For digital assets, all trading – both on- and off-chain – should be reported and timely disseminated to the marketplace via a well-regulated data stream or streams. There could be competitive, alternative data streams, like the Commission has directed for the reforms to the equity markets tapes. But there must be a comprehensive trading price and volume reference for investors, brokers, and other intermediaries.

2. Position Reporting by Significant Holders.

Market integrity and prudent risk management depend upon market participants knowing whether, and who, may have a significant interest in a financial asset. In general, financial markets can be much more easily manipulated by large holders. That is part of the reason why the SEC and CFTC have position limits for their markets.

And the SEC also has detailed rules requiring disclosure of equities securities holders. Regulators have also imposed short selling disclosures and reporting obligations.

Further, large financial asset position holders may themselves concentrate significant risks that may impact other parties. For example, Bill Huang's opaque derivative positions in several public equity securities led to not only the collapse of Archegos, but also significant market

losses and volatility to innocent third parties.²⁹ Put simply, large concentrations of an asset can lead to market stress, and in times of stress, can lead to severe losses and market collapses.

Further, these risks are acutely prevalent in digital asset positions, where we have repeatedly seen instances of large holders in particular assets engaging in activities that may undermine the rights or values of the digital asset positions of others—including by changing fundamental characteristics of the digital asset itself.

Position reporting should be extended to trading in digital assets. As with the other recommendations we make, these rules should apply to both on- and off-chain transactions and holdings.

Minimum Requirement #5: Adequate Regulatory Oversight

1. Entities Must Be Registered and Subject to Examination and Enforcement.

As referenced above, regulation cannot be just by conduct, but rather of the entities materially engaged in market activities, whether as a digital asset manager, digital asset broker, digital asset exchange, or something else. The Commission and the rest of the marketplace know the economic functions well, and can tailor specific compliance expectations to meet fundamental variances for digital assets (such as with respect to custody and transfer agent roles).

Further, the SEC and FINRA maintain processes and standards for conduct for registered persons, and can essentially protect the markets and investors from known bad actors. This can only reasonably be accomplished through a registration-based regime.

Entity-level regulation is also essential to ensure initial and ongoing compliance, as well as adequate recordkeeping to allow for informative examinations and potential enforcement. Also, in the absence of expansion of Section 31 fees to the Commission, registration costs could serve as an important funding source for effective oversight.

²⁹ Erik Schatzker, Sridhar Natarajan, and Katherine Burton, *Bill Hwang Had \$20 Billion, Then Lost It All in Two Days*, Bloomberg, Apr. 8, 2021, available at <https://www.bloomberg.com/news/features/2021-04-08/how-bill-hwang-of-archegos-capital-lost-20-billion-in-two-days>.

2. Digital Asset Markets Must Pay for Their Oversight.

There are currently thousands of registered investment advisers and brokers subject to SEC oversight, as well as dozens of exchanges and dark trading venues. The Commission and FINRA are well positioned to add to this collection, but they must have the resources to do it.

The SEC's mission keeps expanding as the markets grow and assets, and asset classes, diversify. Unfortunately, the SEC's current funding structure is dependent upon Section 31 fees. To the extent that the SEC and FINRA have any role in overseeing the digital asset markets, the market participants in digital assets should bear those costs.

US public equities market participants who may not participate in these other markets should not be compelled to continue to subsidize oversight of other markets. We don't repurpose the Federal Reserve System's budget or the CFTC's budget to pay for equities markets trading, and we shouldn't keep forcing public equity investors to keep paying for digital asset market oversight.³⁰

Conclusion

The SEC's approach of ignoring the digital asset markets wasn't good. Its response to then – years later – simply bring enforcement actions against digital asset firms for failing to comply with the securities laws has proven ineffective both as a legal and policy matter. So now, Congress and this agency have the unenviable task of trying to figure out what types of regulation can bring competition, efficiency, integrity, and fairness to the digital asset markets.

Quite frankly, the digital asset markets have generally lacked all of those characteristics to date.

The people at this roundtable today, as well as many in the industry, are seasoned experts in US securities market trading. They know that leverage restrictions can limit profits. They know that merging brokers with trading venues and a lack of a public tape and best execution obligations leads to massive trading profits for brokers and market makers. They know that strict advertising rules can crimp sales. They know that a lack of transparency in orders and trades means bigger margins for insiders. They know that customer due diligence and systems testing can take time and cost money.

But we need to do those things anyway. Because that's what we've learned over centuries of trading any manner of financial assets.

Without material, regulator-imposed, standardized market competition, efficiency, integrity, and fairness rules akin to those in the equities markets, the digital asset markets are going to remain

³⁰ We would further support the broader revisitation of Section 31 fees to include private fund and other securities transactions, as well, so as to broaden the base of the tax to apply to all of the markets the agency oversees.

