Written Statement of
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Subcommittee on Digital Assets, Financial Technology, and Inclusion

hearing on

"The Future of Digital Assets:
Identifying the Regulatory Gaps in Digital Asset Market Structure"

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Chairman Hill, Ranking Member Lynch, and Members of the Subcommittee, thank you for inviting me to testify today. My name is Zach Zweihorn. I am a partner at the law firm of Davis Polk & Wardwell LLP, based in our Washington, DC office. I am a member of the firm's Financial Institutions Group and our Trading & Markets practice. I have been with Davis Polk for over 15 years, where I began my career. I am testifying today in my personal capacity, and not on behalf of my firm or any client.

I. Background and Practice

My legal practice has focused on the regulation of the securities markets and, in particular, on the federal securities laws and the rules of the Securities and Exchange Commission (the "SEC" or "Commission") that govern the activities and conduct of securities market intermediaries such as brokers, dealers, national securities exchanges, and clearing agencies, as well as those of the Financial Industry Regulatory Authority ("FINRA") regulating its member broker-dealers. My clients include well-known U.S. and international banking and securities firms, retail and institutional brokers, and exchanges. They consist of major existing firms and new entrants seeking to develop new competing business models. I have advised firms throughout their life cycle, from initial business planning, formation, registration and licensure, ongoing compliance obligations, and consideration of new products and services, to regulatory examinations and enforcement. I am deeply familiar with the way these market participants are organized, operate, and are regulated.

With the rise of the digital asset markets, questions about the status and regulation of digital assets and its market structure have become prominent. I have worked with both traditional financial institutions and "crypto-native" firms to consider their digital asset activities and potential securities law compliance obligations. It has been a challenging landscape to navigate due to the legal and regulatory uncertainty and related risks.

II. But First: Is a Digital Asset a Security?

Much has been said, and more certainly will be, on the question of whether a given digital asset (or all of them) is or should be considered a security under the federal securities laws. Reasonable people can endlessly debate this question. The uncertainty stems from the simple fact that most digital assets are not simply the digital equivalent of conventional stocks or bonds, but something different in kind—an instrument with both functional and speculative uses. Indeed, the Commission staff's "framework" for analyzing the security-status of a digital asset[1] consists of a *non-exclusive* list of over 60 *characteristics* to be considered and weighed to analyze how *likely* a digital asset is to be a security. This is not a formula that results in any level of certainty.

If a digital asset is a security, then what? A public offering of a security must be registered with the Commission under Section 5 of the Securities Act of 1933 (the "Securities Act"). But the sorts of disclosures called for by the registration forms do not contemplate the novel attributes of digital assets, resulting in the disclosure requirements being both over- and under-inclusive.[2] Digital asset purchasers tend to have less interest in an issuer's balance sheet or details about its board of directors (each of which is required), and more interest in the digital asset's emission schedule and on-chain governance (which are not specifically called for). Few issuers have taken the view that their digital assets are securities, and because of his mismatch, even those that have attempted to register under Section 5 have typically not been successful.[3]

III. Secondary Market Registration and Compliance Issues

How and where to draw the lines around when a digital asset is or is not a security is a critical question—and one that Congress needs to clarify.[4] But for purposes of examining market structure regulation, if *any* digital asset is a security (which I refer to as a "digital

[1] SEC Staff, Framework for "Investment Contract" Analysis of Digital Assets (last modified Mar. 8, 2023), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.

[2] *See, e.g.*, Chris Brummer, Disclosure, Dapps and DeFi (June 29, 2022), https://stanford-jblp.pubpub.org/pub/disclosure-dapps-defi/release/1.

[3] *See, e.g.*, *In re Registration Statement of American CryptoFed DAO LLC*, Securities Act Release No. 11134 (Nov. 18, 2022) (order instituting administrative proceedings against firm seeking to register digital asset offering under Section 5, on the basis that its registration statement did not meet the requirements of Form S-1, Regulation S-X and Regulation S-K); Letter from SEC Division of Corporation Finance to Noel Lee, CEO and Chairman, Monster Products, Inc. (June 15, 2018), https://www.sec.gov/Archives/edgar/data/1675583/999999999718006610/filename1.pdf (informing firm that the Division would not examine its Form S-1 seeking to register digital assets on the basis of the Division's view that the filing failed to comply with the requirements of the form).

[4] My colleague Joe Hall is testifying today before another subcommittee of this House in more depth on this subject. *See* Testimony of Joseph A. Hall Before the United States House of Representatives Committee on Agriculture, Subcommittee on Commodity Markets, Digital Assets, and Rural Development (Apr. 27, 2023), https://www.davispolk.com/sites/default/files/2023-04/written-statement-joseph-hall.pdf.

asset security," without taking a view on any particular digital asset), the current securities market structure regulatory scheme simply does not work.

This problem is, in my experience, why the question of whether a digital asset is a security has taken on so much importance. It is not merely about registration and disclosure—though those are important and raise the challenges noted above. But the legal and regulatory consequences that flow from an asset's designation as a security are existential even after its initial sale. Our existing securities market structure and its regulation were designed for traditional debt and equity securities. If an asset *is* a security, then *all* the securities laws apply. We've all heard the siren's call to "come in and register." It sounds enticingly attractive. But this is an oversimplification that conflates *registration*, which may theoretically be possible, with *compliance*, which is not.

The word "registration" is used often in the securities laws. And much of the SEC's enforcement activity in the digital asset space flows from allegations of a failure to register in one manner or another.[5] But there are many different types of registration obligations. Many of the SEC's actions in this space, particularly before the last few months, were focused on whether promoters of a given digital asset had engaged in an offering to the public of an "investment contract" without registering that offering as required with the Commission under the Securities Act.

But the regulatory challenges only begin there. The federal securities laws, and in particular the Securities Exchange Act of 1934 (the "Exchange Act"), impose numerous other types of registration—and more critically, compliance—obligations on parties that facilitate secondary market transactions in securities. To name a few:

- Brokers who effect securities transactions between others, by arranging or facilitating them;

- Dealers who trade in securities to provide liquidity to the market, such as a market maker;

- Exchanges who bring together buyers and sellers and operate a platform that matches these purchase and sale orders;

- Transfer agents who register the transfer of certain securities on behalf of issuers; and

[5] *See, e.g.*, *In re Munchie*, Securities Act Release No. 10445 (Dec. 11, 2017) (alleged failure to register sale of tokens); Complaint, *SEC v. Kik Interactive*, 1:19-cv-0524 (S.D.N.Y. June 4, 2019) (same); Complaint, *SEC v. Telegram Group* (S.D.N.Y. Oct. 11, 2019) (same); *In re Poloniex*, Exchange Act Release No. 92607 (Aug. 9, 2021) (alleged failure to register as a national securities exchange); Complaint, *SEC v. Bittrex*, 2:23-cv-00580 (W.D. Wash. Apr. 17, 2023) (alleging failure to register as broker, national securities exchange, and clearing agency).

- Clearing agencies who facilitate book-entry settlement of securities transactions.

And so, if a digital asset is a security, not only must its *initial* sale be registered or qualify for an exemption from registration under the Securities Act, but its *secondary* market trading must occur through a web of registered and regulated market intermediaries. This is the source of much of the incompatibility.[6]

Quite reasonably, before our federal securities regulators grant registrations, they closely examine each applicant and require that it demonstrate that its proposed business activities will comply with applicable law and rules.

- The process for a firm that wishes to register as a broker-dealer generally involves seeking membership in FINRA. Under FINRA rules, a firm's membership application must demonstrate that it is "capable of complying with applicable securities laws and regulations, and with applicable FINRA rules."[7]

- A firm that wishes to register as a national securities exchange is required to submit a Form 1 with the SEC. Before granting registration, the Commission must affirmatively determine, among other requirements, that the applicant is "so organized and has the capacity" to carry out the purposes of the Exchange Act and can comply, and can enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the exchange.[8]

- Similarly, the process for a firm seeking registration as a clearing agency involves the submission of a Form CA-1 with the SEC, and the SEC making various affirmative determinations, including that the applicant's proposed structure and business activities meet the requirements of the Exchange Act and the rules thereunder.[9]

As a result, registration in these capacities is not simply a matter of filling out the forms and sending them in, but a substantive exercise showing how proposed activities would comply with *existing* securities laws and rules.

Because digital assets are held, traded, custodied, and settled differently from traditional securities, applying the existing regulatory regime raises many legal issues of first impression. And there are many ways in which compliance with existing secondary

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[6] *See generally* Coinbase Global, Inc., Petition for Rulemaking – Digital Asset Securities Regulation (July 21, 2022), https://www.sec.gov/rules/petitions/2022/petn4-789.pdf (petition for rulemaking to the SEC highlighting scores of unanswered questions regarding how existing securities regulations, particularly relating to secondary markets, would apply to digital asset securities).

[7] FINRA Rule 1014(a)(3).

[8] Exchange Act § 6(a)(1).

[9] Exchange Act § 17A(b)(3).

market regulations for trading in digital asset securities is challenging, or virtually impossible.

I would like to highlight several of the ways in which existing securities market structure laws and regulations do not align with digital asset securities, leading firms to find that registration as a securities intermediary is not a viable path under current law.

a. Market Intermediary Responsibility for Issuer Compliance

Today, a broker-dealer or an exchange that seeks to facilitate trading in digital asset securities would be able to *lawfully* deal in few, if any, assets. This is because our securities laws impose gatekeeping functions on brokers, dealers, and exchanges that prevent them from facilitating trading in securities that do not meet certain standards. These include:

- Brokers cannot facilitate trading in a security if that security cannot lawfully be sold by the seller pursuant to registration or an exemption from the Securities Act.[10]

- Dealers generally are prohibited from publishing quotations to offer to transact in a non-exchange-listed security unless various specified pieces of information about the security and its issuer are "current and publicly available."[11] SEC regulations specify the pieces of information required, which contemplate what an investor would need in order to evaluate an investment in a debt or equity security.

- A national securities exchange may not facilitate trading in any security that is not registered under Section 12 of the Exchange Act, a separate registration from that required for initial distribution under the Securities Act.[12]

Only a handful of digital asset security offerings have been publicly sold in an offering registered under the Securities Act. Most digital assets have instead been offered under a

[10] *See, e.g., In re Carley*, Securities Act Release No. 8888 (Jan. 31, 2008); *United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968). *See also* SEC Division of Trading and Markets, Responses to Frequently Asked Questions about a Broker-Dealer's Duties When Relying on the Securities Act Section 4(a)(4) Exemption to Execute Customer Orders (Oct. 9, 2014), https://www.sec.gov/divisions/marketreg/faq-broker-dealer-duty-section4.htm.

[11] Exchange Act Rule 15c2-11.

[12] Exchange Act § 12(a). Unlike registration under Section 5 of the Securities Act, which is required for a distribution of a security, registration under Section 12 of the Exchange Act is required for certain widely held equity securities, Exchange Act § 12(g), and exchange-listed securities, Exchange Act § 12(b). Once registered under Section 12, an issuer is required to file ongoing public reports, such as Forms 8-K, 10-K and 10-Q. Exchange Act § 13(a).

view that they are not securities, and that the securities registration and disclosure requirements—let alone the ongoing compliance obligations—do not apply.

The result is a Catch-22: It is unlawful for a firm to intermediate trading in a digital asset that is a security unless the firm is appropriately registered. But if registered, it is unlawful for the firm to facilitate trading in a digital asset security, unless the purported *issuer* of the security has taken some other action to register or otherwise make information available. A firm is required to register to facilitate trading, but if registered, it is prohibited from facilitating trading—unless the *issuer* of the security takes steps that are entirely outside the control of the intermediary.

b. Broker-Dealer Custody

For any centralized securities market to function and ensure transactions are settled, *someone* needs to hold custody of customers' securities.[13] In traditional securities markets, broker-dealers and banks provide these custody services to their customers. This critical function comes with significant risks to customers. Custodians could fail to properly safekeep customers' securities, as a result of recklessness, negligence, or misconduct (such as theft or fraud).

The SEC's Customer Protection Rule[14] is designed to manage and limit these risks for registered broker-dealers. A broker-dealer that holds a security on behalf of a customer is required to maintain "physical possession" or "control" of that security in a manner that the rule deems satisfactory.[15] "Physical possession" typically refers to holding and protecting an actual paper certificate—something that is rarely done today in securities markets as most securities exist only in electronic form. To satisfy "control" under the rule, the broker-dealer must hold the security only through specified methods, such as through a registered clearing agency or a regulated bank.[16] Not surprisingly, possessing the private key to a blockchain entry is not one of the options enumerated in the rule. As a result, the SEC staff initially took the position that there was effectively no way for a registered broker-dealer to custody digital asset securities on behalf of customers, and permitted only non-custodial models.[17] Later, the Commission provided guidance that

[13] This statement intentionally refers to *centralized* intermediated markets. Many decentralized finance ("DeFi") applications allow for the trading and settlement of transactions through smart contracts without the need for third-party custody, *see, e.g.*, Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange," Exchange Act Release No. 97309 at 19–20 (Apr. 14, 2023).

[14] Exchange Act Rule 15c3-3.

[15] Exchange Act Rule 15c3-3(b)(1).

[16] Exchange Act Rule 15c3-3(c).

[17] *See* Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities (July 8, 2019), https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities; SEC No-Action Letter to FINRA re ATS Role in the Settlement of Digital Asset Security Trades

would permit so-called "special purpose" broker-dealers to maintain custody of digital asset securities if many conditions were met.[18] This guidance was time-limited and so narrow—imposing extreme limitations on the types of activities permitted—that no firms have been able to rely on it.[19]

Aside from the inability of broker-dealers to maintain possession of customer digital asset securities under the Customer Protection Rule, the interaction of Staff Accounting Bulletin 121 ("SAB 121") and the broker-dealer capital rules also make broker-dealer custody of digital assets economically infeasible—similar to concerns raised with regard to custody by banks.[20]

Under SAB 121, a firm that custodies digital assets on behalf of customers must recognize a liability on its GAAP balance sheet equivalent to the value of those assets, along with an offsetting asset.[21] While the GAAP liability counts as a liability for broker-dealer regulatory capital purposes, the offsetting GAAP asset is likely not an "allowable asset" for regulatory capital purposes.[22] Thus, a broker-dealer holding custody of digital asset securities for customers would have to obtain dollar-for-dollar additional capital to offset the SAB 121 liability. This makes broker-dealers providing material digital asset custody services, and still maintaining compliance with regulatory capital obligations, essentially impossible.

(Sept. 25, 2020), https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf.

[18] Custody of Digital Asset Securities by Special Purpose Broker-Dealers, Exchange Act Release No. 90788 (Dec. 23, 2020).

[19] *See, e.g.*, Proposed Rule: Regulation Systems Compliance and Integrity, Exchange Act Release No. 97143 (Mar. 15, 2023) ("[T]here are currently no special purpose broker-dealers authorized to maintain custody of crypto asset securities."); Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange," Exchange Act Release 97309 at n.54 (Apr. 14, 2023) ("To date, no person has been approved to act as a special purpose broker-dealer custodying crypto asset securities.").

[20] *See* Letter from Sen. Cynthia M. Lummis and Rep. Patrick McHenry to Michael Bar, Vice Chair for Supervision, Board of Governors of the Federal Reserve System, Marty Gruenberg, Chairman, Federal Deposit Insurance Corporation, Michael Hsu, Acting Comptroller, Office of the Comptroller of the Currency, Todd Harper, Chairman, National Credit Union Administration, Prudential Impact of Staff Accounting Bulletin 121 (Mar. 2, 2023), https://www.lummis.senate.gov/wp-content/uploads/Prudential-Impact-of-SAB-121-Letter.pdf, ("Since SAB 121 purports to require banks, credit unions and other financial institutions to effectively place digital assets on their balance sheets, it would trigger a massive capital charge.").

[21] *See* SEC, Staff Accounting Bulletin No. 121 (Mar. 31, 2022), https://www.sec.gov/oca/staff-accounting-bulletin-121.

[22] Under Rule 15c3-1 under the Exchange Act, the Net Capital Rule, "assets not readily convertible into cash" are deducted when computing a broker-dealer's net capital. Exchange Act Rule 15c3-1(c)(2)(iv). The stub accounting entry to offset the liability imposed under SAB 121 would likely not be considered readily convertible into cash.

c. Clearing Agency Status

The term "clearing agency" is defined broadly under the Exchange Act to cover persons who perform a number of clearing and settlement activities, including a person who "facilitates the settlement of securities transactions … without physical delivery of securities certificates."[23] Clearing agencies are required to register with the SEC and operate as self-regulatory organizations.

Digital asset securities are not certificated and thus settle without the physical delivery of securities certificates. As a result, anyone involved in any way in the process of facilitating settlement could conceivably be a "clearing agency," with potentially absurd results. The blockchain itself (if it is deemed a "person"),[24] the miners or validators on the blockchain, and the digital asset trading platform all participate in settlement in some way.

Of course, the concept and definition of a "clearing agency" predates blockchain technology. When Congress added it in 1975,[25] it could not have contemplated automated, public infrastructure carrying out key settlement functions. In the traditional markets, clearing agency regulation is critical to ensure that transactions settle properly and credit and other risks inherent in settlement are appropriately managed. As digital asset transactions are generally fully pre-funded and typically settle in real-time, many of these risks are less salient, leaving the definition potentially overbroad and much of existing clearing agency regulation unnecessary.

d. Differences in Market Structure

Digital asset trading platforms have developed in a direct-to-user manner that typically involves a single service provider. They typically allow end-users to trade directly on the platform, with the platform maintaining custody of the user's digital assets, matching buyers and sellers, and effecting (instantaneous) settlement of executed transactions. This model is quite different from the more diffuse provider model in which traditional securities markets operate.

National securities exchanges do not, and legally cannot, allow end-users to trade directly on the exchange. By statute, exchanges may only admit registered broker-dealers as

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[23] Exchange Act § 3(a)(23)(A). Banks and broker-dealers engaged in customary banking, brokerage, or dealing activities are excluded from the definition of clearing agency. Exchange Act § 3(a)(23)(B).

[24] While the Exchange Act defines a "person" as a "natural person, company, government, or political subdivision, agency, or instrumentality of a government," Exchange Act § 3(a)(9), the Commission may take the view that a blockchain only operates through the activities of a group of persons. *Cf.* Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange," Exchange Act Release 97309 at 17–18 (Apr. 14, 2023).

[25] *See* Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975).

members to trade directly on the exchange.[26] National securities exchanges also do not have the regulatory authority to custody assets of persons trading through the exchange, as generally only broker-dealers, banks, and similar entities can provide securities custody services. Transactions executed on a national securities exchange clear through separate securities depositories that operate as registered clearing agencies, of which the custodian broker-dealers and banks are participants. Each of these functions involves a separate registration under a separate regulatory regime. Indeed, in a recent enforcement complaint, the SEC claimed that, because certain digital assets traded on a platform were allegedly securities, a trading platform was each of an (i) unregistered exchange, (ii) unregistered broker-dealer, and (iii) unregistered clearing agency.[27]

While digital asset trading platforms offer a consolidated service, and the traditional securities markets operate with several intermediaries on each transaction, it is not clear that one market structure model is inherently better than the other. The traditional securities model may be less prone to conflicts of interest and may benefit from an increased likelihood that potential misconduct will be noticed by an unaffiliated third party. At the same time, the digital asset model may have advantages from fewer intermediaries that otherwise increase the overall cost of the service, as well as the speed and efficiencies that arise from a single, integrated provider. Each model developed over time based upon the economics, technology, and user preferences for the market. Because the securities laws and rules were developed to regulate the market structure that had already taken hold in traditional securities markets, that infrastructure has been codified in the Exchange Act and SEC rules. It therefore is the legally required model for intermediaries offering services in any type of security—even if new innovations mean the model is not always practical, necessary, or better for investors than other alternatives.

IV. Square Pegs, Round Holes, and Sledgehammers

As the examples above illustrate, there are many ways in which the traditional securities market structure and the related statutes and rules are incompatible with, or at least impractical, when it comes to digital asset securities. The SEC's current approach has been that the laws and rules are what they are, and so they must be complied with. The SEC's view appears to be that if the activity cannot be conducted in compliance with existing laws and rules, the activity—rather than the SEC's application of the laws and rules—should adjust accordingly.

It may be popular in the crypto community to blame the SEC for failing to adopt a regulatory regime that is compatible with digital assets. One can disagree with the SEC's enforcement agenda and the digital asset-related cases that it has brought, and I certainly

[26] Exchange Act § 6(c).

[27] Complaint, *SEC v. Bittrex*, 2:23-cv-00580 (W.D. Wash. Apr. 17, 2023). Under the Exchange Act, national securities exchanges and clearing agencies are also self-regulatory organizations, charged with overseeing and enforcing their members and participants compliance. *See* Exchange Act § 19(g). Digital asset trading platforms, of course, have not viewed themselves as regulators.

do in many cases. But the SEC is a creature of statute, created by Congress and charged with administering the federal securities laws that Congress has adopted. While the SEC has authority to provide exemptions, conditionally or unconditionally, from various securities law obligations,[28] wholesale changes or entirely new regulatory regimes should come from Congress, not the Commission.[29]

The status quo leaves us in an unfortunate position: the SEC acts as an enforcement sledgehammer, insisting that the square peg of digital asset securities be forced into the round hole of traditional securities market structure. I do not believe that this is the best policy position, as the law should not lock in a structure that prohibits innovation. But unless and until Congress gives the SEC an explicit mandate to do otherwise, the SEC is likely to enforce the existing securities laws in the manner that it believes they apply. Adopting a different regulatory structure for digital asset securities is a major question, and one that Congress should speak to. The SEC cannot be expected, and it may indeed not be appropriate for the SEC, to take it upon itself to fashion a different market structure without Congress's explicit directive.

But the inability to conduct digital asset securities activities under existing federal securities laws in the United States does not mean that these assets simply disappear or that U.S. investors lose interest in them. Rather, U.S. investors will find ways to access

[28] Exchange Act § 36(a); Securities Act § 28.

[29] This is not the first time that a market not previously contemplated by the securities laws and rules suddenly became subject to the full litany of those requirements. In adopting Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), "security-based swap" ("SBS") was added to the definition of "security" under the Exchange Act. Dodd-Frank Act § 761(a)(2). But Congress and the Commission recognized that the market in SBS, and the risks that SBS present, are significantly different from traditional securities, notwithstanding the definitional expansion. With a congressional mandate to appropriately regulate the SBS market, the Commission undertook a years-long effort to adopt rules as well as determine which provisions of the otherwise applicable securities laws and rules did not fit for SBS. The result is a set of extensive regulations that govern the SBS market, along with broad exemptions from traditional securities market rules that the Commission determined were not compatible with or necessary for SBS. *See, e.g.*, Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 64795 (Jul. 1, 2011) (granting wide-ranging *temporary* exemptive relief from compliance with certain provisions of the Exchange Act in connection with the expansion of the definition of "security" to encompass SBS, pending further Commission rulemaking); Order Granting Exemptions from Sections 8 and 15(a)(1) of the Securities Exchange Act of 1934 and Rules 3b-13(b)(2), 8c-1, 10b-10, 15a-1(c), 15a-1(d) and 15c2-1 Thereunder in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps and Determining the Expiration Date for a Temporary Exemption from Section 29(b) of the Securities Exchange Act of 1934 in Connection with Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants Exchange Act Release No. 90308 (Nov. 2, 2020) (providing various exemptions from same on a *permanent* basis).

these services through other means,[30] often through offshore providers that are less regulated, supervised, or trustworthy—with predictably calamitous results.[31]

If American investors wish to invest in digital asset securities, they should not be pushed to offshore venues because no legal market structure exists at home. For those who believe a market structure different from the traditional securities markets is appropriate for digital assets, myself included, the solution is for Congress to establish a framework under which this market structure can exist. Congress has addressed the need to accommodate market structure changes before. In 1975, recognizing how technology and the securities markets had developed, Congress adopted Section 11A of the Exchange Act, directing the SEC to facilitate the establishment of a "national market system" for securities, specifying the criteria that the SEC should consider in developing that system, and the steps that it should take in doing so. The SEC responded to that mandate, adopting Regulation NMS and other rules that govern the current market structure for traditional securities.

Congress could and should take the same approach today. Once Congress establishes a clear, workable test to determine which assets should be appropriately regulated as securities (itself a difficult task, to be sure), Congress should find that facilitating a transparent and well-regulated market in the United States for these assets is in the public interest, and direct that an appropriate regulatory regime be implemented to ensure that a trustworthy, transparent, and well-supervised American digital asset securities market can develop and thrive.

Thank you again for the opportunity to participate today, and I look forward to your questions.

[30] *See, e.g.*, Complaint, *CFTC v. Changpeng Zhao*, 1:23-cv-01887 (N.D. Ill. Mar. 27, 2023) (alleging that U.S. investors accessed the non-U.S. Binance digital asset trading platform through the use of virtual private networks, or "VPNs").

[31] *See, e.g.*, Superseding Indictment, *USA v. Samuel Bankman-Fried*, 1:22-cr-00673-LAK (S.D.N.Y. Feb. 23, 2023) (alleging, inter alia, that the defendant operating an offshore digital asset exchange "misappropriated billions of dollars in customer funds").