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June 13, 2023

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: Reopening of the Comment Period: Proposed Amendments to Exchange Act Rule 3b-16

[File No. S7-02-22]

Dear Ms. Countryman:

The Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to offer comments in response to the Securities and Exchange Commission’s (“the SEC” or “the Commission”) reopened comment period and proposal to amend the rule under the Securities Exchange Act of 1934 (“Exchange Act”) that defines terms used in the definition of “exchange.”² ICBA strongly supports the Commission’s proposal to include in the definition of “exchange” trading systems that trade cryptocurrency asset securities and trading systems that use distributed ledger or blockchain technology (“DLT”), including systems characterized as decentralized finance (“DeFi”) or decentralized exchanges (“DEXs”).

The proposal expands the scope of persons required to register as a national securities exchange and extends investor protections to trading systems that trade cryptocurrency asset securities and/or use DLT. Importantly, the proposal confirms that cryptocurrency and DeFi exchanges

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding \$5.8 trillion in assets, \$4.8 trillion in deposits, and \$3.8 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

² Securities and Exchange Commission, *Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of “Exchange,”* RIN 3235-AM45, File No. S7-02-22, available at: <https://www.sec.gov/rules/proposed/2023/34-97309.pdf>.

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must follow the same rules of the road as other entities that trade securities – cryptocurrency exchanges do not get a free regulatory pass simply because they leverage novel technology to facilitate their peer-to-peer trades. ICBA applauds the SEC’s commonsense “technology neutral” approach to determining whether crypto trading platforms satisfy the definition of an “exchange” – it’s the activity that matters, not the underlying technology that dictates whether cryptocurrency trading platforms have a duty to comply with securities laws.³ ICBA agrees with and supports Chair Gensler’s statement that “these platforms match orders of multiple buyers and sellers of crypto securities using established, non-discretionary methods.”⁴

Likewise, ICBA concurs with Chair Gensler’s assertion that such activity meets the definition of exchange. Decentralized exchanges, just like centralized exchanges, engage in activities that fall within existing securities legal and regulatory structures. Decentralization, in the words of the Bank for International Settlements, is simply an “illusion” that attempts to mask active participation and engagement by centralized parties to direct the development of DeFi protocols and encourage their use.⁵

Put simply, cryptocurrencies, while novel, should not be exempt from existing legal and regulatory frameworks, as they share many of the same underlying features and use cases as traditional financial products. ICBA and community bankers encourage regulators to preserve a level playing field between traditional financial products and cryptocurrencies by enforcing existing laws and regulations, such as the SEC’s interpretation of an “exchange” as applied to cryptocurrencies, DeFi and DEXs. Even though the crypto ecosystem is still small relative to the size of US capital markets, the “Wild West” of crypto, to the extent these assets are under regulated, poses risks to consumers and potential threats to financial stability. Now is the time for regulators like the SEC to act quickly and decisively, leveraging and clarifying existing regulatory frameworks to ensure that the traditional financial system is not jeopardized by crypto’s myriad perils and vulnerabilities.

⁴ Securities and Exchange Commission, Chair Gary Gensler, *Statement on Alternative Trading Systems and the Definition of an Exchange* (April 14, 2023) available at: <https://www.sec.gov/news/statement/gensler-statement-ats-041423>.

⁵ Bank for International Settlements, “DeFi Risks and the Decentralization Illusion,” *BIS Quarterly Review: December 2021*, by Sirio Aramonte, Wenqian Huang, and Andreas Schrimpf, 2021, https://www.bis.org/publ/qtrpdf/r_qt2112b.htm (Accessed June 9, 2023).

Background

In January 2022, the Commission proposed to amend Exchange Act Rule 3b-16 to include in the definition of “exchange” systems that bring buyers and sellers of securities that offer the use of non-firm trading interest and provide another type of non-discretionary method (i.e., communication protocols).⁶ The proposed amendments would require these systems to register as national securities exchanges or as broker-dealers and comply with Regulation ATS.

The Commission received many comments which specifically requested information about the application of existing rules and the proposed amendments to systems that trade crypto asset securities and meet the proposed definition of exchange or trading systems that use distributed ledger or blockchain technology, including DeFi systems.

In April 2023, the SEC reopened this comment period and provided supplemental information which reiterates the applicability of existing rules to platforms that trade crypto asset securities, including DeFi systems, and clarifies the entities that would be included in the proposed amended definition of an “exchange.” Specifically, the proposed rule states “an organization, association or group of persons that constitutes, maintains, or provides a market place or facilitates for bringing together purchasers and sellers of crypto asset securities or performs with respect to crypto asset securities the functions commonly performed by a stock exchange as that term is generally understood under the criteria of Exchange Act Rule 3b-16(a), as proposed to be amended, would be an exchange under section 3(a)(1) of the Exchange Act and would be required to register as a national securities exchange or comply with the conditions of Regulation ATS.”

Cryptocurrency exchanges serve as the fundamental link between the traditional financial system, investors, and the sprawling crypto ecosystem. While many investors still choose to work with centralized entities, the recent spectacular failures of several exchanges and so-called “crypto banks” has prompted more investors to seek decentralized platforms, which often claim to provide a “safer” alternative to centralized exchanges. Decentralized exchanges rely on smart contracts, or programs designed to execute a specific set of actions when certain conditions are met, to allow users to trade cryptoassets.

While DEXs are a relatively new phenomenon, they have quickly attracted significant trading volume over the last few years. According to DeFiLlama, a DeFi total value locked aggregator, the largest DEXs routinely facilitate trading volumes reaching hundreds of millions of dollars in value – as of June 9, Uniswap alone has handled more \$6 billion in trading volume in the past

⁶ Securities and Exchange Commission, *Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATSs) that Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities*, RIN 3235-AM45, File No. S7-02-22, available at: <https://www.sec.gov/rules/proposed/2022/34-94062.pdf>.

seven days.⁷ Since stablecoins are primarily used for digital assets trading, the growth of DEXs is tied closely to the development of stablecoins and the overall expansion of DeFi, which underscores why the SEC’s efforts to clarify and exercise its authority over this activity are critical steps in ensuring cryptoassets are regulated.

ICBA Comments

Although many crypto entities claim to offer various forms of function, such as payment capabilities or voting rights, ICBA and its member banks believe almost all cryptocurrencies primarily serve as highly volatile investments with identifiable entities responsible for managing the protocol and seeking to increase the value of any related tokens. Accordingly, we believe this activity clearly meets the criteria set forth in the landmark Supreme Court case *Securities and Exchange Commission v. W.J. Howey Co.* in 1946.⁸ In *Howey*, the Court’s majority determined that an “investment contract” occurs whenever a person invests money in a common enterprise with the expectation of profits due to the managerial efforts of the promoter or other third party.

To that end, cryptoassets that meet the definition of a security should be treated as such by regulators, and crypto exchanges should adhere to securities laws and regulations, including the requirement to register as an “exchange.” ICBA firmly supports the SEC’s efforts to clarify existing laws and regulations, ensure a level-playing field between crypto assets and traditional financial products, and pursue enforcement actions by participants who fail to comply with established rules. ICBA and its members believe that the Commission has supplied clear guidance on this topic with this proposal and the publication of guidance, such as the 2017 *DAO Report* and the *Framework for “Investment Contract” Analysis of Digital Assets*.⁹

Nevertheless, ICBA and its members remain concerned about the potential for a burgeoning DeFi ecosystem to threaten financial stability if crypto volatility spills over into the traditional financial system. Our member banks are also troubled by the potential for DeFi to disintermediate community banks, thus exposing their communities to unknown risks if they cannot access financial services. Community banks originate the majority of agricultural and small business loans—these are critical services that may become disrupted if cryptocurrency continues to evolve outside of the regulatory boundaries, and regulators do not exercise appropriate oversight of these assets.

⁷ DeFiLlama, DEXs volume, <https://defillama.com/dexs> (Accessed June 9, 2023).

⁸ See *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946).

⁹ See Securities and Exchange Commission, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Release No. 81207, 2017, <https://www.sec.gov/litigation/investreport/34-81207.pdf>; Strategic Hub for Innovation and Financial Technology (FinHub), Securities and Exchange Commission, *Framework for “Investment Contract” Analysis of Digital Assets*, 2019, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>.

As such, ICBA agrees with the SEC’s view that the proposed rule should apply to trading in any type of security, regardless of the specific technology used to issue and/or transfer the security. The SEC’s “technology neutral” approach promotes a fair and competitive market, where participants are subject to securities laws based on the functions performed by a trading system, not on its use of technology or how the entity characterizes itself as centralized or decentralized. ICBA also supports the SEC’s decision to remove ambiguity in its proposed amendments to Rule 3b-16 to expressly make clear that the rule applies to trading systems that trade crypto asset securities, including those that use DLT or are characterized as DeFi.

Both the Commission and the President’s Executive Order on Ensuring Responsible Development of Digital Assets recognize that “many activities involving digital assets are within the scope of existing domestic laws and regulations” and systems trading such assets “should, as appropriate, be subject to and in compliance with regulatory and supervisory standards that govern traditional market infrastructures and financial firms.”¹⁰

Accordingly, requiring crypto asset securities trading platforms and DeFi trading platforms to register as national securities exchanges and be subject to the Commission’s regulatory framework provides transparency to market participants, promotes fair and orderly markets, and protects investors. Leveling the playing field, and requiring crypto trading platforms to be subject to equivalent regulation and oversight as the traditional financial products these assets mimic, allows for fair competition between trading systems that perform similar functions, which in turn promotes capital formation, competition, and market efficiencies.

Conclusion

ICBA and its members banks express their appreciation for the Commission reopening the comment period for this critical topic and clarifying that decentralized protocols fall within the existing structure of securities laws and regulations. While blockchain technologies may offer some benefits for the financial sector, those benefits can only be realized if pursued by responsible actors working within established guard rails to maintain investor protections.

ICBA and its members welcome additional engagement with the Commission as it seeks to bring order to the under-regulated “Wild West” of the crypto ecosystem and help to ensure that regulated community banks are not unduly exposed to the risky volatility of the crypto sector or placed at a competitive disadvantage to less regulated crypto platforms.

¹⁰ See *President’s Executive Order on Ensuring Responsible Development of Digital Assets*, dated March 9, 2022, available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>.

Please feel free to contact me at Brian.Laverdure@icba.org if you have any questions about the positions stated in this letter.

Sincerely,

/s/

Brian Laverdure, AAP
Vice President, Payments and Technology Policy

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