

October 12, 2021

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Dear Ms. Mitchell,

Prometheus, Inc. ("Prometheus") appreciates the opportunity to provide comments on Regulatory Notice 21-32 - FINRA Requests Comment on Its Policy Relating to the Assignment of OTC Symbols to Unlisted Equity Securities ("Notice"). The Notice proposes a change to its "current policy relating to the assignment of OTC symbols to unlisted equity securities ("Proposal")." FINRA's Proposal requires firms to "(1) demonstrate their best efforts to obtain a CUSIP identifier, and (2) provide documentation sufficient to identify and categorize the security, including, *e.g.*, that it is an unrestricted equity security (unless traded pursuant to Rule 144A)." We support FINRA's Proposal and agree that it would facilitate the industry's compliance with FINRA's trade reporting rules, enhancing market transparency, integrity and investor protection.

**A. Market Transparency and Investor Protection Will be Enhanced by the Proposal**

As noted by FINRA, such a policy change would allow member firms to report trades to the over-the counter reporting facility ("ORF") for digital asset securities that meet the statutory definition of equity securities,<sup>1</sup> including but not limited to restricted equity securities (after the expiration of the statutory holding period) and Rule 144A restricted equity securities. The Proposal is necessary to ensure customer protection and market integrity. A significant positive impact of the proposal would result in preventing issuers of equity securities from acting as gatekeepers to valid CUSIPs assignment and preventing efficient and proper trade reporting.

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<sup>1</sup> Section 3(a)(11) of the Exchange Act defines an equity security as: "[a]ny stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security."

Although a firm can file a Form T for the purpose of reporting a trade, such reporting mechanisms are impractical and the reported information is not public. These obstacles conflict with the fundamental principles of market transparency, commercial honor and just and equitable principles of trade. The Proposal outlines a fair approach to overcome problems currently faced by member firms in obtaining a valid CUSIP from issuers.

We applaud FINRA's attempt to stay ahead of market and asset trends as acknowledged in the Proposal, "...most capital is being raised through private offerings...particularly using digital asset securities..." We recommend that FINRA expand its proposed policy and assign symbols to utility tokens that lack a valid CUSIP identifier so that utility tokens, that are categorized as investment contracts<sup>2</sup> and securities under Section 2(a)(1) of the Securities Act ("Utility Tokens"), can be reported to ORF. As seen with other types of markets (e.g., cryptocurrency exchanges), manipulation thrives where transparency does not exist and parties are not held accountable. Even though all Utility Tokens may not be classified as equity securities, when utility tokens are investment contracts, trade details should be reported to FINRA<sup>3</sup>. Any distinction between equity securities and Utility Tokens, for purposes of trade reporting, is counterproductive to the overall aim of transparency through trade reporting.

Currently, Utility Tokens are traded with little regulatory oversight. Execution data for certain digital asset securities, including Utility Tokens, are scattered across different trading venues, with no consolidated market data which undermines market integrity and investor protection. Rather than create a distinction between Utility Tokens and equity securities for trade reporting, we propose the implementation of a structure for orderly reporting of this "new" asset class. FINRA should take this important step to allow the digital asset securities space to

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<sup>2</sup> An investment contract is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. See *SEC v. Edwards*, 540 U.S. 389, 393 (2004); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946); see also *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852-53 (1975) (The "touchstone" of an investment contract "is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.")

<sup>3</sup> Most Utility Tokens when issued will meet the definition of an investment contract and accordingly, issuers of Utility Tokens must register public distributions, offers and sales of such Utility Tokens under the federal securities laws unless a valid exemption to registration applies. However, we believe that although Utility Tokens offered under Regulation D, are investment contracts under the Howey Test, and therefore securities under the Securities Act, they are not equity securities under the Exchange Act.

continue its growth, while also protecting markets and investors, by providing the guidance and means for trade reporting for Utility Token.

It is well established that trade reporting brings transparency to markets which ultimately holds investors, issuers and trading venues accountable for their actions. SIFMA and PWC notes in their whitepaper, Security Tokens: Current Regulatory and Operational Considerations for Broker Dealer and a Look Towards the Future, the importance of trade reporting for security tokens for market participants and regulation.

“[S]ecurities markets rely on various reporting and recordkeeping standards for trading. As Security Tokens are issued and traded, it will be important that these transactions are reported in accordance with regulatory requirements as they move through the order lifecycle of execution, matching and subsequently clearing and settlement. As Security Tokens mature, and in order to develop a robust market, transactions should be reported via existing regulatory reporting systems. This includes reporting transactions via current regulatory systems such as Order Audit Trail System (“OATS”) and Consolidated Audit Trail (“CAT”). Using existing reporting systems provides greater efficiency for market participants and helps support effective regulatory oversight of these new assets.”<sup>4</sup>

Transparency of price, time and trading volume is critical to investor protection and market integrity. Recognition of the Utility Tokens as securities for the assignment of CUSIP numbers is critical to such regulatory oversight.

**B. Request for Guidance on the Standards to be Applied by FINRA to Deny A Firm’s OTC Symbol Request.**

The Proposal states that the FINRA staff “would retain discretion to deny a firm’s request for an OTC symbol if the documentation that the firm provides does not adequately demonstrate the security is an unrestricted security (unless traded pursuant to Rule 144A) or otherwise insufficient or unreliable.” We respectfully request further guidance from the staff on what satisfies the standard to have “adequately demonstrate[d] [whether] the security is an unrestricted

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<sup>4</sup> Security Tokens: Current Regulatory and Operational Considerations for Broker-Dealers and a Look Towards the Future, Discussion Paper prepared by the Securities Industry and Financial Markets Association (“SIFMA”) and PricewaterhouseCoopers, LLP. November 2020.

security...or is otherwise insufficient or unreliable.” In considering this standard, we request that the staff consider that many issuers are unwilling to provide assistance in proving whether a digital asset is a security, let alone if it is an unrestricted security. In addition, under Rule 144, section (b)(1), non-affiliates may have the restrictive legend removed after holding the restricted securities for one (1) year regardless of the availability of current public information. Therefore, we seek clarity from FINRA as to what documents or other information would satisfy the discretionary standard set forth in the Proposal based on the information set forth above.

### **C. Conclusion**

Member firms' efforts to comply with FINRA's trade reporting rules are impractical without a valid CUSIP or symbol. This Proposal, whereby FINRA will assign OTC symbols to unlisted equity securities, and assuming the inclusion of Utility Tokens as suggested herein, will facilitate industry compliance with trade reporting rules leading to increased investor protection, market integrity and transparency.

We appreciate the opportunity to share our thoughts and provide comments on the Proposal. We strongly support the Proposal as a policy change to facilitate assigning symbols to unlisted equity securities. We urge the staff to include Utility Tokens within this policy change since they continue to grow in popularity, potentially putting investors and market integrity at risk.

Sincerely,



Benjamin S. Kaplan

Co-CEO

Sincerely,



Rosemarie Fanelli

Chief Regulatory Officer