



May 27, 2022

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Request for Comment Regarding SEC Release No. 34-94524 (File No. S7-12-22): Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer

Dear Secretary Countryman:

The Global Digital Asset & Cryptocurrency Association (“**GDCA**”) and others who have signed this letter welcome the opportunity to comment on SEC Release No. 34-94524, “Further Definition of ‘As a Part of a Regular Business’ in the Definition of Dealer and Government Securities Dealer”, as published in the Federal Register on April 18, 2022 (the “**Proposing Release**”),¹ and proposed Rules 3a5-4 and 3a44-2 (collectively, the “**Proposed Rules**”) under the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”).

Introduction and Overview

The GDCA is a global self-regulatory association for the digital asset and cryptocurrency industry. We were established to guide the evolution of digital assets, cryptocurrencies, and the underlying blockchain technology within a regulatory framework designed to build public trust, foster market integrity and maximize economic opportunity for all participants. Our broad-based membership includes digital asset trading platforms, proprietary trading firms, institutional investors, fund managers, merchant banks, brokerage firms, miners, node operators, custodians, banks, law firms, auditing firms, insurance professionals, academics, consultants and others.

To fulfill our mission, we create standards and consensus-based solutions designed to address responsibly the major challenges facing the digital asset and cryptocurrency industry. In doing so, we collaborate with stakeholders around the world, including industry leaders, professionals, policymakers and regulators. In particular, we:

- advocate for a regulatory environment that allows innovation and protects consumers, stakeholders, and the broader public interest;

¹ See [Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer](#), 87 Fed. Reg. 23054 (April 18, 2022).

- provide education, training, certification, and other resources to build human and technical capacity;
- provide thought leadership and facilitate industry engagement; and
- oversee our members through a self-regulatory mechanism that is guided by principles of accountability, integrity and transparency to promote the highest professional and ethical standards.

We are commenting upon the Proposing Release because of its significance to the digital asset industry and the public. In the Proposing Release, the Securities and Exchange Commission (the “**Commission**”) proposes to redefine the term “dealer” in Exchange Act Section 3(a)(5) by the addition of proposed new Exchange Act Rule 3a5-4.

The main focus of our letter is on the application of the expanded definition of “dealer” to entities that trade digital assets that are within the meaning of the term “securities.” In our view, the application of the dealer registration requirement to such entities is unworkable, and the Commission has completely underestimated the costs of such registration. In fact, the Commission has ignored the reality that its own conduct has made dealer registration impossible for entities that trade digital assets.

While we will focus on the implications of mandatory registration for traders in digital assets, we observe, as a starting matter, that we believe that the Commission’s proposed expansion of the term “dealer” is inconsistent with the historical understanding of the term as used in the statute. By way of example, the Commission’s proposed expansion of the term “dealer” would include “day traders”; *i.e.*, entities that trade throughout the day but that are essentially flat as of the end of the day. Day trading is a strategy that has long existed and the Commission has not previously stretched the statutory language to treat day traders as “dealers.”² The Commission’s expansion of the statutory language beyond its historical meaning is outside of its authority. If the Commission seeks to redefine and expand statutory terms, it should work with Congress to amend the Exchange Act.

I. Impossibility of Dealer Registration and Bars to Trading Activities of Entities that Trade Digital Assets

In the Proposing Release, the Commission attempts an estimate of the costs of registration for entities that would be required to register as dealers. However, those purported costs (i) ignore the reality that the Commission has itself materially discouraged the registration of dealers in digital assets and (ii) the application of the Commission’s rules and Proposed Rules to digital assets would make it essentially impossible for any dealer to trade digital assets.

Impossibility of Registration. By way of example, one of our members has had a digital asset custodial broker application pending with the SEC for four full years. Another member counseled a broker-dealer that was forced to put itself up for sale because it was running out of money, as SEC Staff and FINRA Staff well knew, during the two-year process that it endured before the Staffs finally approved the operation of its digital asset ATS as the last possible extension of its continuing membership application expired. It is

² See, e.g., SEC Investor Publication, [Day Trading: Your Dollars at Risk](#) (April 20, 2005).

our understanding that significant other firms have put on hold indefinitely, have simply abandoned their efforts and withdrawn their applications to conduct business as digital asset broker-dealers, as well as in other categories of market intermediaries that would be subject to registration under the Exchange Act, including as ATSS and transfer agents.³

Digital asset industry participants have largely disengaged because – as Commissioner Peirce has often noted -- the Commission and its Staff have created hurdles for this industry to overcome that are not required by law and are faced by no other industry.⁴ Because the Commission and its Staff slow-walk digital industry initiatives, and because in the end few are approved, the infrastructure – and the guidance – that would be required to bring even one “investment contract platform” online as an SEC-registered exchange or regulated ATS does not exist. There are no useful models for others to follow.

If firms were required to register, the proposed one year compliance period is wholly impractical. In our experience, for a firm that is not currently registered to prepare to register as a broker-dealer, including implementing email, invoicing, and other operations related technology, hiring appropriate personnel, and completing relevant examinations takes at least six months. While FINRA is expected to approve registrations within six months, in the best circumstances that is often not the case. For firms with unusual or complex business plans, such as digital asset focused firms, this process could take years.

Impossibility of Conducting Business as a Digital Asset Dealer. Suppose, for instance, that an entity were permitted to register with the Commission as a securities dealer in digital assets. In such a case, the Commission’s regulations applicable to such entities would make it impossible to conduct such a business, as briefly outlined here:

- Digital assets would generally have no value for purposes of the Commission’s net capital rule (*i.e.*, Exchange Act Rule 15c3-1). Therefore, any Commission-registered dealer in such assets would be

³ The Commission and its Staff have been slow and reluctant to address other compelling needs of the digital asset industry and the public it serves. Best-known in this regard is the treatment of bitcoin cash market exchange-traded product applications, which are invariably rejected despite overwhelming public demand (but only after drawn-out processes that often extend to the very limit of what the Commission’s rules allow). Another example is the reality that something like 10,000 pairs of crypto assets trade on public platforms (*see, e.g.*, the trading of crypto assets displayed at <https://coinmarketcap.com>), while the SEC’s Division of Corporation Finance has issued no-action advice that particular digital assets are not “securities” only three times. *See* Securities & Exchange Commission, No-Action Letter, [IMVU, Inc.](#) (November 17, 2020); Securities & Exchange Commission, No-Action Letter, [Pocketful of Quarters, Inc.](#) (July 25, 2019); Securities & Exchange Commission, No-Action Letter, [Turnkey Jet, Inc.](#) (April 3, 2019). In 2022, core development teams see no reason to solicit no-action assurances from an SEC Staff with a penchant for imposing conditions on “relief” that have no basis in federal securities law. *See, e.g.*, Securities & Exchange Commission, No-Action Letter, [IMVU, Inc.](#) (November 17, 2020) (conditioning no-action letter assurances upon applicant’s performance of KYC/AML checks, a requirement with no basis in federal securities law); *see also*, SEC Commissioner Hester M. Peirce, Speech, [How We Howey](#) (May 9, 2019) (“I do not believe there was anything gray about the area in which TurnKey planned to operate, but issuing this letter may give the false impression that there was.”).

⁴ *See, e.g.*, [Dissenting Statement of Hester M. Peirce in Response to Release No. 34-88284; File No. SR-NYSEArca-2019-39](#) (Feb. 26, 2020).

required to finance all of its positions using equity alone. This would make it prohibitively expensive to operate as a dealer. Yet the Commission in its cost-benefit analysis simply ignores the cost of capital.

- The Commission has not sanctioned any means by which a Commission-registered broker-dealer can custody digital assets. Some time ago, the Commission issued a very early stage and limited concept release in which the Commission reported that it was giving consideration to how a broker-dealer might custody digital assets.⁵ The concept release was obviously unworkable on its face; it would not even have allowed a registered dealer to custody bitcoin or stablecoins or any other digital currency. After issuing an unworkable proposal, the Commission has entirely ignored the subject.
- The Commission has recently approved the publication by the PCAOB of an accounting standard that would treat any digital assets held in custody by an entity as both assets and liabilities of the entity for accounting purposes. Of course, since the assets would have no value for purposes of the Commission's net capital rule, from a broker-dealer perspective they would only be treated as liabilities. Even assuming that the Commission were to approve a method by which broker-dealers could legally custody digital assets, the Commission's accounting requirements would make it impossible for them to do so.
- The Commission has recently stated its view that Exchange Act Rule 15c2-11 applies to all securities (notwithstanding 50 years of regulatory history demonstrating that the rule only applies to equity securities).⁶ Rule 15c2-11 by its terms requires that a dealer publishing a quote in any "quotation medium" (another term that the Commission has broadly defined) is required to have in its possession certain information as to the issuer of the security, including (among many other things) the issuer's balance sheet and financial information going back at least two years. This information simply does not exist as to digital assets, and such assets do not trade on the basis of this information. Notwithstanding the irrelevance of the information, taking the Commission's interpretation of Rule 15c2-11 as the law, Rule 15c2-11 effectively makes it illegal for a dealer in digital assets to post quotes.

In summary, were the Commission to require firms that day trade in digital assets to register as dealers, the Commission, even assuming it actually allowed such firms to register, would be subjecting them to a regulatory scheme that would make it (i) illegal for them to post quotes, (ii) prohibitively expensive to hold any digital assets, (iii) illegal for them to provide custody, and (iv) if they were permitted to provide custody, impossibly expensive for them to do so under the Commission's new accounting regime.

To us, it seems that the Commission is less interested in requiring digital asset firms to register as dealers than in making it impossible for them to conduct business as registered dealers. Regardless of intention, that would be the effect of the proposed new rule if it were adopted.

II. The Proposed Rules suffer from serious procedural defects as applied to the digital assets industry. Any attempt to apply the Proposed Rules to the industry without curing the defects would violate administrative due process.

⁵ See [Custody of Digital Asset Securities by Special Purpose Broker-Dealers](#), 86 Fed. Reg. 11627 (Feb. 26, 2021).

⁶ See [Publication or Submission of Quotations Without Specified Information](#), 85 Fed. Reg. 68124 (Oct. 27, 2020).

As the Commission recognizes, Exchange Act Section 3(f) requires the Commission to evaluate whether the Proposed Rules will promote efficiency, competition, and capital formation.⁷ In the Proposing Release, the Commission includes a section that analyzes the expected economic effects of the Proposed Rules relative to the current baseline, which consists of the current market and regulatory framework in existence today.⁸ This analysis stems from the Commission’s “statutory obligation to determine as best it can the economic implications of the rule.”⁹

If the Commission anticipates that the Proposed Rules will apply to the digital assets industry, then adopting the Proposed Rules would violate the Commission’s obligations under the APA and the securities laws by failing to consider the rules’ impact on those participants.¹⁰ SEC Staff guidance notes that “[d]efining the baseline typically involves identifying and describing the market(s) and participants affected by the proposed rule.”¹¹ Nowhere does the Proposing Release assess the Proposed Rules’ scope and potential impact on the digital assets industry. Although “digital assets” are mentioned once in the Proposing Release, there is no meaningful discussion of the costs of dealer registration as to such assets, and the Proposing Release simply ignores the impact of other Exchange Act Rules, particularly Rules 15c3-1 (as to capital), Rule 15c3-3 (as to custody) and Rule 15c2-11 (as to quotations).

The Commission could potentially alter these rules to make them “fit” digital asset industry participants, but the Commission has not done so.

Conclusion

We are addressing a rulemaking proposal with profound implications for the digital asset industry and the 40 million Americans who have bought digital assets. Again we agree with Commissioner Peirce, who has highlighted and illustrated the prudence of gathering information about possible negative second-order and third-order effects otherwise caused by hasty decisions made with the best of intentions.¹² The President in

⁷ See 15 U.S.C. § 78c(f); see also [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](#), 87 Fed. Reg. 15496, at 15593 and n. 796. Additionally, Section 23(a)(2) of the Exchange Act requires the Commission to consider the impact that any rule promulgated under the Exchange Act would have on competition and to include in the rule’s statement of basis and purpose “the reasons for the Commission’s . . . determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of [the Exchange Act].” 15 U.S.C. § 78w(a)(2); see also 87 Fed. Reg. at 15593 and n. 796.

⁸ See Proposing Release, 87 Fed. Reg. at 23078.

⁹ See *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)).

¹⁰ *Id.*

¹¹ See Office of the General Counsel and Division of Risk, Strategy, and Financial Innovation, Memorandum, [Current Guidance on Economic Analysis in SEC Rulemakings](#), at 7 (Mar. 16, 2012).

¹² See SEC Commissioner Hester M. Peirce, Public Statement, [Rat Farms and Rule Comments – Statement on Comment Period Lengths](#) (Dec. 10, 2021).

his recent Executive Order has directed all agencies, including the SEC, to collaborate with one another and to act prudently when touching upon digital assets so as to avoid harming business, including the \$2 trillion digital assets industry that in the President's view holds promise.

The President has instructed his administration to work "with the private sector to study and support technological advances in digital assets."¹³ Adopting the Proposed Rules without more and without exempting digital assets would destroy, not "support," "technological advances in digital assets," while excluding "private sector" leadership from the process and without even "studying" the industry or the impact. In short, that course of action would ignore the spirit and desire of the Executive Order.

For all the reasons stated in this letter, we respectfully ask the Commission to modify its rules applicable to dealers in digital assets before it makes any attempt to force entities to register as dealers in digital assets. As the proposal stands, the Commission seeks to force entities to register as dealers in digital assets under a regime that would make it illegal for them to trade or provide custody, and prohibitively expensive.

Given the significance of holdings of digital assets to 40 million Americans, we think it behooves the Commission to give consideration to whether its obligation to foster capital formation is consistent with the adoption of rule interpretations that appear so destructive to capital.

Respectfully submitted,


Gabriela Kusz (May 27, 2022 14:32 CDT)

Gabriela Kusz
Chief Executive Officer

Drafting Committee:

Chair – Steven Lofchie, Esq. (Fried Frank)
Patrick Daugherty, Esq. (Foley & Lardner)
Daniel J. Davis, Esq. (Katten)
Erika Harford, Esq. (Anchorage Digital)
Harris Kay, Esq. (McGonigle, P.C.)
Georgia Quinn, Esq. (Anchorage Digital)
Lee A. Schneider, Esq. (Ava Labs)
Damien G. Scott, Esq. (CoinList)
Kathryn Trkla, Esq. (Foley & Lardner)
Nicole Trudeau, Esq. (CEX)

¹³ See [FACT SHEET: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets](#) (Mar. 9, 2022).

cc:

Joseph Biden, President of the United States
Steven Richetti, Counselor to the President of the United States
Brian Deese, Director, National Economic Council of the United States
Gina Raimondo, Secretary of the Department of Commerce
Honorable Gary Gensler
Honorable Hester M. Peirce
Honorable Allison Herren Lee
Honorable Caroline A. Crenshaw
Honorable Rostin Behnam
Daniel Berkovitz, Esq. (SEC General Counsel)
Professor Haoxiang Zhu (Director, SEC Division of Trading and Markets)
Renee Jones, Esq. (Director, SEC Division of Corporation Finance)