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Secretary Vanessa Countryman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0213

Re: Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets (Release Nos. 33-11412; 34-105020)

Dear Secretary Countryman:

Douro Labs LLC ("Douro Labs") respectfully submits this comment letter in response to the Commission's interpretation regarding the application of the Federal securities laws to certain types of crypto assets and certain transactions involving crypto assets (the "Interpretation").[1]

The Interpretation represents a significant and welcome step toward regulatory clarity. The Commission's classification of crypto assets into five categories, its articulation of the conditions under which a non-security crypto asset may become subject to an investment contract, and its framework for separation of such assets from the associated investment contract, collectively provide important guideposts for issuers, investors, and the markets.

However, the Interpretation raises certain questions that, if left unaddressed, will generate uncertainty for the very market participants the Commission seeks to guide. This letter addresses four principal concerns: (1) the need to address the treatment of pre-launch fundraising instruments, most commonly Simple Agreements for Future Tokens ("SAFTs") and warrants for non-security digital assets; (2) an apparent departure from transaction-by-transaction investment contract analysis in Section IV.B.1 that could produce overbroad and unintended consequences for secondary market transactions; (3) the treatment of token buybacks under the Interpretation's investment contract framework; and (4) whether token compensation granted to issuer personnel constitutes the offer and sale of an investment contract, and what exemptions are available for such arrangements both before and after a token's public launch.

## I. The Gap: Pre-Launch Fundraising Instruments Are Not Addressed

Section IV of the Interpretation provides a detailed framework for how a non-security crypto asset becomes subject to an investment contract through an issuer's representations or promises

[1] Douro Labs was an initial contributor to the Pyth Network, the world's leading decentralized oracle network for first-party financial data. Douro Labs operates at the intersection of traditional financial market infrastructure and decentralized systems, and we engage regularly with the Commission and its staff on questions of market structure and securities regulation as applied to crypto asset infrastructure.

to undertake essential managerial efforts. Section IV.B addresses how such a non-security crypto asset may separate from an investment contract, either through fulfillment of the issuer's representations or promises or through the issuer's failure to satisfy them.

The Interpretation briefly references offerings involving "delayed delivery, such as through a 'simple agreement for future tokens,'" as an illustrative matter, but does not address several critical questions regarding the nature of these instruments and the downstream consequences for tokens in secondary markets.

A SAFT is a contractual instrument in which an investor pays money to an issuer in exchange for a right to receive tokens at a future date, typically upon the occurrence of a network launch event or similar triggering condition. A token warrant functions similarly, granting the holder a right to receive or purchase tokens at defined terms upon the satisfaction of specified conditions. Side letter agreements to fundraising documents may also include the same conceptual framework.

The Interpretation's discussion is ambiguous as to whether the SAFT or token warrant (or side letter agreement or other arrangement) constitutes an investment contract, or whether the investment contract is the broader transaction—i.e., the combination of the fundraising instrument and the representations and promises made in connection with it. It is also unclear whether the fundraising instrument should be an investment contract at all, or some other security instrument, or simply a commodity forward subject to CFTC oversight. This distinction has significant practical consequences:

If the SAFT or token warrant is itself the investment contract, then the investment contract is likely fully performed and extinguished upon delivery of the tokens (particularly where other milestones are not described or promised therein and these agreements have integration clauses), and the tokens—assuming they qualify as a digital commodity or other non-security crypto asset—would enter secondary markets free of the investment contract (with a similar outcome if the fundraising instrument simply does not amount to an investment contract or other form of security).

If the investment contract is the broader set of representations and promises made in connection with the fundraising instrument, then the tokens may remain subject to the investment contract upon delivery if the issuer has not yet fulfilled those representations or promises, and the separation analysis under Section IV.B of the Interpretation would apply.

This latter reading would create a significant perverse incentive. If any representation or promise made in connection with a fundraise—including those in pitch decks, whitepapers, roadmaps, and investor presentations—can give rise to or extend the duration of an investment contract, rational issuers will respond by minimizing the content and specificity of their fundraising materials. Issuers may choose to raise capital without a pitch deck at all, or with only the bare minimum whitepaper necessary to secure investor interest, precisely to avoid creating representations or promises that could tether the delivered tokens to an investment contract. This

outcome is directly contrary to the interests of investor protection: investors in private rounds benefit from detailed, informative disclosures about the issuer's plans, and a regulatory framework that penalizes issuers for providing such disclosures will produce less informed investment decisions, not more.

The Commission and the CFTC should jointly clarify which framing applies and under what circumstances.

## II. The Interpretation's Language on Secondary Market Attachment Conflicts with Transaction-by-Transaction Howey Analysis

The Interpretation contains language in Section IV.B that appears to depart from established Howey principles and could produce results that are difficult to reconcile with the investment contract framework the Interpretation itself establishes. These issues arise in two related contexts: the treatment of an issuer's subsequent offers or sales, and the attachment of investment contracts to tokens in secondary market transactions.

### A. The Post-Footnote 96 Language Implies a Status-Based Rather Than Transactional Test

The two sentences immediately following footnote 96 state: "Upon the issuer's fulfillment of such representations or promises, the issuer is no longer offering or selling an investment contract and the investment contract itself ceases to exist. Accordingly, the issuer's subsequent offers or sales of the non-security crypto asset would not constitute securities transactions unless the issuer creates a new investment contract to which the non-security crypto asset is subject."

This language implies that until an issuer fulfills all representations or promises made in connection with a prior investment contract, the issuer is continuously "offering or selling an investment contract" in connection with any subsequent offers or sales of the same non-security crypto asset—even where those subsequent sales are made to entirely different purchasers, under different terms, and without the representations or promises that formed the basis of the prior investment contract. This implication is problematic for three reasons.

#### 1. Howey Is a Transaction-by-Transaction Test

The Howey test evaluates whether a particular "contract, transaction, or scheme" constitutes an investment contract. Courts have consistently applied this test on a transaction-by-transaction basis, examining the specific terms, representations, and economic realities of each offer or sale. As the Interpretation itself acknowledges, the relevant inquiry is whether the issuer's representations or promises are "conveyed to the purchaser prior to or contemporaneously with the issuer's offer or sale to the purchaser."

The language following footnote 96, however, effectively collapses this transaction-by-transaction inquiry into a status-based test: if an issuer has unfulfilled promises

from a prior transaction, all subsequent sales of the same crypto asset are deemed securities transactions regardless of what the subsequent purchaser was told. This appears inconsistent with the transactional framing of Howey. Whether a subsequent sale constitutes the offer or sale of an investment contract should depend on the representations and promises made to the specific purchaser in connection with that specific transaction, not on whether the issuer has outstanding obligations from a prior, separate transaction with a different purchaser.

### 2. Subsequent Purchasers May Not Receive—or Even Be Aware of—Prior Representations

The Interpretation correctly establishes that a purchaser's reasonable expectation of profits must be grounded in representations or promises "conveyed to the purchaser." It further provides that "it would not be reasonable for a purchaser to expect profits based on representations or promises made by third parties" unless authorized by the issuer and conveyed to purchasers.

Consider the common scenario in which an issuer conducts a private SAFT round with detailed representations about network development and subsequently sells or distributes tokens on the open market without making any such representations to the new purchasers. Under the Interpretation's own framework, those subsequent purchasers have no basis for a reasonable expectation of profits derived from the issuer's essential managerial efforts, because no such representations or promises were conveyed to them. The subsequent purchasers may not have seen the SAFT, the pitch deck, or any of the issuer's private communications with the original investors.

Yet the language following footnote 96 appears to treat the issuer as continuously offering an investment contract in connection with these subsequent sales solely because the issuer has not yet fulfilled promises made to earlier purchasers in a different transaction. This conflates the issuer's contractual obligations to its SAFT investors with the Howey analysis applicable to distinct, subsequent transactions with different purchasers under different terms and circumstances.

### 3. The "Traveling Investment Contract" Problem in Secondary Markets

The same analytical tension arises in the Interpretation's treatment of secondary market transactions. Section IV.B states that a non-security crypto asset that has been subject to an investment contract "does not remain subject to the associated investment contract in secondary market transactions where purchasers would not reasonably expect such representations or promises to remain connected to the non-security crypto asset," but that the "associated investment contract will continue to be transferred to subsequent purchasers" until separation occurs.

This framework raises a fundamental question: what happens when an issuer makes representations or promises to private investors that give rise to an investment contract, does not

publicize those representations or promises, and the tokens subsequently trade on open secondary markets where purchasers have no knowledge of the prior promises? The Interpretation does not specify from whose perspective the "reasonable expectation" inquiry is conducted, nor does it address the informational asymmetry that is endemic to crypto asset secondary markets.

If the standard is subjective—based on the actual knowledge and expectations of the individual secondary market purchaser—then a purchaser who has never seen the issuer's SAFT, pitch deck, or whitepaper, and who purchases tokens on a decentralized exchange without any communication from the issuer, would have no basis for expecting the issuer's prior representations or promises to remain connected to the token.

If the standard is objective—based on what a hypothetical reasonable purchaser in the secondary market would expect, regardless of individual knowledge—the analysis requires determining whether a reasonable secondary market purchaser would be expected to investigate the token's issuance history, locate the issuer's prior representations or promises (which may have been made in private, under NDA, or through channels that are no longer publicly available), and form an expectation of profits based on those prior representations. It is difficult to see how such an expectation could be "reasonable" when the representations were never publicized.

### B. Fungibility Makes The Framework Unworkable

Non-security crypto assets are fungible units that are indistinguishable from one another on the blockchain. A token delivered to a SAFT investor is identical to a token minted as a staking reward, earned through an airdrop, or purchased on a decentralized exchange. When a SAFT investor sells tokens on a secondary market, those tokens are pooled with tokens from other sources in liquidity pools, order books, and custodial omnibus wallets. It is technologically impossible in most cases for a secondary market purchaser to determine whether the specific tokens they are acquiring were originally delivered under a SAFT, and therefore whether those tokens carry an investment contract. Nor does the Interpretation explain whether the investment contract attaches only to the specific tokens delivered to the original SAFT investors, or whether it applies to all tokens of the same class—a distinction with enormous practical consequences.

If the former, the framework is unenforceable because those units cannot be identified or tracked once they enter the fungible supply. If the latter, every secondary market transaction in that token would be a securities transaction—a result that directly contradicts the Interpretation's classification of numerous such assets as digital commodities.

### C. Requested Clarification

The Commission should clarify that the language following footnote 96 is not intended to create a presumption that all subsequent offers or sales of a non-security crypto asset by an issuer are securities transactions merely because the issuer has unfulfilled representations or promises from

a prior investment contract. Instead, the Commission should confirm that each offer or sale is evaluated independently under the Howey test based on the representations or promises conveyed to the purchaser in connection with that specific transaction (noting that publicly available statements can contribute to such reasonable expectations). The existence of unfulfilled promises from a prior transaction may be relevant context (particularly where these representations and promises are made publicly known), but it should not be dispositive—and it should not substitute for the inquiry into what the specific purchaser in the subsequent transaction was told and what that purchaser could reasonably expect.

With respect to secondary market attachment, the Commission should confirm that the "reasonable expectation" standard requires that the issuer's representations or promises be publicly available and reasonably accessible to secondary market participants. Where an issuer's representations or promises were made exclusively in private placement documents, under NDA, or through channels not accessible to the secondary market, those representations should not be deemed to travel with the token into secondary markets. The Commission should also address the fungibility problem by confirming that the secondary market investment contract analysis turns on whether the issuer is making ongoing representations or promises to the secondary market as a whole, not on the provenance of individual token units.

## III. Token Buybacks and the Investment Contract Analysis

The Interpretation is silent on the treatment of token buybacks—transactions in which an issuer repurchases its own non-security crypto assets from the open market or directly from holders. Token buybacks are an increasingly common practice among crypto asset issuers and serve a variety of purposes, including treasury management, supply reduction, protocol-funded burns, ecosystem fund rebalancing, and signaling confidence in the project. The Interpretation's investment contract framework raises several unresolved questions about how buybacks interact with the formation, continuation, and separation of investment contracts.

### A. Do Token Buybacks Constitute or Evidence Essential Managerial Efforts?

Under the Interpretation's framework, an investment contract is formed when an issuer offers a non-security crypto asset by inducing an investment of money in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits. An issuer that conducts token buybacks—particularly if it announces or publicizes a buyback program—may be engaged in activity that could be characterized as essential managerial efforts directed at supporting or increasing the market price of the token. It is also unclear what happens when a third party—such as a foundation, an ecosystem fund, a so-called digital asset treasury company (DAT), or an unaffiliated protocol participant—announces or executes a buyback program. Under the Interpretation's framework, representations or promises by third parties generally do not create investment contracts unless "authorized by the issuer and conveyed to purchasers." But where a foundation closely

associated with the issuer announces a buyback, the line between "issuer" and "third party" may be unclear, and market participants may reasonably view the foundation's buyback as an extension of the issuer's efforts.

In traditional securities markets, stock buyback programs are generally not treated as creating new investment contracts because the issuer is repurchasing its own outstanding securities, not offering or selling them. But the Interpretation's framework introduces a different dynamic. If an issuer of a non-security crypto asset announces a buyback program, that announcement could be construed as a "representation or promise" to undertake efforts (deploying capital to reduce circulating supply) from which holders would reasonably expect to derive profits (through price appreciation resulting from reduced supply). Under the Interpretation's logic, such an announcement could give rise to a new investment contract—or, if an investment contract already exists, could extend its duration by adding new representations or promises to the mix.

The Commission should clarify whether the announcement or execution of a token buyback program constitutes a "representation or promise to undertake essential managerial efforts" within the meaning of Section IV of the Interpretation. If it does, the practical consequences are significant: any issuer that repurchases its own tokens and communicates that fact to the market could inadvertently create a new investment contract or prevent the separation of an existing one.

### B. Does an Issuer's Buyback Prevent Separation of an Existing Investment Contract?

Under Section IV.B.1, a non-security crypto asset separates from an investment contract once the issuer has fulfilled its representations or promises to engage in essential managerial efforts. If the issuer is simultaneously conducting token buybacks, the question arises whether the buyback activity itself constitutes an ongoing essential managerial effort that prevents separation—even if the issuer has fulfilled all of the other representations or promises that originally gave rise to the investment contract.

For example, an issuer may conduct a SAFT private round with representations about building a functional network, deliver the tokens upon achieving functionality, and otherwise satisfy the conditions for separation under Section IV.B.1. If, at the same time, the issuer is conducting a publicly announced buyback program that reduces circulating supply and supports the token's market price, a question arises whether the buyback program constitutes an independent essential managerial effort that keeps the investment contract alive—or, alternatively, whether the buyback creates a new, separate investment contract.

The Interpretation's distinction between essential managerial efforts and activities that are merely administrative or ministerial in nature does not clearly resolve this question. The Interpretation provides that activities such as facilitating network effects and fostering ecosystem development do not constitute essential managerial efforts. It is unclear whether token buybacks fall within this category of non-essential activities or whether they are qualitatively different because they

involve direct market intervention by the issuer using its own capital to influence the token's price.

### C. What Is the Status of Tokens Acquired by the Issuer Through a Buyback?

When an issuer repurchases its own tokens, those tokens may be held in the issuer's treasury, burned (permanently removed from circulation), or redistributed through ecosystem incentives, grants, or future sales. Each of these dispositions raises distinct questions under the Interpretation's framework.

If the issuer holds repurchased tokens in its treasury and later resells them, the resale raises the question addressed in this letter: does the existence of unfulfilled promises from a prior investment contract automatically render the resale a securities transaction? The language following footnote 96 would suggest so, which means that an issuer conducting routine treasury management—buying tokens when they are inexpensive and selling them when they are expensive, as any rational treasury would—could be engaged in unregistered securities transactions.

If the issuer burns repurchased tokens, the burn itself may not raise securities law issues, but the announcement of a burn program returns to the question posed in Section III.A herein: is the burn program a representation or promise to undertake essential managerial efforts (reducing supply to support price)?

If the issuer redistributes repurchased tokens through grants, ecosystem incentives, or airdrops, the redistribution may constitute a new offer or sale that must be independently analyzed under the Howey test. The Interpretation addresses airdrops in Section VII but does not address the specific scenario in which tokens previously acquired by the issuer through a buyback are redistributed.

### D. Requested Clarification

The Commission should provide guidance on the following questions regarding token buybacks:

**First**, the Commission should clarify whether the announcement or execution of a token buyback program—including buybacks conducted for treasury management, supply reduction, protocol-funded burns, or ecosystem rebalancing purposes—constitutes a "representation or promise to undertake essential managerial efforts" that could give rise to a new investment contract or prevent the separation of an existing one. We submit that buybacks should not be treated as essential managerial efforts, just as the Interpretation treats network effect facilitation and ecosystem development as non-essential activities.

**Second**, the Commission should confirm that an issuer's buyback activity does not, standing alone, prevent the separation of a non-security crypto asset from an existing investment contract

where the issuer has otherwise fulfilled its representations or promises. The buyback should be evaluated as a separate activity, not as a continuation of the prior investment contract.

**Third**, the Commission should address the status of tokens held by the issuer following a buyback, including whether the issuer's subsequent resale of treasury tokens constitutes the offer or sale of an investment contract, and whether the issuer's redistribution of repurchased tokens through grants, ecosystem incentives, or airdrops is subject to the airdrop analysis in Section VII or to a distinct investment contract analysis.

**Fourth**, the Commission should clarify whether and under what circumstances a buyback program announced or executed by a third party—such as a foundation or ecosystem fund closely associated with, but legally distinct from, the issuer—constitutes a representation or promise attributable to the issuer for purposes of the investment contract analysis.

## IV. Token Compensation to Issuer Personnel and the Investment Contract Analysis

The Interpretation does not address a scenario that is pervasive across the crypto asset industry: the grant or promise of tokens to an issuer's employees, contractors, advisors, and other service providers as part of a broader compensation arrangement. Token-based compensation is the primary mechanism by which crypto asset issuers attract and retain talent, and it typically takes the form of token purchase agreements, restricted token awards, token option agreements, or contractual rights to receive tokens upon vesting conditions (often structured similarly to SAFTs but granted for services rather than cash). The Interpretation's investment contract framework raises fundamental and unresolved questions about whether these arrangements constitute the offer and sale of investment contracts, and if so, what exemptions are available—both before and after a token's public launch.

### A. Does the Grant of Token Compensation Constitute the Offer and Sale of an Investment Contract?

Under the Interpretation's framework, a non-security crypto asset becomes subject to an investment contract when an issuer offers it by inducing an "investment of money" in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits. Token compensation raises the threshold question of whether the grant of tokens for services constitutes an "investment of money" within the meaning of Howey.

The Supreme Court in *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551 (1979), held that a noncontributory, compulsory pension plan did not involve an "investment of money" because any contribution by the employee was de minimis in the context of the total compensation bargain. Lower courts, however, have recognized that the contribution of services or other non-cash consideration can satisfy Howey's investment-of-money requirement in

appropriate circumstances. The Interpretation does not address where token compensation falls on this spectrum.

Even if the investment-of-money prong is satisfied, the question remains whether the issuer's representations or promises to the team member create a reasonable expectation of profits from the issuer's essential managerial efforts. Team members who receive token compensation are typically insiders who are themselves performing the very efforts that drive the project's success. They are not passive investors relying on the efforts of others; they are the "others" upon whose efforts the project depends. Under a strict reading of Howey's "efforts of others" prong, it is difficult to characterize a team member's expectation of profit as derived from the efforts of "others" when the team member is herself contributing those efforts.

Nevertheless, the practical reality is more nuanced. A junior engineer or a contractor providing discrete services may have no meaningful control over or influence on the project's direction. Such a person's expectation of profit from token appreciation may be functionally indistinguishable from that of an outside investor. The Interpretation does not provide guidance on how to draw this line within the issuer's own team.

### B. Post-Launch Token Compensation: Does Delivery of Tokens After Launch Create a New Investment Contract?

The questions above are further complicated when token compensation vests and is delivered after the token's public launch. Many token compensation arrangements involve vesting schedules that extend well beyond the token generation event, with tokens delivered to team members in tranches over periods of two to four years or longer. At the time of each delivery, the issuer may or may not have fulfilled the representations or promises that formed the basis of any investment contract associated with the token.

Under the Interpretation's framework, each delivery of vested tokens to a team member could be analyzed as a separate offer or sale. If the issuer has unfulfilled representations or promises at the time of delivery, the language following footnote 96 would suggest that the delivery constitutes a securities transaction. This would mean that every vesting event—every monthly or quarterly token unlock for every team member—would need to be independently registered or exempt.

For post-launch grants—where the issuer first promises or delivers tokens to a team member after the token is already trading on secondary markets—the analysis is even less clear. If the token has already separated from the investment contract (because the issuer has fulfilled its representations or promises), then the post-launch grant of tokens to a team member should not constitute a securities transaction at all, because there is no investment contract to which the tokens are subject. But if the token has not yet separated, the post-launch grant may constitute the offer or sale of an investment contract, requiring registration or an exemption.

### C. Requested Clarification

The Commission should provide guidance on the following questions regarding token compensation:

**First**, the Commission should clarify whether the grant of token compensation to an issuer's employees, contractors, advisors, and other service providers constitutes the offer and sale of an investment contract under the Interpretation's framework. In particular, the Commission should address whether the contribution of services satisfies Howey's "investment of money" requirement in this context, and whether a team member who is herself contributing essential managerial efforts to the project can be said to expect profits from the essential managerial efforts of "others." We submit that compensatory token grants to persons who are actively contributing to the project's development should not be treated as investment contracts, because such persons are not passive investors—they are the very individuals whose efforts drive the project's success.

**Second**, the Commission should clarify whether each delivery of vested tokens under a pre-launch compensation grant constitutes a separate offer or sale that requires an independent exemption, or whether the initial grant and all subsequent deliveries are treated as a single transaction covered by the exemption applicable to the initial grant. The former interpretation would make token-based compensation administratively impracticable; the latter is consistent with how compensatory equity grants are treated under Rule 701 in traditional securities markets.

## V. Conclusion

The Interpretation is a constructive and important step toward regulatory clarity. The classification framework, the articulation of the investment contract formation and separation analysis, and the treatment of mining, staking, wrapping, and airdrops collectively represent the most comprehensive statement from the Commission on these issues to date. Douro Labs commends the Commission for this work.

However, the omission of clear guidance on pre-launch fundraising instruments, the ambiguous language regarding ongoing offers and secondary market attachment in Section IV.B, the unanswered questions regarding the treatment of token buybacks, and the silence on whether and how compensatory token grants are subject to the investment contract analysis are material gaps that, if left unaddressed, will undermine the very clarity the Interpretation is designed to provide. We respectfully urge the Commission to supplement the Interpretation with guidance addressing these issues.

Douro Labs welcomes the opportunity to engage further with the Commission and the Crypto Task Force on these issues.

Respectfully submitted,

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