MEMORANDUM

To: Crypto Task Force Meeting Log
From: Crypto Task Force Staff
Re: Meeting with Representatives of Nasdaq, Inc.

On May 21, 2025, Crypto Task Force Staff met with representatives from Nasdaq, Inc.

The topic discussed was approaches to addressing issues related to regulation of crypto assets. Nasdaq, Inc. representatives provided the attached documents, which were discussed during the meeting.

Nasdaq Request for Meeting with SEC Crypto Task Force

Proposed Nasdaq Attendees

- John Zecca, EVP and Chief Legal, Regulatory, and Risk Officer
- Jeffrey Davis, SVP, General Counsel, North American Market Services
- Eun Ah Choi, SVP, Global Head of Regulatory Operations
- Brett Kitt, VP, Deputy General Counsel
- Arnold Golub, VP, Deputy General Counsel
- Olumuyiwa Odeniyide, Associate General Counsel
- Chuck Mack, SVP, Head of North American Product Management
- Matthew Savarese, VP, Strategic Planning
- Daniel Carrigan, Consultant

Proposed Agenda

- Nasdaq will provide an overview of the recommendations it set forth in its April 25, 2025 comment letter to the Crypto Task Force.
- Nasdaq will solicit feedback and questions from the Task Force.

JOHN A. ZECCA
EXECUTIVE VICE PRESIDENT,
GLOBAL CHIEF LEGAL, RISK &
REGULATORY OFFICER
1100 NEW YORK AVENUE, NW
WASHINGTON, DC 20527

April 25, 2025

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: What's in a Name? A Stock by Any Other Name ...
Nasdaq Inc.'s Response to "There Must Be Some Way Out of Here"

Dear Ms. Countryman:

Nasdaq appreciates the opportunity to comment on the questions that Commissioner Peirce raised in her statement.[1] Nasdaq welcomes the energy that the new Administration and the Commission have injected into the digital assets regulatory debate. The Commission's guidance on meme coins and reserve-backed stablecoins plus Commissioner Peirce's statement have already advanced the conversation considerably in a very short time.

Commissioner Peirce wisely wrote that taxonomy is the starting point for capturing the essential nature of digital assets and determining their proper treatment as financial instruments under existing and future federal securities laws. The Commission, by continuously embracing new technologies, new instruments, and new market participants, has built a market ecosystem, the fruits of which have powered the U.S. economy and made our markets the envy of the world. It can do the same for digital assets, with support from Congress and collaboration with the Commodities Futures Trading Commission ("CFTC"). Thus, while a stock by any other name would still be a stock, the existing market ecosystem can readily absorb digital assets by establishing the proper taxonomy and calibrating certain rules to reflect what is truly new and novel about digital assets.

No entity reflects this constant evolution and change more than Nasdaq. Nasdaq pioneered the shift from trading paper shares to electronic shares, from trading telephonically to trading wirelessly and then in the cloud, from trading equities to trading options, futures, and fixed income securities, and from trading in the U.S. to trading around the globe. Nasdaq has transformed itself from developing its own innovative trading technology to becoming the world's leading supplier of regulatory and capital markets technology. In the digital assets space today, Nasdaq's trading and clearing services, market and trading surveillance, and central

[1] See Commissioner Hester Peirce, "There Must Be Some Way Out of Here," Feb. 21. 2025, at https://www.sec.gov/newsroom/speeches-statements/peirce-statement-rfi-022125.

securities depository technology support digital assets platforms on six continents.[2] To facilitate these myriad transformations, Nasdaq has been consistently at the vanguard of advocating for investor- and issuer-focused regulatory change including, most recently, in its March 2025 policy paper on capital formation.[3]

Throughout successive waves of transformations, the U.S. securities markets have adapted and thrived by leveraging institutions and creating roles that are effective and accountable to the Commission and to investors. Issuers, underwriters, exchanges, alternative trading systems, asset owners, clearance and settlement agencies, custodians, and broker-dealers alike – all form a solar system held in place by the Commission's gravity. These institutions and the roles they play form the bedrock of a unified, deep, and liquid market that each day transfers trillions of dollars of capital, trades billions of shares, on behalf of millions of investors, among thousands of regulated and accountable market participants, all at the speed of light. The systemic speed, efficiency, predictability, stability, and success of our market ecosystem is nothing short of astounding. This success is the product of massive investments and constant innovation that benefit millions of Americans.

Nasdaq's experience in this evolving ecosystem as well as our global presence animate several core principles that inform our view of digital assets regulation:

First, as always, the interests of investors are paramount. Any regulatory framework that the Commission, its sister agencies, or Congress creates for digital assets must aim to serve the best interests of, and protect, retail and institutional investors, above all other things.

Second, embrace innovation and efficiency, but be prudent about doing so. For more than a decade, fears and concerns about digital assets have blocked the path towards the adoption of a responsible and pragmatic regulatory framework in the U.S. The public's interest in digital assets has proven to be enduring and the technologies and players involved have also matured. Thus, we agree that the time has arrived for the Commission to move forward with guidelines for a regulatory structure that fosters innovation, but only when that innovation improves the investor experience in both good economic times and bad. Innovation for the sake of efficiency alone is not consistent with that goal. The Commission's mission to protect investors applies equally to digital assets; innovation must serve the interests of investors, and not the other way around.

Third, markets need a clear and predictable taxonomy. Past attempts at digital assets regulation have frustrated creators, investors, and regulators alike because they lacked clarity, consistency, predictability, and finality. A successful taxonomy would include clear categories and a process to manage change going forward as the industry evolves.

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[2] Asset managers rely on the Nasdaq Series Crypto Index Family for benchmarks that cover individual cryptocurrencies and the Nasdaq Crypto™ Index (NCI™) as underlying for almost $1 billion of assets under management across North and South America and Europe. See Nasdaq Financial Technology Solutions, at https://www.nasdaq.com/solutions/fintech.

[3] See "Advancing the U.S. Public Markets" Unlocking Capital Formation for a Stronger American Economy," March 31, 2025, at https://nd.nasdaq.com/rs/303-QKM-463/images/Advancing-the-U.S.-Public-Markets-Unlocking-Capital-Formation-for-a-Stronger-American-Economy.pdf?version=0&mkt_tok=MzAzLVFLTS00NjMAAAGZig_FDECgivLyMSwJFsWU9rH_jPHtwsJat2YUJVeyL0Iw9QN0vif0u26iuoQ_kxLr6i3BS23Rd1TjDbPaR58.

Fourth, treat like assets alike. The rules governing electronic shares of an instrument today should govern tokenized shares of the same instrument tomorrow. Whether it takes the form of a paper share, a digital share, or a token, an instrument's underlying nature remains the same and it should be traded and regulated in the same ways.

Fifth, digital assets that pose lower risks to investors warrant more flexible regulation. For many digital assets, a light and flexible regime could appropriately balance the need for investor protection and the drive for innovation. Registration, offerings, ongoing disclosure requirements, and trading could all be made fit-for-purpose.

Sixth, promote competition on a level playing field. Congress empowered the Commission to promote fair competition across similarly situated instruments and market participants. Digital asset trading platforms and existing market participants should compete on a level playing field for all instruments. Differences in regulation that create the opportunity and incentive to arbitrage or evade regulation would distort the market and harm investors.

Seventh, ensure that digital asset trading platforms account for systemic risks. Some existing digital asset trading platforms operate in a vertically integrated, direct-to-retail business model that eschews third-party intermediaries. These intermediaries, which include brokers, underwriters, clearing firms, and custodians, each have considerable expertise and experience in their respective functions, and they bring to bear considerable resources to accomplish those functions, subject to close oversight. Vertically integrated platforms assert that consolidating all aspects of a transaction into a single entity reduces costs and offers other efficiencies.[4] We question that premise in more detail below, but notwithstanding any efficiencies, we encourage the Commission to consider whether this model unduly concentrates risks for both investors and the markets and creates structural conflicts of interest that must be addressed. Such risks and conflicts are ones that the Commission has wisely chosen elsewhere to mitigate by requiring key functions in the transaction chain to be separated and performed by independent and disinterested third parties, all while fostering innovative technology, resilient operations, and ultra-low costs for retail investors.

With these principles in mind, Nasdaq offers suggestions below to help the Commission to craft a dynamic ecosystem for digital assets trading. As noted below, Nasdaq fully understands that some of these proposals would require coordination between the Commission and the CFTC, perhaps more coordination than has historically occurred. It may be beneficial or necessary for Congress to guide that coordination or to fill gaps between the jurisdiction of the Commission and the CFTC. Nasdaq believes that the comprehensive regulatory structure outlined below would stimulate a growing, robust digital assets ecosystem in the United States that would serve investors and foster innovation.

First, **regarding taxonomy:**

- Establish a four-part taxonomy like Commissioner Peirce's proposal:
    - ***Financial Securities***: Financial Securities are tokenized versions of all instruments that the Securities Act of 1933 defines as "securities," except

[4] Vertically integrated digital asset trading platforms differ from self-regulatory organizations, like Nasdaq, which are subject to Commission oversight of every aspect of its governance and operations – including actions that we take to operate our own markets and enforce our own rules.

investment contracts.[5] For example, the term Financial Securities includes equity and debt securities issued by operating companies, such as common stock. It also includes special purpose acquisition vehicles ("SPACs"), exchange traded funds ("ETFs"), options and related rights, warrants and analogous securities, regardless of whether offered publicly or through private placements and in primary and secondary sales.

- ***Digital Asset Investment Contracts***: This category comprises tokenized investment contracts, which would remain securities subject to the Commission's jurisdiction. As commonly understood, an investment contract is a reasonable promise of a return on capital invested in a common enterprise where the return is derived solely[6] from the efforts of the promisor or someone other than the investor. In practice, determining whether an instrument constitutes an investment contract is tricky, especially in the context of digital assets. As we discuss below, we propose to classify digital assets as Digital Asset Investment Contracts to the extent that the Commission recognizes them as such under a clarified version of the so-called Howey test. We urge the Commission to continue to issue guidance as to how to interpret and apply that test to various types of instruments. The Commission should be clear, however, that digital assets that possess the attributes of Financial Securities are not classifiable as Digital Asset Investment Contracts. The Commission should prohibit persons from acting in bad faith to evade regulation by mischaracterizing digital assets as Digital Asset Investment Contracts which possess the settled characteristics of Financial Securities. Thus, an issuer of ownership interests in a corporate enterprise – which is understood to mean a stock – should not be permitted to claim that the asset instead is a Digital Asset Investment Contract to avoid complying with federal regulations pertaining to stocks.
- ***Digital Asset Commodities***: Those meeting the definition of commodities set forth in the Commodities Exchange Act, with certain clarifications that we suggest below.

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[5] The Securities Act of 1933 defines the term "security" to mean "any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 15 U.S.C. 77b(a)(1). We propose that the term "Financial Securities" encompass all of these instruments except investment contracts.

[6] Although the Howey test itself states that efforts at generating profits must be "solely" the product of others, subsequent cases have held that these efforts may be primarily the product of others. See, e.g. SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 483 n.15 (5th Cir. 1974) (That a scheme assigns "nominal or limited responsibilities to the [investor] does not negate the existence of an investment contract.") (citation and quotation marks omitted).

- ***Other Digital Assets***: As set forth in the Meme Coin Statement, these digital assets are neither securities nor commodities.[7]

- Regulate digital assets representing Financial Securities as they are regulated today regardless of tokenized form. Tokenized Financial Securities, such as NMS stocks, would be subject to existing offering, listing, and trading requirements; exchanges, ATSs, and broker-dealers that support them would fulfill their current roles.
- Establish light touch regulation for Digital Asset Investment Contracts that is rooted in Regulation A. This regime would enable Digital Asset Investment Contracts to trade side-by-side with Digital Asset Commodities and, potentially, Other Digital Assets on specialized ATSs (ATS-Ds, discussed below) created for that purpose.
- Act jointly with the CFTC to establish a temporary and voluntary regulatory safe harbor to enable digital assets not yet clearly classified in the above buckets ("Temporarily Unclassified Digital Assets") to go to market quickly and safely pending a definitive taxonomy determination by regulators. Temporarily Unclassified Digital Assets would be subject to light-touch, risk-based disclosure requirements.

Second, **regarding digital assets registration**:

- Clearly state that all Financial Securities will be registered with the Commission as provided under the federal securities laws, unless subject to an existing exemption from regulation.
- Provide for Digital Asset Investment Contracts that meet the requirements of Regulation A to be exempt from registration. Calibrate registration requirements for all other Digital Asset Investment Contracts to match the risks they pose.
- Neither Digital Asset Commodities nor Other Digital Assets would be registered.
- As discussed above, for Temporarily Unclassified Digital Assets, offer an optional and temporary safe harbor for registration, provided that a registrant adheres to limited basic and risk-based disclosure requirements during the safe harbor period.

Third, **regarding digital assets trading**:

- Clearly state that digital assets that constitute Financial Securities must trade as they do today. For example, tokenized NMS stocks must be listed on national securities exchanges and trade on exchanges or ATSs.
- Acting jointly with the CFTC, create a new category of ATS called "ATS-Digital" or "ATS-D" that may trade Digital Asset Investment Contracts, Digital Assets Commodities, Other Digital Assets, and Temporarily Unclassified Digital Assets in its own appropriately regulated ecosystem.

Fourth, **regarding tokenization and initial offerings**:

- Clearly state that the tokenization of Financial Securities does not change the applicability of the federal securities laws that govern how such Financial Securities may be offered or traded, either publicly or through private placements.

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[7] See Div. of Corporation Finance, Staff Statement on Meme Coins, Feb. 27, 2025, at https://www.sec.gov/newsroom/speeches-statements/staff-statement-meme-coins ("Meme Coin Statement").

- Apply Regulation A to sales of Digital Asset Investment Contracts.
- Provide greater flexibility for initial offerings of Digital Asset Investment Contracts and other digital assets on ATS-Ds.

In addition to the above, Nasdaq recommends that the Commission proceed cautiously in several areas:

Preserving existing roles can protect investors from risks that inherently arise from vertically integrated and direct-to-retail digital assets trading platforms. If the Commission decides to permit vertically integrated, direct-to-retail digital asset trading platforms to operate under its new regime (as ATSs or ATS-Ds), then it may wish to consider whether it would be prudent to impose upon them resiliency, security, capacity, and integrity standards. The standards could be akin to those that apply currently to fair access ATSs. The Commission may wish to consider whether to require these platforms to take steps to mitigate the conflicts of interest they face, particularly when they process both sides of transactions. It should consider whether interoperability and fair access standards are needed to mitigate the risk that vertically integrated platforms could leverage their ownership of key technologies, like blockchains, to achieve anti-competitive ends. Likewise, it should consider how to address the risk that these platforms could force investors to consume products or services they do not want or need. The Commission also may wish to consider whether to impose best execution obligations or other duties of care to mitigate investor risks posed by a direct-to-retail model. Finally, Congress may wish to consider how mechanisms like the Securities Investor Protection Corporation ("SIPC") could be extended to apply coverage to investors trading digital assets in brokerless trading platforms. We suggest that investors in these platforms have protection available to them if their trading platform fails (e.g., due to a security breach or a technology failure) and their digital asset investments are lost. [8]

Consider whether atomic settlement of digital assets is in the best interests of investors and the markets. Although the blockchain allows for near-instantaneous or "atomic" settlement of digital assets transactions, the Commission should consider whether the potential costs of moving to atomic settlement outweigh its benefits, particularly with respect to market liquidity. For example, the Commission should take note of the fact that atomic settlement could compromise the longstanding, advanced, and liquidity enhancing practices of lending securities as collateral or for short-sale purposes. Additionally, the Commission should consider whether atomic settlement would effectively limit investors' access to margin, which is credit that is important for maintain liquidity in the markets, especially in times of market stress. Atomic settlement could also increase operational risks and costs that market participants face, including greatly increasing their capital obligations, by requiring them to continually settle transactions throughout the day rather than engage in end-of-day transaction netting.

With these recommendations in mind, Nasdaq is confident that the Commission can establish an attractive path for integrating digital asset technology into the capital markets. If

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[8] Presently, SIPC does not provide coverage for digital assets that are non-securities, such as commodities and currencies. It also does not apply to unregistered digital asset investment contracts. See https://www.sipc.org/for-investors/what-sipc-protects#:~:text=SIPC%20protects%20stocks%2C%20bonds%2C%20Treasury,a%20SIPC%2Dmember%20brokerage%20firm..

done properly, this path will be one that is both prudent and flexible, marrying broad innovation with guardrails that have kept investors safe and markets running soundly for almost a century.

I. Digital Asset Taxonomy

The classification of digital assets as securities, commodities, or neither has bedeviled regulators, legislators, and courts for years. Clear classification is critical because, under existing statutes, it determines whether such assets fall within the jurisdiction of the Commission, the CFTC, both, or neither agency. This, in turn, determines whether the assets are subject to the prescriptive statutory and/or rules-based requirements applicable to securities, the supple principles-based requirements applicable to commodities, or to state laws. This ambiguity and the resulting arbitrage have distorted market behaviors and stifled innovation in digital assets for far too long. The SEC's March 21, 2025, Crypto Task Force Roundtable on what constitutes a security was a productive step toward regulatory clarity, though it highlighted the difficulty of resolving such taxonomy issues.

Nasdaq recommends stating clearly that digital assets representing Financial Securities will be regulated as Financial Securities are regulated today. The federal regulatory regime that governs Financial Securities is not to be taken lightly. Over the past 90 years, the federal securities laws have been forged by recurring crises. They are the products of the Great Depression, the Great Recession, Black Monday, the Dot.com Bubble, the Flash Crash, and numerous other economic busts, manias, panics, recessions, and crises. They have withstood multiple technological transformations: from the Paperwork Crisis of 1967-70 to the advent of electronic trading; from mainframe to server to cloud; from fractions to decimals and from telephone to fiber optics to wireless. Many of these events posed significant risks and some inflicted painful financial harms; they also provided important lessons for policymakers charged with remediating and preventing their recurrence. If history and experience have taught us anything, it is that our existing securities laws and rules can be adapted and improved, but they should not be weakened or discarded.

The success of the national market system is a marquee achievement of sustained Commission execution of the securities laws. In 1975, Congress determined that the creation of a national market system was necessary to ensure that U.S. markets for shares in the world's largest and most important corporations, as well as the world's largest sources of wealth, employment, and economic growth, operate soundly, in an interconnected manner, and in the best interest of investors.[9] The national market system has sustained public confidence in the fairness, transparency, and accessibility of the markets. It also has facilitated greater competition among trading venues, enabled fast executions, at low costs, and made available vast troves of market data to investors. The system protects investors against extreme bouts of volatility (market-wide circuit-breakers), which helps the markets and investors to navigate moments of shock more smoothly and safely. Investors in NMS stocks deserve these benefits and protections, irrespective of the form that NMS stocks take. Investors will benefit if tokenization occurs in a manner that accommodates the national market system.

With Commission direction, tokenization can become another successful transformation rather than a means of circumventing an ecosystem that has rewarded and protected issuers, market participants, and investors for many years. To preserve the many benefits of the national

[9] See 15 U.S.C § 78k-1(a)(1)(B)-(D).

market system, digital assets that constitute Financial Securities should continue to list and trade as they do now. For example, NMS stocks should continue to list on national securities exchanges and trade on those exchanges and on ATSs. For non-NMS stocks, they should continue to trade over the counter in broker-dealer systems and in private placements. Likewise, other tokenized Financial Securities, like options, SPACs, and ETFs, should remain subject to their existing regulatory frameworks for trading.

To be clear, Nasdaq fully supports adapting traditional securities trading venues to accommodate tokenization. We see an approaching future where clearing and settlement procedures accommodate both traditional and blockchain transactions. Until that time, however, we suggest that Financial Securities continue to trade as they do now and that NMS stocks continue to trade within the national market system. If the SEC does permit adaptations of certain existing requirements, it should be careful to avoid creating opportunities for regulatory arbitrage.

Nasdaq further recommends that the SEC clarify the Howey test for Digital Asset Investment Contracts. Although the task of classifying digital assets that constitute Financial Securities is straightforward, this task is considerably more difficult in the case of Digital Asset Investment Contracts.

The prevailing practice for determining whether a digital asset is an investment contract has proven unsatisfactory to date. The test set forth in SEC v. W.J. Howey Co., 328 U.S. 293 (1946) ("Howey") is subjective and has led to inconsistent and controvertible results. Howey's shortcomings are evidenced by the bevy of SEC enforcement actions taken over the past few years, which arose from fierce disputes as to whether digital assets of varying types constituted securities. Like many judicially created doctrines, the Howey test has developed in slow and uneven ways based on idiosyncratic fact patterns that have made some matters of interpretation unpredictable and frustrating to market participants. Discussions during the March 21, 2025 Crypto Task Force Roundtable underscored stark differences that exist among experts as to how the Commission should interpret the various prongs of the Howey test and how those prongs should apply to particular digital asset designs.

The ideal solution to this problem would be to further clarify, either by rule or legislation, what constitutes a Digital Asset Investment Contract. To this end, Nasdaq supports ongoing efforts to refine the Howey test to classify Digital Asset Investment Contracts more clearly and predictably going forward and to do so via regulation rather than on the basis of a series of enforcement actions. For example, we support Commissioner Peirce's thoughtful endeavors over the past few years to distinguish between tokens that are or represent Digital Asset Investment Contracts and tokens that are the objects of investment contracts.[10] We also support

[10] See Commissioner Hester Peirce, "Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization," Feb. 6, 2020, at https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-blockress-2020-02-06#_ftnref5 ("The SEC has tried to apply the Howey analysis to crypto, but doing so is not particularly easy. For example, some commentators have pointed out that we have elided the distinction between the token and the investment contract. The "contract, transaction or scheme" by which the token is sold may constitute an investment contract; but the object of the investment contract—the token—may not bear the hallmarks of a security. Conflating the two concepts has limited secondary trading and has had disastrous consequences for the ability of token networks to become functional. Also of concern, suggesting that tokens will increase in value, combined with securing secondary market trading, can trigger

the Commission's policy statements clarifying that meme coins and certain mining activities do not constitute Digital Asset Investment Contracts.[11] Further clarity is still needed on whether, and under what circumstances, staking is a security. The goal of this clarification, which could take the form of either agency guidance or rulemaking, would be to classify the existing landscape of digital asset models as much as possible to minimize ambiguity.

In clarifying the definition of a Digital Investment Contract, the Commission should state that a digital asset cannot be classified as a Digital Asset Investment Contract to the extent that it has the settled properties of a Financial Security, like common stock. For example, the Commission should consider it an act of bad faith for an issuer to attempt to self-certify a digital asset (discussed below) as a Digital Asset Investment Contract when the digital asset constitutes an ownership interest in a corporation (and thus, is commonly understood to be a stock).

Nasdaq recommends that Congress refine its definition of a "commodity" under the Commodities Exchange Act to include Digital Asset Commodities. Currently, the Commodities Exchange Act defines a "commodity" to mean certain enumerated goods and then virtually anything else.[12] Nasdaq recommends that Congress clarify this commodity definition as it is overly broad and can be interpreted to encompass every digital asset that is not a security. Congress may wish to clarify that commodities must have certain defining characteristics to be Digital Asset Commodities, including fungibility, utility, decentralization, and perhaps finiteness of supply and finite divisibility.[13] Congress also may wish to expand the scope of the CFTC's jurisdiction over Digital Asset Commodities to include regulation of spot markets for these assets.

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a conclusion that those tokens are being sold pursuant to an investment contract. There are circumstances in which the security label fits, but, in other cases, promises made about tokens increasing in value are nothing more than expressions of the hope that a network will succeed and be used by lots of people.").

11 See SEC Div. of Corp. Fin., "Statement on Certain Proof-of-Work Mining Activities," March 20, 2025, at https://www.sec.gov/newsroom/speeches-statements/statement-certain-proof-work-mining-activities-032025.

12 See 7 U.S.C. 1a(9) ("The term 'commodity' means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, **and all other goods and articles,** except onions (as provided by section 13–1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.") (emphasis added).

13 Nasdaq is supportive of the proposed definition of a Digital Commodity set forth in bipartisan legislation passed in May 2024 entitled the "Financial Innovation and Technology for the 21st Century Act" or "FIT21." H.R. 4763 (118th Cong.). That definition calls for a Digital Commodity to be a "functional system and certified to be decentralized." See id., Section 102(55)(A). We also support FIT21's criteria for determining decentralization. See id., Section 101(25) (stating that a system is decentralized if, during the past year, no individual had the sole authority to control or significantly change the blockchain system's functionality or operation. Additionally, no one could restrict or prohibit non-issuers from using, earning, or transmitting the digital asset, deploying software, participating in decentralized governance, or operating infrastructure related to the blockchain system. Furthermore, no digital asset issuer or affiliated person owned 20% or more of the total units of the digital asset or had the authority to direct the voting power of 20% or more of the outstanding voting power).

Nasdaq recommends that the SEC and CFTC jointly adopt a temporary safe harbor and resolution process for Temporarily Unclassified Digital Assets. Any static approach to comprehensively classifying all digital assets (outside of Financial Securities) as Digital Asset Investment Contracts, Digital Asset Commodities, or none of the above, is doomed to obsolescence as new and novel asset designs emerge. Regulators would do better to adopt a framework that allows regulation to keep pace with innovation so that one, three, and five years from now, digital asset creators will not find themselves once again in limbo, facing the same regulatory uncertainties and Hobson's choices that they do now. Thus, Nasdaq proposes to bridge the gap between innovation and regulation with a temporary safe harbor solution for Temporarily Unclassified Digital Assets.

This approach aims to provide a stopgap means for novel digital assets to come to market safely and without undue delay, even when the regulatory taxonomy applicable to those assets is unclear, while also providing regulators with an opportunity to catch up to the novelty with a permanent classification determination. To be clear, the safe harbor would apply until the regulators take final action (after exhausting any applicable due process) to modify their guidance or rules to definitively classify a Temporarily Unclassified Digital Asset as falling within an existing regulatory classification or representing a new category of digital asset. However, we recommend that if regulators do not take final action within a certain period after initiation of the safe harbor (e.g., 240 days), then any permanent classification proposed by the registrant would be deemed approved by the regulators. Notwithstanding the above, regulators would retain authority to halt trading in Temporarily Unclassified Digital Assets due to concerns about fraud or manipulation.

Under Nasdaq's proposal, if a person: (1) is unsure whether a digital asset is a Digital Asset Investment Contract, a Digital Asset Commodity, or an Other Digital Asset; (2) does not wish to wait until regulators decide the correct taxonomy for them; and (3) does not wish to decide taxonomy for themselves and take the risk that regulators will second-guess their decision, then that person could opt to register the digital asset under a temporary safe harbor that is jointly administered by the SEC and CFTC.[14] Under this proposal, a Temporarily Unclassified Digital Asset could begin trading immediately upon registration, and without waiting for regulators to determine the asset's taxonomy. To ensure that the Temporarily Unclassified Digital Asset is safe for investors, the registrant would be subject to both basic and risk-based disclosure requirements – requirements that would be similar to Digital Asset Investment Contracts. If a registrant opts for the safe harbor and complies with its terms, then neither the CFTC nor the SEC would hold the registrant liable for offering an unregistered security or commodity, provided that the registration was done in good faith and not as a means of evading the application of the federal securities or commodities laws.

The conditions of the proposed safe harbor would be as follows:

First, the registrant would expressly submit itself to the jurisdiction of both the SEC and the CFTC with respect to the asset and agree not to contest that jurisdiction going forward. In

[14] We propose that the CFTC issue these regulations pursuant to its antifraud and anti-manipulation authority over commodities (Commodity Exchange Act Section 9(1)), while the SEC would do so through its authority over the requirements for registration statements (Securities Act of 1933 Section 7(a)(1)). To avoid uncertainty about jurisdictional authority, it may be appropriate for the SEC and CFTC to jointly pursue enforcement actions in connection with Temporarily Unclassified Digital Assets.

particular, the registrant would acknowledge the possibility that the registered asset is capable of definition as a security or a commodity to afford the SEC and CFTC joint jurisdiction over the asset. [15]

Second, the Temporarily Unclassified Digital Asset would be subject to basic prohibitions against fraud and manipulation, which the SEC and CFTC could each enforce in a coordinated manner. Combating fraud and manipulation are core investor protection principles that have served as lynchpins for the regulatory frameworks under both the SEC and the CFTC.

Third, the Temporarily Unclassified Digital Asset would be subject to a common set of basic disclosure requirements. These basic disclosures would include information that is material to all holders of the Temporarily Unclassified Digital Asset. Specifically, the disclosures would comprise a standardized form of the white papers that trading platforms publish today in connection with listing digital assets. Typically, these white papers describe the nature, purpose, technological design, creation, destruction, supply and distribution, operation, security, and management of digital assets as well as any rights, benefits, utility, capabilities, or privileges that are incident to ownership of such assets.[16] Again, any potential buyer of a Temporarily Unclassified Digital Asset would, at minimum, be able to understand what exactly is being offered for sale, what it does, how it works, and the risks of ownership.

Fourth, the Temporarily Unclassified Digital Asset would be subject to supplemental risk-based regulatory requirements. These supplemental requirements would apply *only* to the extent that the asset exhibits enumerated characteristics of securities and only to the extent that the exhibited characteristics warrant imposition of such requirements. If, for example, a Temporarily Unclassified Digital Asset grants the Asset holder a right to receive a share of the future profits generated by an underlying enterprise (but, for the sake of illustration, may not constitute an investment contract because profits arguably depend, in part, upon the holder's own efforts to develop the services to be produced by the enterprise), then the registrant would be required to disclose the enterprise's financial statements and risk factors, subject to SEC oversight and enforcement. Imposing such supplemental disclosure requirements would be prudent so that potential purchasers of the Temporarily Unclassified Digital Asset could readily assess the current and likely future performance of the underlying enterprise and its ability to generate profits as well as the factors that could have a material impact on such performance. If the asset grants voting rights to a holder (but again, for the sake of illustration, may not be an investment contract because the asset at the time only offers utility to the asset holder), then supplemental information describing those rights, how they relate to other classes of voting rights, and how voting may be exercised, might be required. Likewise, if a Temporarily Unclassified Digital Asset promises a holder repayment of capital contributed, plus a yield, then

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[15] The Task Force is considering a similar approach to coin and token offerings where the Commission could "provide temporary prospective and retroactive relief for coin or token offerings for which the issuing entity or some other entity willing to take responsibility provides certain specified information, keeps that information updated, and agrees not to contest the Commission's jurisdiction in the event of a case alleging fraud in connection with the purchase and sale of the asset." See Commissioner Hester M. Peirce, The Journey Begins, Feb. 4, 2025, at https://www.sec.gov/newsroom/speeches-statements/peirce-journey-begins-020425.

[16] Nasdaq supports FIT21 in this respect, which would similarly require disclosures of source code, transaction history, digital asset economics, plan for development, and risk factors. See FIT21, Section 303.

the registrant should be required to disclose information about the terms of repayment, as well as information about other creditor claims or liens that may impact the ability of the Asset holder to receive repayment in the event of a bankruptcy or liquidation.

Importantly, the fact that a Temporarily Unclassified Digital Asset exhibits one or more characteristics of a security would not subject it to the full panoply of securities regulations; only targeted requirements would apply. In the example above, a Temporarily Unclassified Digital Asset that provides for future profit sharing, but not an ownership interest in an underlying asset, would not require disclosures regarding or valuations of the underlying asset. If the asset provides no voting rights, disclosures governing voting rights would not apply. Nasdaq proposes that these supplemental regulatory requirements apply only when necessary and appropriate to mitigate material risks that certain characteristics pose to holders of the Temporarily Unclassified Digital Assets. If a Temporarily Unclassified Digital Asset does not exhibit any securities characteristics, then only the basic disclosures and the prohibition against fraud and manipulation would apply under the safe harbor.

If a registrant believes in good faith that a Temporarily Unclassified Digital Asset falls in the Other Digital Assets category – i.e., it is not subject to either SEC or CFTC jurisdiction – and it does not wish the asset to become subject to either the basic or any supplemental regulations that the safe harbor prescribes, then nothing would require that person to register the Asset under the safe harbor. For example, if an issuer of a meme coin believes that its coin will be used for collectible purposes only, and that it fits squarely within the SEC's Meme Coin Statement, then the issuer may feel comfortable that no safe harbor registration is needed. However, if the issuer markets the meme coin as an investment, such that the applicability of the Meme Coin Statement is unclear, then the issuer may wish to avoid the risk of being wrong by registering the coin under the safe harbor.

Regulators would retain significant authority and responsibility. If a registrant of a Temporarily Unclassified Digital Asset acts in good faith but a regulator disagrees with the registrant's classification during the look-back period (described below), the registrant would have a grace period to come into compliance with the laws and regulations that apply to the revised classification of the asset. If a registrant does not act in good faith and proposes to classify a digital asset in a manner that is contrary to a known taxonomy determination, or to evade applicable regulatory requirements or jurisdiction, then the registrant's actions could be subject to an enforcement action by the agency whose jurisdiction or requirements were impacted. An example of such a bad faith act would be to self-certify a digital asset as being a Temporarily Unclassified Digital Asset when it is an ownership interest in a corporation, and thus clearly is a stock (and therefore a Financial Security).

Finally, if after registering under the safe harbor, Congress or regulators update their digital asset taxonomy guidance, rules, or laws to address the proper taxonomy of a Temporarily Unclassified Digital Asset, then the Temporarily Unclassified Digital Asset would be required to come into compliance with the new requirements applicable to that classification, again with a grace period to allow for a smooth transition. The intent of this safe harbor would not be to establish a permanent category of unclassified digital assets, but rather to facilitate innovation during a transitional period when regulators are deciding how to deal with novel assets. Thus, if the SEC issues guidance interpreting the Howey test to include as investment contracts tokens

that were previously unclassified, then registrants of the unclassified tokens would need to come into compliance with regulatory requirements applicable to Digital Asset Investment Contracts.

II. Registration

Today, securities offerings in the U.S. are generally subject to some form of registration requirements. The Commission has clearly articulated the benefits of the existing offering registration regime as providing investors with material information needed to make informed investment decisions, as well as liability protections, benefits that apply equally to digital assets securities. The existing registration provisions are calibrated to the risks posed by the companies issuing such securities, as well as the securities themselves. Digital assets representing well-understood securities are no different.

Nasdaq recommends that digital assets representing Financial Securities remain subject to existing registration requirements (or exemptions therefrom). For example, the offer and sale of digital assets representing the common stock of an operating company or other equity securities would be registered under the Securities Act of 1933 and, if widely held or listed, the class of securities would be registered under the Securities Exchange Act of 1934, just like any other stock. These registration requirements ensure that current and potential investors receive material information about the company, including details about the company's finances, management, risks and governance, as well as details about the rights of the security and its holders. Tokenized ETFs similarly would register under the Investment Company Act of 1940 (typically via Form N-1A), just as non-tokenized ETFs are required today. Tokenized bond issuances would also remain subject to registration and regulation under the Securities Act of 1933. There is no reason why the technology underpinning a Financial Security alone should change the well-trodden path for registration under the federal securities laws for those products, where investors are provided material information and liability protections.

All offers and sales of digital assets that are Financial Securities and Digital Asset Investments would be subject to some form of registration prior to listing or trading unless an existing regulatory exemption from registration is applicable to them. However, new or amended forms and line-item requirements may be necessary in both cases to account for the fact that existing forms may not account for the unique ownership and management structures, business or other attributes as do non-digital securities. Moreover, disclosure requirements for Digital Asset Investment Contracts (provided that they are not exempt from registration under Reg. A) can be tailored to their risk profile. This could be best accomplished by creating new registration forms and requirements that recognize the technological and organizational differences between Financial Securities and Digital Asset Investment Contracts. For example, determining who serves as the issuer of a Digital Asset Investment Contract would enable that person or entity to fulfill to some extent the important role currently played by issuers. Likewise, to reduce regulatory arbitrage, it would help for the Commission to coordinate with fellow regulators in other jurisdictions to ensure equivalent treatment of digital assets that trade across regulatory jurisdictions.

Nasdaq recommends that the SEC and CFTC jointly develop a common registration scheme for digital assets that are not Financial Securities, including unified registration forms and self-certification process. A new form would allow registrants to self-certify the taxonomy of a digital asset as a Digital Asset Investment Contract, a Digital Asset Commodity, or a Temporarily Unclassified Digital Asset. To limit regulatory arbitrage towards the least

burdensome regulatory framework, self-certification would be backed by the registrant's good faith and the opinion of an independent third-party expert, which could include a law firm or a registered trading platform. The self-certification would be subject to a look-back of 60 days, during which either the SEC or the CFTC could challenge its validity subject to due process and specified standards of review.[17] The bi-partisan FIT21 legislation also contemplates a look-back process.[18]

Ultimately, a digital asset properly registered as a Financial Security would become subject to exclusive SEC jurisdiction and would be subject to all federal securities laws, including those laws applicable to securities registration.[19] A Digital Asset Investment Contract, which is also a security, would also be subject to exclusive SEC jurisdiction, but as discussed, it would be subject to unique regulatory requirements (or it may be exempt from registration if it meets the requirements of Regulation A). Likewise, a Digital Asset Commodity would become subject to exclusive CFTC jurisdiction and would be subject to the federal commodities laws. Finally, if a registrant registers a digital asset as a Temporarily Unclassified Digital Asset, and that classification is unchallenged, then as discussed above, jurisdiction and requirements would be determined by the nature of the characteristics that the asset exhibits at the time of registration.

Although the identity of the proper registrant of a Financial Security or a Digital Asset Investment Contract would be clear as set forth under federal securities laws, the identity of the proper registrant may be less clear for Temporarily Unclassified Digital Assets. Many digital assets lack traditional concepts like "issuers," centralized executive management, or controlling ownership interests. To resolve this uncertainty, we propose that registration responsibility rest first with traditional registrant parties, if they exist and are applicable; these could include an issuer, a market maker (in a context analogous to a market maker filing FINRA Form 211 to effectuate trading of OTC securities), or the platforms seeking to trade the assets. If none of these are present, then registration responsibility would rest with another person to be determined (subject to regulatory approval) by and among the community involved in the creation, design, governance, operation, maintenance, and promotion of the digital asset (the "Participant Community"). That is, in the absence of a traditional registrant, the Participant Community would be responsible for selecting among themselves a bona fide and duly qualified representative (the "Designated Representative") to register the Temporarily Unclassified Digital Asset and assume responsibility (jointly and severally with the Participant Community) for

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17 Look-back rights should also apply whenever the registrant applies to re-classify an asset as well as whenever the registrant files an update to its registration form that discloses a material change to the asset, such as a change of control or a change of functionality, utility, or rights.

18 FIT21 proposes a self-certification process where the SEC would have 60 days to reject self-certification before certain assets on a system would be considered "digital commodities" subject to CFTC jurisdiction. See FIT21, Section 304.

19 Nasdaq supports the Division of Corporate Finance's recent statement adapting the federal securities registration and disclosure regulations to account for unique characteristics of digital asset securities. See Division of Corporate Finance, "Offerings and Registrations of Securities in the Crypto Asset Markets," Apr. 10, 2025, at https://www.sec.gov/newsroom/speeches-statements/cf-crypto-securities-041025?utm_medium=email&utm_source=govdelivery. For example, we support adapting Form S-1 to allow for the descriptions of the business and securities to reflect the particulars of digital assets securities, such as token governance structures. Descriptions of real estate and equipment may not be relevant. Risk factors also may need to be tailored to the digital asset environment. Securities dilution may not be a factor that investors need to consider where voting or other rights are not affected by the supply of a digital asset.

regulatory compliance on an ongoing basis. Such a Designated Representative would be accountable for relevant disclosures and inquiries unless the Designated Representative withdraws, is replaced, or self-certifies that the Temporarily Unclassified Digital Asset is sufficiently decentralized such that no one else can qualify as a Designated Representative.

A process would be needed to resolve disputes as to competing claims to be valid members of the Participant Community or valid Designated Representatives. Regulators would be empowered to affirmatively appoint a Designated Representative of their own choice among the Participant Community, pursuant to due process, if the Participant Community does not reach consensus on its own Representative. Regulators could also veto the choice of a Designated Representative made by the Participant Community and appoint an alternative that they deem more appropriate for that role.

Under Nasdaq's proposal, registration of Temporarily Unclassified Digital Assets would entail certain ongoing requirements. For example, Designated Representatives would be required to certify that basic common disclosures will be kept current and accurate, including an established, regular cadence of predictable updates as well as more current updates, if required to account for the occurrence of material events. Specifically, Designated Representatives would be required to disclose to the SEC and CFTC any material changes in the ownership, control, functionality, utility, or contractual rights associated with the asset. Ongoing disclosure requirements would also apply to Temporarily Unclassified Digital Assets that exhibit security characteristics requiring periodic disclosures.

In a filing to the regulators, a registrant also would be able to certify that a previously unclassified or previously classified digital asset should be re-classified as a Digital Asset Investment Contract, a Digital Asset Commodity, or Other Digital Asset.[20] Regulators or Congress should issue specific guidance on factors that would warrant such re-classification.[21] For example, a Digital Asset Investment Contract issuer would be able to self-certify that the asset has changed from a security to a commodity due to, for example, an action or a series of actions that affected the decentralized control and operation of the asset. Any such proposed changes to digital asset taxonomy or characteristics should occur in good faith and be backed by the opinion of an independent third-party expert. Such proposed changes would also be subject to look-back periods.

III. Trading

As stated earlier, Nasdaq recommends that Financial Securities continue to register, list, trade, settle, and clear as they do today while the Commission charts a path to injecting new technology into the ecosystem.

Nasdaq also recommends that Congress, the Commission, and the CFTC act jointly to create a segregated market ecosystem built on existing structure that allows unified trading for all Digital Asset Investment Contracts, Digital Asset Commodities, Temporarily

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[20] Given the well-developed precedents of the limited categories of Financial Securities, the Temporarily Unclassified Digital Assets category is not designed for these digital assets. While there may be cases where a registrant would have to certify as to a re-classification to Financial Securities, we assume such reclassification would not be subject to the safe harbor.

[21] The Commission has issued some guidance on when an investment contract may be subject to re-classification as a commodity. See https://www.sec.gov/files/dlt-framework.pdf. More specific guidance is needed.

Unclassified Digital Assets, and Other Digital Assets.[22] This ecosystem would have several key characteristics. First, it would leverage familiar regulatory frameworks to ensure that markets are fair, secure, and orderly in nature. Second, this ecosystem would be structured to permit all digital assets (other than Financial Securities), regardless of classification, to trade side-by-side in the same venues. (Financial Securities would continue to trade on existing trading venue types, including national securities exchanges and ATSs.). Third, both existing digital assets trading platforms and "traditional" securities market operators (such as national securities exchanges) would be able to own and operate markets that trade the foregoing categories of non-Financial Security digital assets under a new regulatory framework and on a level competitive playing field. Fourth, it would include hallmarks of regulated markets that are neutral, transparent, and fair. Fifth, for reasons we discuss below, we recommend that such trading venues interact with investors through brokers, but if they employ a direct-to-investor model, then we suggest that the direct-to-investor venues assume best execution and best interest duties on investors' behalf or otherwise impose investor suitability requirements.

Specifically, Nasdaq proposes that the Commission and CFTC act jointly to create a special purpose ATS-D to be administered by the SEC and the CFTC, depending on the digital assets traded.[23] We propose that all Digital Asset Investment Contracts and Temporarily Unclassified Digital Assets be required to trade on such ATS-Ds, while Digital Asset

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[22] Although the Commodities Exchange Act and the Exchange Act of 1934 do not expressly prohibit securities trading alongside commodities or other assets in a single trading venue, it is not clear that Congress contemplated that possibility either. Thus, express Congressional authorization is preferable to remove any jurisdictional doubts as well as to facilitate efficient administration and oversight of an ATS-D that trades multiple classes of digital assets. There are different ways in which joint administration and oversight of ATS-Ds could be accomplished. We recommend the following:

- Congress would designate the SEC as being the primary regulator of an ATS-D for administrative purposes given that the concept is a creature of Regulation ATS. The SEC would be responsible for evaluating application forms to register new ATS-Ds (presumably, on a Form ATS-D) and for monitoring ATS-Ds for compliance with Regulation ATS. However, the CFTC also would have authority to weigh in on aspects of an ATS-D application that pertain to a venue's proposal to trade Digital Asset Commodities. (We note that banking regulation features similar concepts of primary and backup regulators for consumer financial products and services.)
- For ongoing oversight of products traded on ATS-Ds, we suggest that Congress designate the SEC to be the exclusive regulator of all Digital Asset Investment Contracts, while the CFTC would be the exclusive regulator of all Digital Commodities traded on ATS-Ds.
- We recommend that Congress direct the CFTC and SEC to issue joint rules providing for joint jurisdiction over Temporarily Unclassified Digital Assets, including a joint process for reaching decisions on the appropriate regulatory classifications of such Assets.
- Congress could also grant limited joint jurisdiction for these agencies to oversee trading of Other Digital Assets on ATS-Ds, but such limited jurisdiction would not include authority to substantively regulate Other Digital Assets. Thus, the CFTC and SEC would have power to establish general rules governing the terms and conditions in which Other Digital Assets can trade on ATS-Ds, but they would not impose registration requirements on Other Digital Assets and would not enforce violations of federal consumer financial laws or state laws that might apply to such assets. The agencies could refer suspected violations to competent authorities, such as the Federal Trade Commission, but could not undertake enforcement actions.

[23] Nasdaq proposes that both newly formed and existing digital assets trading platforms be required to register with the SEC as ATS-Ds to trade Digital Asset Investment Contracts or Temporarily Unclassified Digital Assets.

Commodities and Other Digital Assets would have the option to trade there. All categories of digital assets eligible to trade on an ATS-D could trade side-by-side under the same rules.

Nasdaq envisions that an ATS-D would operate like an existing ATS with a few exceptions:

- First, we propose that fair access requirements apply, regardless of trading volumes, to ensure that ATS-Ds are broadly accessible to the public as well as to ensure that such markets are not subject to anticompetitive behavior by vertically integrated platforms with exclusive ownership of key technologies, like proprietary blockchains. Accordingly, ATS-Ds would be required to establish written standards for granting access to trading on the venue and not unreasonably prohibit or limit access or grant access on unfair or discriminatory terms. Blockchain technology used to effectuate transactions on ATS-Ds also should be interoperable with those of other ATS-Ds.
- Second, ATS-Ds would be required to provide at least some basic level quoting and trade transparency for free, and on a delayed basis, which would contribute to a basic form of consolidated market pricing (which third parties could then aggregate for the benefit of investors). ATS-Ds also should be able to offer real-time market data for sale. Such basic standards and contributions would alleviate concerns about market fragmentation and yet not rise to as burdensome a standard as a consolidated tape or National Best-Bid or Offer requirement. For example, an ATS-D might be required to publish on its website, or through a data feed, its top of book displayed quotes.
- Third, Nasdaq proposes that best execution obligations apply to intermediaries acting on behalf of investors, like broker-dealers, to ensure that the intermediaries obtain the most favorable terms for their customers. Requiring ATS-Ds to publish execution quality statistics would aid brokers in fulfilling this obligation. To the extent that the Commission permits ATS-Ds to market digital assets directly to retail investors, without use of broker intermediaries, then the Commission should require the ATS-Ds to assume a best execution duty to ensure that investors have access to the best available executions, not only on that particular ATS-D, but also across the entire marketplace.
- Fourth, we propose that an ATS-D may choose to impose requirements for listing the digital assets they choose to trade, but the initial listings process would need to be streamlined and customized for this purpose.
- Fifth, we propose that trades executed on an ATS-D be reported to a trade reporting facility that consolidates and publicly disseminates trading information from multiple ATS-Ds, similar to over-the-counter equities trades. [24]

Nasdaq proposes that Financial Securities, whether in digital or analogue form, would not be eligible to trade on ATS-Ds. To ensure that the markets for digital assets are subject to free and fair competition, we propose that both broker-dealers and national securities exchanges be free to own and operate ATS-Ds as separate and distinct trading venues.[25]

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[24] FIT21 proposes that digital asset trading platforms would have similar features, including rules for fair access, notice, order display, capacity, integrity, and security. See FIT21, Section 404(b).

[25] Congress and the CFTC should also consider whether it would be appropriate to authorize commodities market participants to own and operate an ATS-D.

Moreover, to the extent that an exchange owns and operates an ATS-D, we recommend that the Commission recognize and respect the distinction between the exchange's facilities used to operate its traditional equities market and those used to operate the ATS-D. Said otherwise, we recommend that the Commission regulate the ATS-D in accordance with Regulation ATS rather than treating it as a facility of an exchange. National securities exchanges have unparalleled experience and expertise in soundly operating the world's deepest and most transparent pools of liquidity – even in volatile and uncertain times. We ask the Commission to refrain from artificially constricting competition by impeding the ability of exchanges to leverage this experience and expertise and apply it to digital assets markets. The Commission should not hold exchanges owning and operating ATS-Ds to a higher operating and regulatory standard than it does to other entities owning and operating ATS-Ds.

IV. Initial Offerings of Digital Assets on Digital Asset Trading Platforms

For many initial offerings of Digital Asset Investment Contracts, Nasdaq believes that Regulation A under the Securities Act of 1933 provides a workable framework for issuers, coupled with reasonable restrictions in place to ensure investor protection. After an issuer sells such Digital Asset Investment Contracts pursuant to Regulation A, the Digital Asset Investment Contracts can immediately be freely traded on an ATS-D, and the issuer would be required to comply with the more streamlined disclosure obligations under Regulation A as opposed to those required for an issuer selling through a conventional public offering process. While the Commission would likely need to make incremental tweaks to the Regulation A process for such offerings (e.g., expanding issuer eligibility beyond the U.S. and Canada, increasing the offering size, and revisiting the state blue sky limitations), Nasdaq believes that the existing framework can be further adopted and modernized to support the public offer and sale of Digital Asset Investment Contracts. For example, the two-tiered Regulation A exemption could be modified via a future Commission rulemaking that would add a third "tier" that would impose new disclosure obligations tailored to the unique nature of Digital Asset Investment Contract offerings, while reducing operating company disclosure requirements that would not be applicable or helpful to investors. Additionally, the Commission could look to aspects of other existing exempt offering frameworks to appropriately balance investor protection and disclosure concerns. For example, the availability of certain safe harbors under Regulation D that are based in part on the soliciting activities of an issuer, and the application of initial trading restrictions for purchasers in those offerings, are regulatory tools that can be utilized by the Commission to build out a framework for the offer and sale of Digital Asset Investment Contracts.

Similarly, for initial offerings of digital assets representing Financial Securities, Nasdaq believes that the existing framework for initial public offerings and direct listings of ordinary equity securities is the right framework for these instruments. Under the existing framework, the issuer has the choice to either engage in an initial public offering (generally involving the use of an underwriter to assist in the initial sales) or to conduct a direct listing of the securities onto an exchange. These options should continue to work for offerings of digital assets representing Financial Securities, but as noted above, tweaks may be required in certain instances to tailor

initial registration requirements and disclosures to digital assets with ownership and management structures and other characteristics that differ from traditional issuers. [26]

V. The Risks of Trading Digital Assets in Vertically Integrated and Direct-to-Retail Digital Asset Markets

Some existing digital asset trading platforms seek freedom to operate in a vertically integrated, direct-to-retail business model that eschews the third-party intermediaries which traditionally serve the securities markets, such as brokers, underwriters, clearing firms, and custodians. These platforms assert that consolidation of all aspects of a securities transaction into a single entity will reduce costs and offer other efficiencies. However, the Commission should consider whether this approach poses undue concentration risks to both investors and the markets – risks that the Commission has wisely chosen to mitigate by requiring the separation and independent performance of key functions in the securities transaction chain. Indeed, the distributed structure of traditional securities markets is no relic of a bygone era. It is not something that occurred due to technological or geographic limitations that impeded efficiency. Instead, the existing structure is the product of prudent decision-making and hard lessons learned from almost a century of experiences, both good and bad.

This structure is also populated with skilled intermediaries with extensive knowledge of and experience with varying market conditions and trends. It incentivizes brokers to research and analyze these trends and educate and advise investors on how to navigate them. It has facilitated access to liquidity by ensuring that trades can be executed efficiently without significantly impacting market prices, especially in highly fragmented markets. This structure facilitates regulatory compliance by ensuring that a regulated entity, subject to oversight, is accountable for every link in the transaction chain. In short, the existing system adds tremendous value for the markets and investors. We recommend that the Commission be wary about discarding this structure in the name of efficiency.[27]

In any event, we disagree with the premise that the vertically integrated model would necessarily offer meaningful efficiency gains and cost savings relative to today's markets. Today's markets already employ bleeding edge technologies to process transactions and transmit data reliably and securely at almost unfathomable speeds – and at little to no costs to investors. By contrast, many blockchain transactions still take minutes to confirm and can be expensive for investors to execute, especially during periods of heightened market activity. Whereas exchanges are subject to capacity planning requirements and scale up successfully during volatile times, the same has not been true historically for many digital assets trading platforms.[28] Some of these platforms continue to suffer from blockchain network congestion during times of

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[26] With respect to initial public offerings, we note the investor protection benefits afforded by utilizing traditional "gatekeepers" who take liability under the existing framework. For example, underwriters are incentivized to take their diligence obligations seriously due to Section 11 liability for a registration statement. Similarly, law firms must provide a legality opinion on a new issuance.

[27] If the Commission permits digital assets to trade in vertically integrated direct-to-retail platforms, then it should consider allowing exchanges and conventional ATSs to organize themselves similarly.

[28] See, e.g., Misyrlena Egkolfopoulou and Charlie Wells, "Crypto Investors Fume as World's Biggest Platforms Are Disrupted," Bloomberg News, May 19, 2021, at https://www.bloomberg.com/news/articles/2021-05-19/world-s-top-crypto-platforms-disrupted-as-bitcoin-ether-tumble.

volatility, which leads to slower transaction processing speeds and higher costs to investors. Some of these platforms have even experienced outages during high-traffic events, such as the 2021 crypto bull run, due to infrastructure that was ill-prepared to manage rapid user growth and high trading volumes. During these periods of high demand, digital asset investors reportedly experienced difficulties buying, selling, or even reliably viewing their balances. Despite the complexities of the traditional securities market ecosystem, such outages are rare on securities markets.

Even if vertically integrated platforms can, in fact, deliver on their efficiency promises, efficiency gains alone may not outweigh the countervailing risks to investors posed by conflicts of interest, or the absence of brokers to pursue best executions on investors' behalf. Likewise, cost savings may not warrant countervailing risks to market stability, resiliency, and integrity posed by single points of failure and lack of interoperability.

If the Commission ultimately decides to permit vertically integrated digital asset trading platforms to operate under its new regime, then it may wish to consider whether to impose resiliency, capacity, security, and integrity requirements upon such platforms that are akin to requirements applicable to fair access ATSs.[29] Moreover, the Commission should consider requiring heightened standards for availability and resiliency if the concentration of security, operational, and regulatory risks into a single integrated platform creates a single point of failure. The Commission could require these platforms to adopt policies and procedures that are reasonably designed to ensure that they operate securely, with integrity, and in compliance with applicable regulations. It could require these platforms to be transparent about and be accountable for security breaches, technical outages, and degradations. Furthermore, the Commission should consider applying such standards to the blockchain technologies that vertically integrated platforms rely upon to create and trade digital assets.[30]

Likewise, if the Commission allows for digital assets trading platforms to serve retail investors directly, then we recommend that the Commission consider taking steps to mitigate the risks to investors that third-party intermediaries like brokers and clearing firms currently mitigate in traditional securities trading ecosystems. These risks include conflicts of interest that arise when the same firm clears and settles both sides of a transaction and disputes that may occur about transaction terms or execution errors. There also are risks that retail investors will receive bad executions if they lack the sophistication or resources that a broker possesses to survey and access liquidity available on multiple markets. At a minimum, we recommend that the Commission mitigate these risks by imposing safeguards like investor suitability requirements when brokers are not present.[31] The Commission also may wish to consider whether to impose duties on direct-to-retail digital asset trading platforms, including the duties of best interest and best execution, to help mitigate conflicts of interest and to provide retail investors with assurance that they will receive best prices available throughout the markets. Finally, it may be prudent to

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29 FIT21 also proposes that digital asset trading platforms be subject to standards for capacity, integrity, and security. See FIT21, Section 404(b).

30 Blockchain outages are not theoretical. See Tom Blackstone, "Arbitrum network went offline for 78 minutes because of inscriptions," December 15, 2023, at https://cointelegraph.com/news/arbitrum-network-goes-offline-december-15.

31 FIT21 would require procedures to mitigate conflicts of interest, but it does not specify what these procedures entail. See FIT21, Section 408.

make available to digital assets investors the protections of SIPC, which insures investors against certain securities losses caused by fraud or broker-dealer failures.

Recent history suggests that the Commission cannot afford to leave vertically integrated and direct-to-retail digital assets platforms to manage these risks themselves.[32] Indeed, one need only look to FTX or Voyager to understand the concern with consolidating many functions within individual digital asset trading platforms.[33] To be clear, the relevant concern is not limited to scandal, as trading platforms – including traditional securities exchanges – are not immune to risks. However, for digital assets trading platforms, the risks involved – and the potential harms arising from them – are uniquely serious as the risks are concentrated and self-managed.[34]

Lastly, the Commission should consider the competitive risks presented by vertically integrated digital assets trading platforms. The risk exists that these platforms could leverage their ownership of key proprietary technologies, like the blockchain and transaction sequencers, to hinder competition and achieve other anticompetitive ends. For example, a platform could abuse its control of a central sequencer or its block proposing infrastructure by prioritizing the addition of transactions to the blockchain in a manner that preferences important customers. It could cross-subsidize or unfairly tie products together that users don't want or need. Vertically integrated platforms could refuse to deal with issuers and others that do not wish to utilize the platform's full vertical technology stack. A platform could refuse to make its technologies interoperable with those of competing platforms. Again, if the Commission chooses to permit digital assets to trade on vertically integrated trading platforms, it should address and mitigate these risks. Mitigation measures could include requiring digital asset trading platforms like ATS-Ds to make their blockchains interoperable and to provide access to their blockchains on fair, reasonable, and non-discriminatory terms. It might also require platforms that own centralized sequencers to have transparent and fair rules regarding sequencer prioritization.

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32 See, e.g., Mt. Gox exchange collapse (2014)(approximately $450 million at time of collapse); DAO hack (2016) (estimated losses of $60 million at the time); Bitfinex hack (2016)(estimated losses of $72 million at the time); Coincheck hack (2018)(estimated losses of $534 million); QuadrigaCX collapse (2018)(losses of approximately $190 million); BitGrail hack (2019) (losses of approximately $170 million); KuCoin hack (losses of approximately $281 million); Fcoin Exchange insolvency (2020) (estimated losses of $130 million); Poly Network hack (2021) (estimated losses of $611 million); BitMart hack (2021) (losses of approximately $196 million); Ronin Bridge hack (2024) (losses of approximately $375 million); GAM3R.BET protocol exploit (2024) (estimated losses of $240 million).

33 FTX, a digital assets exchange, collapsed due to conflicts of interest between it and its affiliated trading arm, Alameda Research, whereby FTX secretly and without authorization loaned its customers' funds to Alameda to help Alameda cover its own trading losses. Meanwhile, Voyager served as both a custodian of its customer's digital asset deposits and aa lender of those same assets to third parties. It collapsed when its loans of customer deposits went bad, and it was unable to satisfy customer requests for withdrawals.

34 We support FIT21's proposal to prohibit digital asset trading platforms from also acting as a custodian for customer's digital asset holdings. See FIT21, Section 404 (requiring use of a "Qualified Digital Asset Custodian").

VI. The Risks of Atomic Settlement of Digital Asset Securities

The Commission should consider whether the markets would benefit from instantaneous or "atomic" settlement of digital asset securities on the blockchain. We recommend that the Commission proceed cautiously on this topic.

For example, the Commission should consider the potential impact of atomic settlement on liquidity and credit. We agree with SIFMA, which recently cautioned the Crypto Task Force that a move to atomic settlement risks disrupting the ability of investors to lend securities, including the ability of companies to pledge shares for collateral to meet their short-term financing needs.[35] These impacts would be serious because the provision of credit in the capital markets is important to increasing liquidity. It frees up funds for buying and selling securities and for diversifying portfolios without the need to liquidate existing assets. The availability of credit also helps to stabilize markets during times of stress, ensuring that there are always funds available to support trading activity.

The Commission should consider the impact of atomic settlement on intraday operational and credit risks – risks that market participants mitigate now through netting settlements at the end of trading days. Such risks may increase if settlements were to occur on a transaction-by-transaction basis.

Furthermore, atomic settlement could place investors at risk by limiting the ability of trading platforms to readily provide recourse to investors for unauthorized or erroneous trades, such as Nasdaq's ability to nullify clearly erroneous trades prior to settlement.

Moreover, the benefits of atomic settlement may be overstated in that it does not, in fact, provide for instantaneous transaction settlement; a gap will still exist between the time when a transaction executes and when it is recorded on the blockchain. Although this gap may be small, the fact that it still exists raises the question of whether atomic settlement really obviates the need for traditional settlement services.

In short, the Commission should consider whether the potential costs of moving from T+1 to atomic settlement outweigh the benefits of doing so. At a minimum, this is a subject that requires much closer evaluation and consideration before the Commission takes any steps in that direction.

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[35] See SIFMA, "SEC Crypto Task Force: Initial Feedback," March 2025, at 13, at https://www.sec.gov/files/ctf-memo-sifma-2025-3-14.pdf.

VII. Conclusion

Nasdaq appreciates the Commission's consideration of this comment letter. We are excited to embark on this journey and leverage our expertise and experience to ensure the journey is safe and successful for our markets and for investors. We are available to the Commission and to the Crypto Task Force at your convenience to discuss any questions you may have.

Sincerely,

John A. Zecca

Cc: The Honorable Paul S. Atkins, Chairman, SEC
The Honorable Mark T. Uyeda, Commissioner, SEC
The Honorable Hester M. Peirce, Commissioner, SEC
The Honorable Caroline A. Crenshaw, Commissioner, SEC
Richard Gabbert, SEC Crypto Task Force, Chief of Staff
Michael Selig, SEC Crypto Task Force, Chief Counsel
Taylor Asher, SEC Crypto Task Force, Chief Policy Advisor
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Laura Powell, SEC Crypto Task Force, Senior Advisor
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