

**Testimony on
“Examining the Cryptocurrencies and ICO Markets”**

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Chairman Huizenga, Ranking Member Maloney, and Honorable Members of the Subcommittee, I am honored to be here today, and I am delighted that the Subcommittee is holding this hearing. I believe that Congress should pass legislation in the near term that will authorize and direct regulators to modify or eliminate regulations that needlessly impede the innovation and capital formation opportunities offered by the development of blockchain and cryptocurrency technologies,¹ while at the

¹ One of my clients describes a blockchain, non-technically but helpfully, as a spreadsheet that resides on no single computer but that is accessible from any computer. In this formulation, the terms “cryptocurrency,” “coins” and “tokens,” which I generally refer to as “**tokens**” or as “**cryptocurrency**,” are things that are tracked on the spreadsheet, and they can generally have almost any properties the token developer sets. In general, the company that issues the tokens or a related entity or foundation (collectively, the “**Token Company**”) also develops a blockchain-based platform that permits the tokens to be used in connection with specified types of commercial transactions, such as the purchase and sale of certain goods or services. The platform also may permit users to earn tokens by performing some service that is useful to the platform, such as by verifying the accuracy of information, or by providing information, that is relevant to the platform.

same time assuring that appropriate provisions are in place to protect token investors and token users.

I also believe that in the longer term, Congress should pass legislation establishing a comprehensive legislative and regulatory system governing blockchain and cryptocurrency in the United States. While I believe it is currently too early to know exactly what such a system would look like, I believe there are some principles and approaches that Congress can identify now, and that these can serve as a framework to begin developing that legislation.

My goal today is to describe the legislation that I believe Congress should adopt as soon as reasonably possible, and to also describe a framework for the more comprehensive legislation Congress may enact in the future.

Introduction

At the outset, I would like to introduce myself, and to briefly describe why I am so pleased to have the privilege of appearing before this Subcommittee today. I am a partner in the Washington DC office of the Palo Alto-based law firm Wilson Sonsini Goodrich & Rosati. Wilson Sonsini generally is recognized as the premier legal adviser to technology, life sciences and other growth enterprises worldwide. The views I present today are my own, and are not necessarily the views of Wilson Sonsini or of my partners and other colleagues. I also am not appearing here today on behalf of any client or any third party, and my clients might not agree with all or parts of my testimony.

I am the head of Wilson Sonsini's Blockchain and Cryptocurrency practice. I represent a large number of companies in their coin and token

offerings (often referred to as initial coin offerings, or “**ICOs**”).² I also represent, among others, institutional investors in connection with their investments in ICOs, private funds that invest in ICOs, companies that assist issuers in conducting ICOs, and companies that will provide advice to ICO investors. I have practiced in the securities and financial services field for over 30 years, and during that time I have represented public and private companies, private funds, registered funds, investment advisers, broker-dealers, fintech companies, law firms and a variety of other companies. I started my career at the Securities and Exchange Commission (“**SEC**”).

Blockchain Innovation. In the ten months or so since ICOs started becoming wide spread in the United States and throughout the world, I have had the pleasure of working with some amazingly talented and creative entrepreneurs who hope to use blockchain technology and tokens to:

- solve difficult issues, ranging from improving internet security to helping low- and moderate-income people obtain credit;
- create new types of businesses, such as businesses that permit individuals to determine whether and how to release private information, and to compensate those individuals for releasing that information; and
- dramatically reshape existing businesses, such as: (i) the way electrical power is delivered in the United States and other

² The terms “initial coin offering” and “ICO” are something of a misnomer. They likely are meant to refer to a public offering of tokens to the retail public. However, the SEC takes the position that most tokens are securities, and that it generally is illegal to sell tokens to the retail public unless, for example, the tokens are publicly registered or are qualified for public sale under Regulation A+. As a result, most initial offerings of tokens in the United States now involve private placements to accredited investors. In addition, in many of these offerings, the issuer actually sells an agreement to deliver tokens at some point in the future; this agreement often is referred to as a simple agreement for future tokens, or “**SAFT**.” For convenience, I will refer to the initial sale of both tokens and SAFTs as an ICO, regardless of whether the sale is public or private, and regardless of whether the instrument sold is a token or a SAFT.

developed countries, as well as the way it is delivered in third-world countries that lack developed power grids; (ii) the way people use and interact with each other through social media; and (iii) the way people determine the validity of the news they read and hear about.

Capital Formation Opportunities. I also have had the opportunity to represent Token Companies and token investors in what may be a new type of capital raising transaction that seems to potentially offer significant benefits to both. Until recently, a company that wanted to raise venture capital or other early-stage financing might sell common or preferred stock, convertible debt or other securities that give investors an economic interest in the company. A company seeking to raise traditional venture capital financing often is limited to raising small amounts at the earliest stages (often in the range of \$1 million to \$2 million), and the amount it can raise in later rounds (such as series A rounds and beyond) often is based on a negotiated valuation of the company (which does not necessarily reflect a fair valuation of the company).

ICOs may appropriately give certain Token Companies the ability to raise significantly more money than they could in traditional venture capital financings. Tokens generally do not provide holders any economic or voting rights in the company that sold them.³ Instead, the value of the tokens is intended to increase or decrease in tandem with the increasing or

³ At least in the early stages of most platforms, however, the token investors still may rely to a significant extent on the Token Company, such as to continue to develop, maintain and operate the platform; to market the platform to new users; perhaps to make continuing improvements to the platform, and perhaps to take other actions such as listing the tokens on an exchange or otherwise assisting in providing liquidity for the tokens. In addition, many Token Companies retain a significant number of the tokens, many of which they may sell or otherwise release in the future.

This is a key reason that the Securities and Exchange Commission (“SEC”) takes the position that most or virtually all tokens are securities. Investors in tokens pay money or other compensation for the tokens, they seek to profit through an increase in the value of the tokens, and they rely to a significant extent on the efforts of the Token Company for the expected increase in the value of the tokens. See *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946).

decreasing commercial success of the platform: as more people use the platform to engage in the intended commercial activities, more people need to purchase or obtain tokens to engage in those commercial activities, and this increasing demand for tokens should cause the value of the tokens to increase.

The value of the tokens, therefore, often is tied to investors' expectations of the likely commercial demand for the tokens, and the value investors assign to the tokens in an ICO often is largely independent of the value of the Token Company that issued them.⁴ If token investors expect the platform to be commercially successful, investors may be willing to invest significantly more in the related tokens than they would be willing to invest in equity or debt securities of the Token Company; in such a case, the Token Company is able to raise more money in an ICO than in a traditional venture financing transaction.⁵

⁴ For example, and entirely hypothetically, consider a commercially successful token-based platform that permits users to rent construction equipment from entities that have construction equipment that is not currently being used, and that requires the rental payments to be made in tokens. The company that created the platform and issued the tokens may find that in its location it is not able to profitably rent out its unused construction equipment, and instead the commercial success of the platform may be based on the success of other entities renting construction equipment in other locations. The token holders would be largely indifferent to the lack of commercial success by the token-issuing company.

⁵ An important, if challenging, point to keep in mind is that in many cases the Token Company does not "own" the platform, and the Token Company may or may not derive significant revenues from the platform it created. For example, many platforms are forms of marketplaces where many sellers and buyers of particular goods or services come together. In those types of platforms, the Token Company that created the platform may profit by, for example, providing goods and services on the platform, performing services for compensation on the platform, or holding tokens related to the platform that may over time appreciate in value. On the other hand, if the platform is successful but the Token Company is not a successful competitor on the platform, the Token Company may not get much or any revenue from the platform, even though other participants on the platform might generate significant revenue from it.

Of course, token platform models take many forms, and some platforms are set up specifically to provide continuing revenue streams to the Token Company that created the platform. For example, some Token Companies may be the exclusive provider of services on the platforms they create, or they may charge fees on platform transactions or activity regardless of their role in the transaction.

ICO investors effectively are able to crowdfund the development of the platform (a type of crowdfunded project finance), may be able to get liquidity in the tokens far sooner than they can get liquidity in a traditional startup or venture capital investment, and may also use the tokens to transact business on the related platform.

Fraud and Misconduct Concerns. Unfortunately, as various recent SEC and CFTC actions have demonstrated, blockchain and cryptocurrency technology also offer opportunities for fraud and a variety of other potential misconduct. As a result, I believe that there needs to be an appropriate and tailored regulatory scheme that encourages and facilitates innovation and capital formation, while at the same time guarding against fraud and other misconduct. I believe Congress should play an important role in establishing that regulatory scheme.

A Suggested Two-Step Legislative Approach

I believe it is too early for Congress and the federal regulators to enact a comprehensive legislative or regulatory scheme governing cryptocurrency. With a few exceptions, widespread efforts to develop tokens and token platforms began in earnest late last spring, so that for the most part we have had less than a year's experience with tokens and token platforms.

To date, we have seen a number of token and SAFT offerings, but we have very few examples of functioning token platforms. Outside of Bitcoin, Ether and a few other general purpose cryptocurrencies, we have very few examples in the United States of freely tradeable or freely-trading tokens. We do not yet have any tokens that have been publicly registered or that are qualified under Regulation A+. And we don't yet have any exchanges or alternative trading systems that are authorized to trade tokens that are securities.

All of these things will happen, and they hopefully will start to happen fairly soon. Once they do, the markets will undoubtedly develop in ways we can't predict, we likely will find unexpected regulatory barriers and hurdles, and we may find that we need significantly new ways of combatting concerns like money laundering, data falsification, and identity theft.

We also don't have a clear sense of the types of uses blockchain technology can be used for, so we don't yet know all the parameters that need to be considered in developing well-tailored legislation. As one example, artificial intelligence, or AI, may be combined with the significant capability of blockchain systems to obtain and store information; this opens the possibility of entirely new businesses and scientific advancements based on predicting individual or group behavior or attributes to ever-greater degrees of accuracy, and in ever-widening spheres of activity. On the other hand, it also opens the possibility of nefarious actors using the same technology to improperly manipulate individual or group behavior, to fraudulently obtain and misuse confidential personal and business information, and to potentially manipulate trading and other markets and activities that rely on particular people (such as stock analysts and market makers) receiving and acting upon accurate information.

As a result, I believe that we don't know enough - yet - about the emerging cryptocurrency markets and businesses to develop a comprehensive legislative or regulatory framework. There is a significant risk that even the best-intentioned framework will have unanticipated negative consequences.

We see this law of unintended consequences, perhaps, with New York's "Bitlicense" statute, which requires issuers and exchanges to obtain a special license to issue or trade cryptocurrency in New York State. The statute was written at a time when Bitcoin was essentially the only major cryptocurrency, and arguably an underlying premise of the statute is that all cryptocurrency will be currency that can be used for purchases and sales of any goods or service – that is, that all cryptocurrency will be like Bitcoin.

It turns out that most cryptocurrency is not like Bitcoin and instead is intended to be used only for specific purposes primarily on one or more designated token-based platforms. As a result, very few businesses have sought or obtained a Bitlicense, and perhaps the most significant impact of the Bitlicense statute is that many token issuers now exclude New York residents -- often alone among United States citizens -- from participating in their token or SAFT offerings.

Also, cryptocurrency is a global phenomenon, and different countries do and will regulate cryptocurrency differently. It would be extremely helpful for major countries to develop legislative and regulatory approaches to cryptocurrency that at least mesh well with each other. A country that regulates cryptocurrency in a significantly different and more onerous manner than other countries faces the risk, like New York State, that many issuers of cryptocurrency will simply avoid that country. On the other hand, given the potential dangers and risks of fraud and from nefarious actors in the blockchain and cryptocurrency industry, the United States and other responsible countries should not engage in a “race to the regulatory bottom” either.

I believe that there is important legislation that Congress can and should consider now, and I believe that Congress and others should begin thinking about what a comprehensive legislative and regulatory approach to cryptocurrency eventually might look like. I will address both of these in the remainder of my testimony. And I again thank the Subcommittee for holding this hearing, because I believe this hearing is an important step to moving forward on both legislative efforts.

Current Legislative Focus

I believe that Congress could immediately provide significant and appropriate assistance to emerging blockchain and cryptocurrency companies by passing legislation that achieves three aims: (1) appointing a single federal regulator, presumably the SEC, to have primary jurisdiction

over ICOs, tokens and token-related platforms (collectively, “**Token Activities**”); (2) authorizing and directing the SEC and other federal regulatory agencies to modify or waive various of their rules and regulations as they apply to Token Activities; and (3) preempting certain state substantive laws, such as State money transmitter laws and State securities registration provisions, as they apply to Token Activities.

Need for a Primary Federal Regulator. In addition to the innovation and capital formation opportunities that Blockchain and Token Activities offer, they sadly also offer the potential for fraud and other misconduct. Federal and state regulators naturally and appropriately will attempt to regulate against bad conduct that arguably falls within their spheres of influence. As a result, we already have seen the SEC, the CFTC and FinCEN assert jurisdiction over aspects of Token Activities, and it would not be surprising to see other federal regulators assert jurisdiction as well.

Congress should clarify that a single federal regulator has primary jurisdiction over Token Activities. This will provide regulatory certainty to the markets, and will help the token industry avoid unnecessary regulatory costs and burdens trying to comply with multiple regulatory schemes each aimed at addressing the same underlying Token Activities. The most likely federal regulator to have primary authority would seem to be the SEC, because the capital raising, investor protection and market regulation aspects inherent in regulating Token Activities all seem to fall well within the SEC’s statutory and regulatory expertise, and because the SEC already is deeply involved in thinking about and regulating Token Activities.

To be clear, the CFTC, FinCEN and other regulators should retain their important regulatory roles in the regulation of Token Activities. Some tokens or agreements related to tokens may be futures contracts or swaps that properly are regulated by the CFTC. Some token platforms may in effect be money services businesses that quite properly fall within the ambit of FinCEN. And certainly the Department of Treasury, the Internal Revenue Service, federal banking regulators and other federal regulators will have important roles in the regulation of tokens and cryptocurrency.

Nonetheless, I believe it will be helpful to the cryptocurrency markets, and to federal regulators, for Congress to clarify that the SEC is the primary regulator of Token Activities.

Authority for the SEC to Modify and Waive Rules. As I discussed earlier, ICOs present a novel form of capital raising, in which the token investor's primary concerns are the likely future commercial viability of the related token platform, and (usually) the ability of the Token Company to develop, maintain and operate the token platform and the token economy. This is very different from the situation in traditional capital raising techniques, such as the sale of stock and bonds, in which investors are primarily concerned with the future economic activities and well-being of the company that issued the stock or bonds. Not surprisingly, a securities-regulatory scheme developed for stocks and bonds does not fit perfectly for tokens and token platforms.

I believe that Congress should authorize the SEC to, and direct the SEC to, modify or waive existing rules and regulations, as appropriate and with due regard for investor protection, to facilitate Token Activities. Examples of some rules and regulations that should be waived or modified include:

- Registration Provisions: Many Token Issuers will eventually register their tokens, either in a full public offering on Form S-1, or under Regulation A+. This will permit the tokens to be freely tradeable. However, there are still a number of outstanding questions and issues regarding how registration will work, including:
 - Clarifying that Regulation A+ is available to Token Companies (the SEC staff has indicated informally that it is);
 - Modifying the requirement that an issuer have a registered transfer agent, since there are no registered transfer agents for tokens, and the notion of a transfer agent is seemingly needless in a blockchain context, since all sales and

- purchases of tokens on the blockchain are publicly visible (even if the identity of each holder is not known);
- Modifying the prospectus delivery rules to permit a Token Company to satisfy this requirement by posting the prospectus on the relevant platform;
 - Expressly permitting the Token Company to offer through the prospectus tokens that are “mined,” that are earned by platform users for providing services to the platform, or that otherwise are generated algorithmically by the platform, rather than sold out of the Token Company’s inventory of tokens;
 - Clarifying the ability of the Token Company and the platform to rely on the prospectus to permit the commercial use of the tokens on the platform;
 - Clarifying that Token Companies may use the prospectus for a “continuing offer” of tokens, which would cover all of the Token Company’s token sales, all token uses on the platform and all of the token generation events on the platform for as long as the prospectus was current;
 - Permitting additional latitude for selling token holders to sell their tokens under Regulation A+. Currently, the value of the tokens owned and sold by selling token holders in an initial Regulation A+ offering cannot exceed 30% of the total value of tokens sold. In some cases, Token Companies may have sold significant numbers of tokens to accredited investors in a private placement prior to the Regulation A+ qualification, and it may be beneficial for the Token Company to be able to qualify those tokens under Regulation A+, even if the value of those tokens exceeds the current 30% limit; and
 - Permitting “air drops” and other free distributions of tokens pursuant to the prospectus.
- **Trading Rules:** In order for many token platforms to function efficiently, users of the platform will need to be able to buy and

sell tokens, and the Token Company may need to sell and receive tokens on a continuous basis. The SEC should amend its rules to:

- Permit the Token Company to sell tokens at the same time that it may receive tokens for performing services or selling goods on the platform, notwithstanding Regulation M and Rule 10b-18 under the Securities Exchange Act of 1934, which generally prohibit an issuer from buying and selling its own securities at the same time. These simultaneous purchases and sales might be subject to appropriate and tailored requirements to limit the opportunity for manipulation of the price of the tokens;
- Permit the Token Company to offer a link to one or more registered token exchanges or alternative trading systems that permit platform users to buy and sell the tokens needed to use that platform, without forcing users to leave the platform, go to the exchange to buy or sell the tokens, and then come back to the platform to continue engaging in the commercial activities for which the platform is designed;
- Permit the Token Company and other platform service providers that are regularly engaged in commercial activities on the platform, which require them to buy, hold and sell tokens (which may be securities), to do so without being deemed to be a broker or a dealer that needs to register with the SEC and FINRA; and
- Permit intermediaries to act as finders and receive compensation, including in the form of tokens, for introducing to the Token Company accredited investors who invest in the tokens in a private placement, without the finder being required to become a registered representative of a broker-dealer. Such a finder should, however, be subject to disclosure and antifraud rules.

- Exchange and Alternative Trading System Rules: Currently, there are no exchanges or alternative trading systems authorized to trade tokens that are securities. The SEC and FINRA should be encouraged to be flexible in authorizing exchanges and alternative trading systems, notwithstanding concerns such as, for example:
 - Limited initial trading volume and difficulty of valuing cryptocurrency. In many ways, these types of issues pose a “chicken-and-the-egg” problem; the regulators may be reluctant to approve token markets until there is (for example) more trading volume and better pricing mechanics, but trading volume and pricing mechanics will improve only when there are trading markets; and
 - Clearance and settlement, registrar and transfer agent functions will take very different forms in token trading than in trading in more conventional securities.

In addition, the SEC and FINRA should be encouraged to authorize exchanges and alternative trading systems for tokens that permit trading of any freely-tradeable tokens, including tokens that are freely tradeable after a designated period of time pursuant to Rule 144 or Regulation S under the Securities Act of 1933, and not just of tokens that are freely tradeable by virtue of being publicly registered or qualified under Regulation A+.

- Investment Company and Investment Adviser Rules: The SEC should be encouraged to address various issues that arise under the Investment Company Act and the Investment Advisers Act, including the following:
 - The SEC should make it clear that tokens held by the Token Company that issued them should not cause the Token Company to have to register as an investment company. In general, a company that holds a significant portion of its assets in the form of securities may be an investment company, such as a mutual fund, and may need

to register under the Investment Company Act. Since the SEC treats most tokens as securities, and since many Token Companies hold a significant number of tokens that they intend to issue in the future, some Token Companies could be deemed to be investment companies simply by holding their own tokens;

- The SEC should revise the custody rules to accommodate tokens. Both investment companies and investment advisers are subject to a requirement that, in general, they hold assets with a bank, a broker or another qualified custodian. The admirable purpose of these custody rules is largely to prevent theft by insiders. Transferring ownership of tokens to a bank or other custodian poses difficulties and risks that are not generally present with other securities, including the risk associated with someone hacking the custodian's token wallet, and the difficulty of making fairly frequent purchases and sales of tokens, especially in volatile markets, when the orders must (for example) be sent to the custodian, so the custodian may execute the order or transfer the tokens to another party so that the order may be executed. The SEC should work with the industry to develop other methods, perhaps based on blockchain technology, to meet the objectives of the custody rule while also permitting more effective trading of cryptocurrency; and
- The SEC should reconsider recent statements of its Staff suggesting that it would not approve registration statements of registered funds that seek to engage in cryptocurrency trading. The Staff raised valid considerations, such as concerns related to the valuation and liquidity of tokens, that might apply to mutual funds and exchange traded funds, which need daily liquidity and accurate daily pricing of their assets. But these concerns should not prevent closed-end funds and business

development companies from investing in tokens, since these funds do not make daily offers and sales of their securities, and therefore are less directly affected by the lack of liquidity and lack of pricing sources for tokens. Also, retail and other investors might be far better protected if they were able to invest in a diversified token fund with professional investment management, rather than investing in individual tokens without professional investment management assistance.

My suggestions here are not intended to imply that the SEC is not trying to do some of these things already. They are. But Congressional authorization and direction could still be very helpful.

Authority for Other Federal Regulators to Modify and Waive Rules. As I discussed above, even with the SEC as the primary regulator of Token Activities, other federal regulators will still have important roles in regulating various aspects of Token Activities. These other federal regulators also should be authorized and directed to modify and waive applicable rules and regulations, as appropriate, to facilitate Token Activities, consistent with investor and token holder protection; consistent with privacy, anti-money laundering and similar concerns; and with a view to minimizing systemic risks (such as could exist in the future if systems develop to permit highly leveraged trading in tokens or in synthetic token instruments).

In addition, the Department of Treasury should be authorized and directed to adopt rules and regulations that clarify the taxation of tokens and token transactions, and that facilitate the use of tokens to compensate and reward employees of, and independent contractors to, a Token Company. Currently, each time a U.S. taxpayer sells a token or other cryptocurrency – whether for dollars or other fiat currency, or in exchange for another type of cryptocurrency or tokens – that transaction may give rise to taxable income. This adds significant costs and accounting burdens to buyers and sellers of cryptocurrency.

The Department of Treasury should consider alternatives such as developing a “like-kind exchange” rule for tokens and cryptocurrency, so that (for example) exchanges of tokens and cryptocurrency are not taxed until they are exchanged for dollars or other fiat currency.

Similarly, sales of tokens by a Token Company (whether in a private or public sale of tokens) generate income to the Token Company that often is immediately subject to tax. The Department of Treasury also should consider rules that would permit a Token Company to better match the recognition of income from selling tokens to the expenses of developing the platform on which the tokens will be used; those development efforts may take years.

There also are myriad tax and tax deferral issues involved with granting SAFTs and tokens to employees and independent contractors. The Department of Treasury and the Department of Labor should work with the cryptocurrency industry to help address these tax issues, so that Token Companies can more easily use tokens for employee incentives, and in some cases as employee compensation.

Preemption of State Money Transmitter and Similar Laws. A number of States have laws that require businesses that transmit money to satisfy registration and substantive requirements. A principal, although not an exclusive, focus of many of these statutory schemes is to require money transmitters to conduct anti-money-laundering (“**AML**”) and similar checks on customers and to maintain sufficient reserves to meet their payment obligations.

Many of these State laws are sufficiently broad that many Token Companies and their related platforms could fall within those laws. The cost and time of attempting to comply with the laws of all 50 States can be prohibitive, and since the vast majority of Token Companies intend to offer their platform throughout the United States – and often throughout the world – it is reasonable for a single federal regulatory money transmission scheme to apply to virtually all Token Companies and their platforms.

I propose that Congress expressly preempt these State laws, and give the SEC, in consultation with FinCEN, the sole responsibility of determining when, and to which token-related entities and platforms, AML and similar requirements should apply. As FinCEN recently noted, the SEC already is responsible for applying AML and similar requirements to brokers, exchanges and other regulated entities, and it likely would be most efficient and effective for the SEC to make similar determinations for Token Companies, token platforms, token markets, and other token-related entities.

State laws also should be preempted with respect to capital and other substantive requirements. Token platforms typically should not be subject to capital requirements, because typically (at least today) those platforms do not act as a principal in the transmission of tokens from one user to another; as a result, there generally should not be a risk that the platform's (or Token Company's) lack of resources will affect the completion of a token transaction, which makes capital requirements unnecessary. If the SEC determines that there are certain token-related entities that perhaps should have capital requirements applied to them (in addition to the capital requirements already applicable to regulated entities), the SEC should adopt rules or seek Congressional approval to impose those capital requirements.

Federal Preemption of State Securities Registration Provisions. I propose that States be preempted from imposing substantive registration requirements on Token Companies that publicly register their tokens on Form S-1. Under Section 18 of the Securities Act of 1933, many tokens that are registered in a public offering on Form S-1 would not be eligible for preemption from State registration, and the registration statement for those tokens would need to be approved by the SEC and the securities commissions of each of the 50 States. By contrast, Regulation A+ -- which mandates a less comprehensive disclosure regime than is applicable to public offers on Form S-1 -- does provide Token Companies with preemption from State registration requirements.

There are significant costs and time delays in seeking 50 additional reviews and approvals of a registration statement already approved by the SEC, and given the SEC's (proposed) federal preeminence in regulating Token Companies and other token-related entities, it does not seem that any potential benefits from those additional reviews outweigh their costs. This is particularly true since virtually all tokens will be used throughout the United States (and often throughout the world), so that no single State or group of States should have a unique interest in registering token offers. Also, as indicated above, there is no obvious reason to offer Token Companies preemption from State registration provisions pursuant to Regulation A+, and to not offer the same preemption for public offerings on Form S-1.

Longer-Term Legislative Focus

As I discussed earlier, I believe it is too early to enact comprehensive legislation governing the blockchain and cryptocurrency industry. I do think, though, that even at this early juncture, Congress can begin identifying key themes that the comprehensive legislation should contain. Here are some thoughts about those themes:

- **Simplicity**. Any comprehensive legislative scheme should be simple and inexpensive.
 - The system that exists today, which is generally a private placement of a SAFT or of tokens, and which in many cases will be followed by a public offering on Form S-1 or under Regulation A+, is complicated and time consuming. A comprehensive legislative scheme should permit Token Companies to prepare and post a standardized, simple and informative disclosure form, and then beginning selling tokens to the public;
 - To follow up on the last point, the registration statements and prospectuses that will be used in the near term will be

- lengthy documents that almost no retail investor likely ever will read cover to cover. A comprehensive legislative approach should identify the token-related information that is important for token investors and token users, and should encourage Token Companies to deliver that information in a format most likely to be obtained and understood by those investors and users; and
- The comprehensive legislative scheme should generally avoid causing Token Companies or others to have to make fine legal distinctions as to whether a particular token is or is not a security, and at what point in the future the token might stop being a security. In general, the legislative scheme should apply to virtually all Token Companies and to most tokens;⁶
 - Tailored. Any comprehensive legislative scheme should be carefully tailored to address the needs of token investors and token users.
 - For example, as I discussed earlier, a token investor and a token user have very different interests than an investor in a company's common stock or debt. Any disclosure requirements imposed on Token Companies or others should be tailored to address only information that is relevant;

⁶ It is important to be cautious on the goal of having the legislative scheme apply to all tokens. Some tokens are just digital representations of common or preferred stock, or of debt securities. These tokens are really just a form of book entry security, and likely should be regulated in the same way as any other equity or debt security. Similarly, tokens may not be eligible for the type of comprehensive legislative scheme described in the text if, for example, the tokens give holders the right to participate in profits, revenue, dividends or other income from a particular company or business, or give holders the right to convert their tokens into equity, debt or similar securities. As a starting point, Congress might limit the availability of the comprehensive legislative scheme to tokens that are securities solely because they are “investment contracts” as defined in *Howey* and subsequent cases. In fairness, this approach may inadvertently exclude some categories of tokens that ought to be able to rely on the contemplated comprehensive statutory scheme, so this approach should be viewed only as a starting point for discussion.

- As an example of the last point, current disclosure regimes, rightly, place great importance on audited financial statements of the issuer of common stock or debt securities. The financial statements of a Token Company may be much less important to token investors and token users, especially over time if the Token Company's participation in the token platform and the token ecosystem is greatly diminished, or if the Token Company has escrowed or otherwise segregated sufficient assets to support the operations of the token platform and token ecosystem for the foreseeable future; and
- On the other hand, a comprehensive legislative scheme may need to address issues unique to Token Companies, such as what obligations, if any, a Token Company and its Board owe to token holders (although admittedly this may be a State law corporate issue as opposed to a federal question), and what rights, if any, token holders should have to participate in the operation and management of the related token platform.
- Protective. In addition to protecting the interests of token investors and token users, a comprehensive legislative scheme also should guard against systemic risks posed by blockchain and cryptocurrency technologies, including by: (i) appropriately balancing privacy concerns with law enforcement needs; (ii) balancing free speech rights with the need to protect the integrity of data and information stored on the blockchain and accessible to AI and other technologies; and (iii) balancing capital formation and innovation goals with the need to guard against manipulative or coercive marketing or other tactics. These may well be some of the most challenging parts of creating a comprehensive legislative scheme governing blockchain and cryptocurrency technology, and we likely are only at the earliest stages of even being able to identify the

potential issues, much less to develop sound policy and legislative responses to them.

CONCLUSION

Thank you again for the opportunity to testify before you today. I am delighted this Subcommittee is focusing on blockchain and cryptocurrency technologies, and I believe your leadership can greatly facilitate the continued development of these technologies, while at the same time appropriately protecting investors in these technologies and users of these technologies. I would be delighted to answer any questions. Also, as you move forward with your work on these issues, if you think I may be of any assistance, I would be delighted to help.