BLOCKCHAIN ASSOCIATION

April 18, 2022

VIA EMAIL (rule-comments@sec.gov)

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

Re: Notice of Proposed Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade US Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade US Treasury Securities and Agency Securities (Release No. 34-94062; File No. S7-02-22; Fed. Reg. No. 2022-01975)

Dear Ms. Countryman:

The Blockchain Association submits this letter in response to the request for comments by the US Securities and Exchange Commission ("SEC") with respect to its proposal to amend the interpretation of the definition of "exchange" in Rule 3b-16 ("Rule 3b-16") under the Securities Exchange Act of 1934 ("Exchange Act") and to make certain other amendments to Regulation ATS and Regulation SCI under the Exchange Act ("Proposal").[1]

The Blockchain Association is a nonprofit organization dedicated to improving the public policy environment for public blockchain networks so that they can develop and prosper in the United States. We endeavor to educate policymakers, courts, law enforcement, and the public about blockchain technology and the need for regulatory clarity to allow for a more secure, competitive, and innovative digital marketplace. The Association is comprised of over 80 industry leaders who are committed to responsibly developing and supporting public blockchain networks fueled by cryptocurrencies. Our diverse membership reflects the wide range of this dynamic market and includes crypto exchanges, custodians, software developers, early-stage investors, trading firms, and others supporting the crypto ecosystem.

We write to highlight the following concerns with the Proposal, as further discussed below. First, the expansions to Rule 3b-16 under the Proposal exceed the scope of the SEC's statutory authority under the Exchange Act by subjecting actors and activities not covered by the definition of "exchange" under Section 3(a)(1) of the Exchange Act to substantial regulation. Second, the SEC's promulgation of the Proposal violates statutory rulemaking requirements by eliminating the opportunity for meaningful stakeholder engagement in the rulemaking process, both by providing an insufficient comment period and by offering insufficient analysis relating to the detrimental, and potentially fatal, impact of the Proposal on an entire industry. Third, we are concerned by the vagueness of the Proposal with respect to decentralized finance in light of the SEC's recent efforts to regulate the industry.

[1] *See* Amendments to the Definition of Exchange; Alternative Trading Systems That Trade U.S. Government Securities, National Market System Stocks, and Other Securities; etc., Fed. Reg. No. 2022-01975 (Mar. 18, 2022) (the "Proposal").

I. Existing Regulatory Framework.

Section 3(a)(1) of the Exchange Act defines "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."[2] It then defines "facility" when "used with respect to an exchange" as an exchange's "premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service."[3]

The SEC's current interpretation of the definition set forth in Section 3(a)(1), codified in Rule 3b-16, outlines a two-part test whereby an "organization, association, or group of persons" shall be deemed an exchange "if such organization, association, or group of persons: (i) brings together the orders for securities of multiple buyers and sellers; and (ii) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade."[4] Rule 3b-16 defines an "order" as "any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limited order, or other priced order."[5]

Under the current regulatory framework, platforms that facilitate communications between buyers and sellers of securities need not register as an exchange or an alternative trading system where (i) the communications do not involve firm indications of willingness to buy or sell a security, or (ii) actors on the platform do not "use" established, non-discretionary methods governing the interactions between firm indications of willingness to buy or sell a security. Such platforms also need not register as broker-dealers.[6]

II. Decentralized Finance Protocols.

Decentralized finance, and decentralized exchange protocols through which digital assets may be traded, operate autonomously and automatically through smart contracts and the participation of their users ("Decentralized Protocols"). Decentralized Protocols are

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[2] 15 U.S.C. § 78c(a)(1).

[3] 15 U.S.C. § 78c(a)(2).

[4] 17 C.F.R. § 240.3b-16(a).

[5] 17 C.F.R. § 240.3b-16(c).

[6] *See, e.g.*, Neptune Networks, Ltd., SEC No Action Letter (Mar. 4, 2020) (recommending no enforcement action against a cryptographic communications protocol that is not registered as a broker-dealer or alternative trading system and that connects, and facilitates communication between, sell-side and buy-side market participants, but which "is not involved in the post-execution transaction process" such as "booking, confirmation, clearance and settlement with respect to any such transaction" and which does not receive any transaction-based compensation).

disintermediated by nature: no actor facilitates or effectuates transactions between users. In other words, no organization, association, or group of persons is necessary to administer such protocols, or provides a trading facility or rules under which users may interact and transact. Thus, although established, non-discretionary methods governing the interactions between users and the settlement of transactions may exist on such protocols, no actor "uses" such established, non-discretionary methods in the sense contemplated by Section 3(a)(1).

Decentralized Protocols remove intermediaries that would traditionally be subject to regulation under the Exchange Act. Instead, Decentralized Protocols permit users to interact on a peer-to-peer basis, which renders intermediaries unnecessary to execute transactions. Put differently, neither the actors nor the conduct meant to be captured by Section 3(a)(1) are present in communications and transactions involving Decentralized Protocols. Thus, to the extent that the proposed expansion of Rule 3b-16 would capture such protocols and activities, the SEC would exceed the scope of its statutory authority under the Exchange Act.[7]

We note that, in general, the Exchange Act and these related provisions do not apply to transactions through Decentralized Protocols unless they involve securities. Whether and when a given digital asset may qualify as a security under the US federal securities laws remains unclear. Yet, given the SEC's expansive view of what may be deemed a security, there remains a risk that certain digital assets that users trade through Decentralized Protocols may (ex post) be deemed by the SEC to be securities. Accordingly, this comment letter seeks to address ambiguities and challenges in the potential impact of the Proposal on Decentralized Protocols.

III. The Proposal Exceeds the SEC's Statutory Authority Under the Exchange Act.

The Proposal seeks to expand the SEC's Rule 3b-16 interpretation of the definition of "exchange" under Section 3(a)(1) to encompass communications protocol systems that "(1) bring[] together buyers and sellers of securities using trading interest; and (2) make[] available established, non-discretionary methods (whether by providing a trading facility or communication protocols, or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade."[8] This overly expansive revision will allow the SEC to deem persons that merely provide *access* to Decentralized Protocols as exchanges. As a result, such persons would have to register as broker-dealers and alternative trading systems and be subject to SEC regulations and FINRA rules, despite the absence of any intermediary or any intermediary-like conduct in connection with securities transactions.[9]

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[7] Under the Administrative Procedure Act, a "reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

[8] Proposal at 34.

[9] *See, e.g.*, Allyson Versprille, *SEC's Lone Republican Warns of Threat to Crypto DeFi Platforms in New Agency Plan*, Bloomberg (Feb. 1, 2022) (https://www.bloomberg.com/news/articles/2022-02-01/sec-s-peirce-sees-threat-to-crypto-defi-platforms-in-agency-plan) ("This proposal includes very expansive language, which, together with the chair's apparent interest in regulating all things crypto, suggests that it could be used to regulate crypto platforms. . . . The proposal could reach more types of trading mechanisms, including potentially DeFi protocols.").

A. Bringing Together Buyers and Sellers Using Trading Interests.

If adopted, the Proposal would amend Rule 3b-16 to shift the SEC's focus from interactions between *orders* on a platform to interactions between *actors* on a platform. It would also expand the definition to include "trading interests" that otherwise fail to constitute firm orders. The Proposal clarifies that "[t]rading interest, as proposed, would include not only orders, as the term is defined under Rule 3b-16(c)," but also "any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price."[10] Any interaction on a platform in which counterparties merely identify a security in connection with just one of the above-quoted qualities—quantity, direction, or price—would therefore subject that platform to registration as an exchange or an alternative trading system, even if no orders are placed or transactions executed on such platforms.

This is an extraordinarily broad definition. In defining an exchange, Section 3(a)(1) refers to "bringing together purchasers and sellers of securities." It does not include "prospective" purchasers and sellers, which the Proposal's inclusion of mere trading interests would capture. Merely indicating a possible interest in buying or selling a security without mentioning the quantity or pricing terms that would otherwise characterize an order would allow the SEC to deem a platform an exchange despite it not "performing with respect to securities the functions commonly performed by a stock exchange."[11] This amended definition improperly and substantially exceeds the scope of the SEC's statutory authority under the Exchange Act.

B. Making Available Established Non-Discretionary Methods.

If adopted, the Proposal would amend Rule 3b-16 to broaden the scope of the Exchange Act to include actors that merely *make available* non-discretionary methods under which this broadened notion of trading interests may interact. This departure from the existing Rule 3b-16 interpretation, which covers only those actors that *use* such non-discretionary methods, would vastly widen the SEC's jurisdictional reach with no corresponding statutory authorization.

Section 3(a)(1) limits those who can be deemed an "exchange" to "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."[12]

By contrast, the Proposal states that "[t]he term 'makes available' is also intended to make clear that, in the event that a party *other than the organization, association, or group of persons* performs a function on the exchange, the function performed by that party would still be captured for purposes of determining the scope of the exchange under Exchange Act Rule 3b-16."[13] In other words, the Proposal aims to expand the group of persons subject to the Exchange Act to

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[10] Proposal at 35.

[11] U.S.C. § 78c(a)(1).

[12] *Id*.

[13] Proposal at 40 (emphasis added).

include those who expressly do not fall under the statutory language of Section 3(a)(1). In the case of Decentralized Protocols, this could be interpreted to include the prospective buyers and sellers themselves, as well as the creators and maintainers of code, smart contracts, and online websites that merely provide access to Decentralized Protocols, all of whom are beyond the statutory definition Congress specified in the Exchange Act.

Importantly, Section 3(a)(1) defines an "exchange" through the use of active verbs: to be deemed an "exchange" under the statute, one must "constitute[], maintain[], or provide[] a market place or facilities" for the buying and selling of securities. As discussed above, Decentralized Protocols exist as autonomous, self-executing code deployed on public blockchain networks. Decentralized Protocols are not operated, controlled, maintained, or owned by "any organization, association, or group of persons, whether incorporated or unincorporated," as Section 3(a)(1) requires. Thus, Decentralized Protocols fall outside the scope of Section 3(a)(1) by definition.

The Proposal attempts to sidestep the active language animating the rule by noting that Regulation ATS "attribute[d] the activities of a trading facility to a system if that facility is offered by the system directly or indirectly (such as where a system arranges for a third party or parties to offer the trading facility)."[14] But that analogy does not extend to prospective buyers and sellers communicating on Decentralized Protocols, or to persons that create or provide access to Decentralized Protocols, as none "constitute[], maintain[], or provide[]" a market place or facilities for securities transactions.[15]

Likewise, holders of governance tokens related to Decentralized Protocols do not "constitute[], maintain[], or provide[]" a market place or facilities for securities transactions. Governance token holders constitute an unaffiliated, dispersed group of stakeholders with the power to alter the executable code that comprises a Decentralized Protocol; they do not actively control the day-to-day operations of the Decentralized Protocol, which operates autonomously and will continue to do so in perpetuity without relying on governance token holders whatsoever. Finally, Decentralized Protocols themselves cannot be captured by the statutory definition of "facility," as they consist merely of self-executing code and are therefore not "premises" or the "tangible or intangible property" of any "organization, association, or group of persons."[16]

IV. Insufficiency of Agency Review and Stakeholder Participation.

The Administrative Procedure Act states that a "reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[17] An agency rulemaking is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation

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[14] Proposal at 40.

[15] *See, e.g.*, Securities & Exchange Comm'n, *Framework for "Investment Contract" Analysis of Digital Assets* (Apr. 2, 2019) (https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets) (noting, specifically with respect to analysis of digital assets under the *Howey* test, that the SEC looks to the efforts of "Active Participants," which it defines as "a promotor, sponsor, or other third party (or affiliated group of third parties)" that provide "*essential managerial efforts* that affect the success of the enterprise" (emphasis added)).

[16] 15 U.S.C. § 78c(a)(2).

[17] 5 U.S.C. § 706(2)(A).

for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[18] An agency must adequately consider all aspects of a rule and "offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard."[19]

A. Lack of Adequate Comment Period.

The Administrative Procedure Act requires that an agency consider "relevant matter presented" during the notice and comment period,[20] including "comments which, if true, raise points relevant to the agency's decision and which . . . cast doubt on the reasonableness of a position taken by the agency."[21] To satisfy this requirement, an agency must "ensure that the public has a meaningful opportunity to participate in the regulatory comment process," which includes ensuring "that commenters have sufficient time to submit their comments."[22]

The Proposal could subject Decentralized Protocols to substantial regulation as well as significant and unprecedented industry-wide regulatory compliance burdens. Moreover, to the extent that adoption of the Proposal will cause the developers of code and smart contracts related to a Decentralized Protocol, or the maintainers of online websites that merely enable access to a Decentralized Protocol, to be captured under the "exchange" definition, such persons will not be in a position to cause the Decentralized Protocol, which operates on an autonomous and decentralized basis, to register as a broker-dealer and an alternative trading system and comply with the relevant regulations in relation thereto. Accordingly, the Proposal could have the effect of simply forcing such persons to cease their activities, effectively dealing a death blow to new activity in this sector while failing to achieve the Proposal's stated goals in regard to Decentralized Protocols that may already exist.

As noted in our March 10, 2022 letter to the SEC requesting an extension of the notice and comment period and as also recognized by Commissioner Peirce, thirty days is insufficient time to analyze the applicability and appropriateness of extending the Rule 3b-16 interpretation to

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[18] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[19] *Id.* at 56–57 (finding a National Highway Traffic Safety Administration rule revoking seatbelt requirements arbitrary and capricious because it "fail[ed] to analyze the continuous seatbelts in its own right" and "failed to offer any explanation why a continuous passive belt would engender the same adverse public reaction as the ignition interlock" where "every indication in the record point[ed] the other way" because "it is the agency's responsibility . . . to explain its decision").

[20] 5 U.S.C. § 533(b); *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

[21] *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 36 n. 58 (1977).

[22] US Senate Permanent Subcommittee on Investigations, *Abuses of the Federal Notice-And-Comment Rulemaking Process* at 8 (Oct. 22, 2019) (https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf) (citing Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (stating that a "meaningful opportunity to comment on any proposed regulation . . . should include a comment period of not less than 60 days")).

encompass decentralized communication systems protocols.[23] This is especially true given the SEC's failure to include or even mention such systems protocols, or digital asset protocols more generally, and the effect of the Proposal thereon in its analysis. This omission also exacerbates the lack of sufficient time offered to comment on the Proposal, as it requires commenters to conduct independent analyses of the applicability of the Proposal to Decentralized Protocols just to determine whether a comment is warranted. Thirty days is insufficient time both to perform this analysis and to fully consider and comment on the Proposal.

B. Insufficient Analysis.

Agencies must further "assess both the costs and the benefits of [an] intended regulation," "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," and make decisions based on "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."[24] The burden is higher for "significant regulatory action," which is defined in part as "any regulatory action that is likely to result in a rule that may . . . [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities," as well as rules that may "[r]aise novel legal or policy issues."[25]

The SEC focuses much of the Proposal's cost-benefit analysis on government securities and NMS stock alternative trading systems, identifying only 14 entities as "Other Communication Protocol Systems" that would be subject to regulation.[26] While we do not believe Decentralized Protocols should be subject to the Proposal, the Proposal's vagueness with respect to such Decentralized Protocols suggests that the SEC may intend to target more than just the 14 entities referenced therein. But the Proposal is silent about the substantial number of Decentralized Protocols that could be subject to SEC regulation through the Proposal's expansion of Rule 3b-16.

In fact, decentralized finance and other digital asset protocols are not mentioned once in the 650-page Proposal. This omission is significant: the Proposal notes that "certain restructuring costs, such as costs associated with making changes to business practices to comply with the broker-dealer registration requirements, could be significant," but dismisses this cost by noting that only "6 non-broker dealer operated Communication Protocol Systems without a broker-dealer affiliate could be required to restructure their business in order to comply with the

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[23] Latham & Watkins LLP, Letter to the SEC on behalf of the Blockchain Association regarding Release No. 34-94062 (Mar. 10, 2022) (https://www.sec.gov/comments/s7-02-22/s70222-20119197-272003.pdf); Commissioner Hester M. Peirce, *Dissenting Statement on the Proposal to Amend Regulation ATS* (Jan. 26, 2022) (https://www.sec.gov/news/statement/peirce-ats-20220126) ("It would have been an irresponsible abdication of our role as the primary overseer of the U.S. capital markets to limit the public to a 30-day comment period on fundamental changes to the $22 trillion Treasury market; it is unconscionably reckless to do so for a proposal the effects of which will reverberate through all of the markets that we regulate, in ways that we cannot foresee.").

[24] Exec. Order No. 12,866, 3 C.F.R. 638 (1993)

[25] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

[26] *See* Proposal at 475.

broker-dealer registration requirements."[27] We therefore respectfully request that the SEC clarify that it intends the Proposal to cover only the 14 entities identified therein.

Given the decentralized and autonomous nature of Decentralized Protocols, and the lack of an intermediary who could serve as a broker-dealer affiliate, the Proposal would impose significant financial and operational burdens that have not been considered by the Proposal. Indeed, without sufficient guidance from the SEC, these burdens may simply be insurmountable due to the incompatibility of the decentralized nature of Decentralized Protocols with the requirement for a centralized, regulated intermediary imposed by the "exchange" definition. It may simply be infeasible to cause Decentralized Protocols, persons such as software developers who write the code underlying Decentralized Protocols, maintainers of websites that provide access to Decentralized Protocols, and other participants in the decentralized finance ecosystem to register as broker-dealers or alternative trading systems and comply with the relevant regulations in relation thereto. The Proposal concedes that the SEC "is unable to provide estimates on certain restructuring related costs for a non-broker-dealer operated Communication Protocol System because the Commission does not have information regarding the scope of its restructuring, such as the need and the extent of required changes in current business practices, the need and the extent of consulting services, and its choice of entity type for incorporation."[28]

Without further guidance and clarity from the SEC, such costs imposed by the Proposal on Decentralized Protocols and related persons would be extensive. Moreover, without further guidance, it is unclear how such persons could achieve compliance with the relevant regulations. The result would stifle innovation and competition in this nascent industry. A failure to consider and analyze these consequences in connection with the Proposal is contrary to the requirements of the Administrative Procedure Act.

V. The Proposal is Improperly Vague.

To the extent that the SEC intends to use its expanded interpretation of Section 3(a)(1) in the Proposal's revisions to Rule 3b-16 to extend its regulatory reach over Decentralized Protocols,[29] the Proposal lacks any discussion, analysis, or even mention of decentralized finance, digital assets, or decentralized communications system protocols. Moreover, the Proposal does not include sufficient discussion regarding the breadth of the expansion resulting from the replacement of the term "uses" with "makes available" in Rule 3b-16(a)(2). The Proposal includes a brief, vague and rather cryptic discussion regarding the SEC's intention to capture any

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[27] Proposal at 491; *but see* Allyson Versprille, *SEC's Lone Republican Warns of Threat to Crypto DeFi Platforms in New Agency Plan*, Bloomberg (Feb. 1, 2022) (https://www.bloomberg.com/news/articles/2022-02-01/sec-s-peirce-sees-threat-to-crypto-defi-platforms-in-agency-plan) ("This proposal includes very expansive language, which, together with the chair's apparent interest in regulating all things crypto, suggests that it could be used to regulate crypto platforms. . . . The proposal could reach more types of trading mechanisms, including potentially DeFi protocols.").

[28] Proposal at 491–92.

[29] *See, e.g.,* Allyson Versprille, *SEC's Lone Republican Warns of Threat to Crypto DeFi Platforms in New Agency Plan*, Bloomberg (Feb. 1, 2022) (https://www.bloomberg.com/news/articles/2022-02-01/sec-s-peirce-sees-threat-to-crypto-defi-platforms-in-agency-plan) ("This proposal includes very expansive language, which, together with the chair's apparent interest in regulating all things crypto, suggests that it could be used to regulate crypto platforms. . . . The proposal could reach more types of trading mechanisms, including potentially DeFi protocols.").

"party other than the organization, association or group of persons [that] performs a function of the exchange," without describing what types of market participants would actually be captured as a result of the expansion.[30] We are concerned that the SEC's promulgation of this vague and expansive interpretation will only serve the goal of regulation through enforcement, rather than engaging in the meaningful and constructive stakeholder participation required by the Administrative Procedure Act.[31]

"Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."[32] While an agency's interpretation of its own regulations is granted significant judicial deference,[33] the Proposal's vagueness with respect to the application and reach of the possible expansion of Section 3(a)(1) through Rule 3b-16 will test or exceed the limits of such deference if and when the Commission later seeks to apply the new rule to Decentralized Protocols.[34] We respectfully submit that the SEC should not promulgate a vague regulation and later avail itself of administrative deference when interpreting it in actions not subject to the important notice and comment period. We therefore respectfully request that the SEC revise the Proposal to clarify its intention with respect to Decentralized Protocols, rather than perpetuating and intensifying the existing regulatory uncertainty surrounding these novel and innovative technologies.

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The goals of the Blockchain Association and the SEC are aligned in seeking operational transparency and fair access, and we encourage the SEC to revise its Proposal to ensure clear and transparent regulatory oversight in this novel and innovative space. To that end, we appreciate the opportunity to provide comments with respect to this important rule-making. The staff of the Blockchain Association and our counsel are available to meet and discuss these matters with the SEC and to respond to any questions.

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[30] Proposal at 38.

[31] *See, e.g.*, Gary Gensler, Remarks Before the Aspen Security Forum (Aug. 3, 2021) (https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03) (noting a desire to prioritize bringing "crypto trading, lending and DeFi platforms" into "regulatory frameworks" and "public policy frameworks").

[32] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

[33] *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (internal quotation marks omitted)); *accord Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (stating that "the ultimate criterion" in interpreting agency rulemaking is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

[34] *See, e.g.,* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 616 (1996) ("Given the relative rigors of notice-and-comment rulemaking, . . . deference makes it easier for the agency simply to issue vague regulations and then put off the difficult policy questions until the relatively less demanding implementation stage.")

Respectfully submitted,

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