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Rutgers Center for Corporate
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Blockchain and Fintech Program

PROPOSED U.S. DISCLOSURE GUIDELINES FOR A PARTICULAR CATEGORY OF TOKENS

Background

The proposed token disclosure guidelines set forth in this document were designed by a working group of academics and practitioners composed primarily of lawyers, former federal regulators, and legal scholars from a variety of backgrounds, including people knowledgeable about U.S. securities, commodities, swaps, technology, intellectual property, consumer protection, and commercial law, among other areas.

The proposed disclosure guidelines are designed to identify and elicit the disclosure of material information about certain types of tokens (as explained more fully herein). The proposal makes no recommendation about when disclosures should initially be provided (or to/by whom), whether or when updates should take place (or to/by whom), or the frequency of disclosures or updates. The proposal also makes no recommendation about where and how the initial disclosures and updates (if required) should be made available or whether they should be subject to prior review and/or approval by any regulator or self-regulatory body. The proposal provides a flexible disclosure regime that can be a guide for disclosures under existing regulations and new legislation that relates to certain types of tokens.

Although the starting point for the proposed disclosure guidelines was Form 10, Form 1-A, and Form SF-1 under U.S. federal securities laws, the contemplated disclosure is not meant to designate tokens as securities or imply that securities laws and rules apply to the types of tokens covered by the proposed guidelines. The proposal also takes into consideration several pending legislative bills that provide for a token disclosure regime under CFTC regulation and oversight. The proposal is informed by various laws and rules, including securities, swaps, commodities, and consumer protection, and most especially the following concepts:

- Disclosure of information that is material to both purchasers and users of the tokens;
- General anti-fraud standards from those laws, particularly for the materiality standard;
- The ability to leverage disclosures made by third parties, so long as there is a reasonable basis to believe those disclosures are applicable, material, and not misleading; and
- Flexibility to meet various facts and circumstances which may change over time.

We believe that it is more important to agree on the scope and substance of the disclosure guidelines than who may administer any implementing regime. For this reason, the proposal does not suggest the oversight of any particular regulator or self-regulatory body. There may be more than one body that administers the guidelines, depending on various factors beyond the scope of this proposal.

This version of the proposed token disclosure guidelines is intended to start a dialogue. Supporters and contributors will be reaching out to their respective networks to solicit feedback and support. If you would like to be included as a contributor or supporter, reach out to one of the individuals or industry groups listed below.

Proponents of Proposed U.S. Disclosure Guidelines

The proposed disclosure guidelines include contributions and support from:

GLOBAL DIGITAL ASSET &
CRYPTOCURRENCY ASSOCIATION



THE **DIGITAL**
CHAMBER



GBBC Global Blockchain
Business Council

Support from industry groups does not necessarily reflect the views of any particular member of the group.

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Individuals listed are supporting in their individual capacity and not in the name of their organization.



**Rutgers Center for Corporate
Law and Governance**
Blockchain and Fintech Program

April 22, 2024

From: Professor Douglas Eakeley, Professor Carol Goforth, and Professor Yuliya Guseva

Re: Disclosure Guidelines for Native Tokens, Discussion Draft

Statement in Support of the Proposed Disclosure Guidelines

We support the creation of a relevant and specific disclosure framework for digital assets such as native tokens. An appropriate and modernized disclosure system is a sine qua non for promoting and maintaining a more transparent and efficient market. Adequate disclosures are critical to combatting fraud, protecting investors, and improving price formation and market integrity. Quoting Justice Brandeis, “sunshine is said to be the best of disinfectants.” Of course, the required information should be relevant and material to purchasers of assets.

The proposed Disclosure Guidelines are well-developed and represent a valuable starting point in promoting these objectives. Legal and economic scholarship supports the need for targeted disclosures, including relevant information relating to network governance, risks associated with the particular token, material participants, and other disclosure categories as listed in the Guidelines.

The proposed Guidelines do not address the issue of classification of digital assets as securities, commodities, or another type of asset. Instead, they focus on the information and disclosures relevant and material to all purchasers of digital assets and to digital-asset markets in general. This underlying approach addresses the crucial objectives of improving market transparency and integrity. The Guidelines aim to achieve this without addressing asset classifications and which federal agencies (for example, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or both) should have jurisdiction.

We believe that the second major contribution of this project is its potentially positive impact on the international regulatory environment. Major jurisdictions, including the European Union, are ahead of the United States in designing regulatory regimes specifically designed for digital assets. The E.U., for example, has a system that envisions disclosure principles similar to those proposed in the Guidelines.

These Disclosure Guidelines do not assign reporting obligations to a specific entity, such as the “issuer” in securities markets. In conventional securities law, a corporate issuer is deemed the least-costly and most effective source of information about the firm. The onus of disclosures is thus placed on the corporate party that has an informational advantage regarding the value of the offered and traded securities, as well as its prospects and risks. In some projects involving digital assets, individual developers, firms, or foundations may possess a similar informational advantage. In others, however, the insider advantage may be non-existent or have dissipated over time after a network launch. Additional and careful regulatory research is needed to determine the least costly and efficient sources of initial disclosures and future periodic reporting in these latter situations. While we do not opine on solutions, one possible approach is assigning more reporting obligations to exchanges, an avenue already considered by the regulatory bodies in the United Kingdom. Another possibility might involve creating self-regulatory organizations (SROs) in digital asset markets, an approach that has worked well for other asset classes here and abroad.

Respectfully,

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General Instructions

The category of tokens to which the proposed regime applies is called “[native DLT](#)” tokens (“Tokens”; *see also* “[intrinsic](#)” tokens). The embedded link provides further definition of this category. Tokens may have many functions and features within and outside the protocol, system, or network (the “Network”) on which they were created or generated, including but not limited to functioning as a mechanism of payment, resource allocation, and/or sybil resistance or Network security; formal or informal governance or voting rights; rights to receive payments, attend events or participate in activities; evidence of membership in a formal or informal group or organization; *etc.*

The guidelines apply regardless of whether (a) the Token is [classified as](#) “fungible”, “[non-fungible](#)” (“NFT”), or under another technical standard; (b) a Network utilizes an account-based or token-based [system](#) (or another technical design); and/or (c) the Token is created or generated on a centralized or decentralized Network (where “decentralized” is defined as no single source of truth, no single point of failure, and no single authority responsible for or capable of changing data and/or account or transaction information).

Important assumptions underlying the proposed guidelines are discussed at the end of this document.

The disclosure guidelines are meant to assist with developing the appropriate scope and substance of disclosures for Tokens. Those that provide these disclosures should tailor their information to the specific facts and circumstances of the Token, taking into account the materiality principle to help identify information that is most useful to purchasers and to users of the Tokens as of the date the disclosures are provided.

Network

Provide a narrative, plain-English description of the Network, including the associated risks, such as:

- Explain what the Network does and how it accomplishes its core objectives, including, to the extent relevant, the material characteristics of the Network’s architecture, software and functionality.
- Explain the underlying technology of the Network, including, to the extent relevant, the roles and responsibilities of different participants on the Network who are responsible for its functioning and maintenance.
- Provide an overview of the measures taken to ensure Network security, including links to summaries of third-party audits, formal verification, penetration testing, or other measures, if available.
- Identify instances where the Network is susceptible to single points of failure or attack, including, where applicable, if there are single sources of truth related to the Network, and/or a single authority capable of or responsible for changing data recorded on the Network or transactions effected by users, including, to the extent relevant, any consensus mechanism, validation or mining mechanism, including the associated rules.
- If relevant, describe how transactions are validated on the Network and how the blockchain is designed to achieve consensus among Network participants and other information, such as an explanation of any protocol rules and consensus rules (including cryptographic consensus).
- Provide details on statistics available to measure Network performance, including (if applicable) number of transactions executed per unit of time, time to finality, and block confirmation time.
- Include an explanation of any fees, such as transaction costs, gas fees, *etc.*, applicable for utilizing the Network, including how they are assessed and who receives such fees.

- Where the Network is not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Tokens

Provide a narrative, plain-English description of the creation or generation of the Tokens and their key functions and features, including the associated risks, such as:

- Explain the creation or generation of the Tokens and how they were distributed to initial holders and any ongoing distribution, including, to the extent relevant, the Tokens' key design features and the rights and obligations of holders and users of the Tokens.
- If relevant, describe the conditions under which the key functions and features of the Tokens (including any rights and obligations) may be changed and by whom.
- Describe the current or anticipated functions and features of the Tokens, including usage on the Network. Provide details on what the Token is and how the Token functions and/or is anticipated to function both within and outside the Network.
- If the Tokens are used as a means of payment on the Network, describe what actions and/or activities they can be used to pay for, including, to the extent relevant, whether the Tokens are used as "gas", or payment for performing a transaction on the Network, to create or register a new digital asset or smart contract on the Network, to purchase goods or services on the Network, to allocate resources on the Network, to perform or participate in governance functions, and/or to secure the Network.
- Describe any incentive models including fee or reward mechanisms (and who receives them), and any mint/burn mechanisms.
- Where the Tokens are not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Governance

Provide an explanation of any governance mechanisms for implementing changes to the Network or Tokens, including voting thresholds and quorum requirements and whether there is any governing body and/or any type of foundation that makes governance decisions. If applicable, describe any governance rights provided to Token holders. Explain whether and how Material Participants (defined below) are required to initiate or implement any changes to the Network or Token agreed upon through governance. The associated risks also should be described, including the conditions in which modifications to the Network or Tokens may be made, or if certain modifications are not possible. Where the Network is not yet in existence, the disclosures should explain what is intended with respect to governance.

Governance Arrangements

To the extent relevant to governance of the Network, set forth information with respect to any governance arrangements, formal or informal, involving each person who, to the best of discloser's knowledge, owns more than 5% of the Tokens (which person shall include any entities). Include, to the extent known, the percentage of beneficial ownership of 5% or greater Token holders in such arrangement based upon [X] number of Tokens outstanding as of [insert date]. The associated risks also should be described. If relevant, include how the Network or Material Participants (defined below)

manage and use Tokens held in treasury. Where the Network is not yet in existence, the disclosures should explain what is intended with respect to these matters.

Technology

Describe how the Network’s technology and software is maintained and updated, including how code updates are written and reviewed and ultimately deployed. Identify whether the Token’s smart contract can be modified, by whom, and what effect(s) that may have on the rights of holders of the Tokens and/or on the finality of transactions and data. Identify any official or other material communications channels for discussion of technical matters related to the Network. The associated risks also should be described. Where the Network is not yet in existence, the disclosures should explain what is intended with respect to these matters.

Material Participants

- To the extent known, provide the names and relevant experience, qualifications, attributes, and skills of each person, group of persons, or entity that materially contributed and/or continues to contribute to the development and/or operation of the Network and/or the Tokens, which can include any member of the core development team(s) and/or, founders, officers, directors, key employees, significant validators, and/or persons with significant governance power or authority (“Material Participants”).
- To the extent known, indicate generally the percentage of Tokens held by the Material Participants as a group, whether directly or beneficially, as of the date of this disclosure, which data can be presented in aggregate form.
- Describe any limitations or restrictions on the transferability of Tokens held by Material Participants and any arrangement or agreements to provide Tokens to Material Participants.
- The risks associated with having Material Participants also should be described.
- Where the Network is not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Token Supply and Vesting Information

Provide information about the Token’s supply and vesting, which information may include, but is not limited to, as applicable:

Total Token Supply	Total number of Tokens that there will ever be in existence
Circulating Token Supply	The number of Tokens that have been minted, burned and are currently in circulation as of [date]
Token Release Schedule	Release schedule for additional Tokens that can be minted or distributed by the Network as well as an indication of whether supply is intended to be inflationary vs. deflationary and whether issuance is fixed vs. variable
Vesting and/or Lock-up Schedules	To the extent known, schedule for Tokens that have been allocated to Material Participants that are subject to vesting and/or lock-ups

Token Distribution/Allocation	Information about how Tokens were initially distributed among investors, founders, miners/node operators, other participants, treasury reserve, <i>etc.</i>
Airdrops	Token supply that was provided or is intended to be provided as an airdrop (<i>i.e.</i> , free distribution)
Token Rewards (by Each Category of Network Participant)	Which participants, including miners, node operators, stakers and delegators, liquidity providers, <i>etc.</i> , receive any type of token rewards or payments for their activity or actions on the Network
Costs Associated With Transacting on the Network	Costs including “gas fees”, fees to miners, and other network costs
Number of Active Wallet Addresses	The number of wallet addresses actively transacting in the Token
Total Value Locked	The sum of all Tokens deposited in the Network that are earning rewards, interest, <i>etc.</i> , as applicable
Treasury	Total Tokens in the treasury of the Network and/or any entity that may be viewed as an ecosystem foundation, community development pool, or other similar treasury.

Explain whether there is any way to change the Total Token Supply, Circulating Token Supply, Token Release Schedule, Vesting Schedules, and Token Rewards, and the mechanism to make any such change.

The risks associated with these matters also should be described. Where the Network and/or the Tokens are not yet in existence, the disclosures should explain what is intended with respect to each of the above items.

Additional Financial Information

Explain whether the price or value of the Token bears any direct, material relationship to any entity’s ongoing financial performance due to any promise by such entity to share such financial performance with Token holders and the mechanism by which such financial performance is shared. Provide the relevant financial performance information. The associated risks also should be described. Where the Network and/or the Tokens are not yet in existence, the disclosures should explain what is intended with respect to these matters.

Risk Factors

- Provide a narrative, plain-English description of applicable risks relating to the Network and the Tokens, which may include, among other things and to the extent relevant, the following risks that are associated with, among other things, unique features of the Tokens, price volatility, limited rights of Token holders, valuation and liquidity, novel technologies, legal and regulatory and other known material risks that could impact the Token or the Network.
- Describe relevant cybersecurity risks of the Tokens, the Network and their usage including, among other things, and to the extent relevant, hacking vulnerabilities and other cybersecurity events that could result in a substantial, immediate, and/or irreversible loss for Token holders. Additional examples may include risks of bugs, errors, flaws

or vulnerabilities in relevant software code, risks related to ransomware and malware attacks, or any other security compromises of the Network and the risks associated with those security breaches to Token holders.

- Where the Network and/or the Tokens are not yet in existence, the disclosures should discuss the likely risks with respect to each of the items above.

Exhibits

Provide the following documentation if available, including, to the extent materially relevant:

- Any and all relevant whitepapers (including any technical and Token whitepapers) and other documentation related to the Network and/or the Tokens;
- Source code that has been open sourced (i.e., a text listing commands to be compiled or assembled into an executable computer program used by Network participants to access the Network, amend the code, and confirm transactions);
- Location of a publicly accessible code repository;
- Documentation on the Token's smart contract(s);
- Recent code audit reports; and
- Location of a publicly available and independently maintained block explorer (and/or instructions for an independent third party to create a block explorer or similar tool for verifying the transaction history of the Tokens).

Offering and Sale Information

This portion of the proposal is intended for offerings and sales of Tokens that are made prior to the distribution of Tokens on the Network. In addition to providing the aforementioned disclosures, the following disclosures would supplement the above disclosures and are only relevant if there is an offering and sale (defined as some form of payment or barter in exchange for Tokens). In all other situations, *e.g.*, where the Network is in existence and a distribution of Tokens has been widely made, these disclosures are not required but the rest of the disclosure regime is applicable.

Token Offering and Sale Details

- Details of the offering and sale, including the number of Tokens in the offering, purchase price, length of offering period and qualifications of purchasers.
- Explain how the Network will be launched and the Token supply at launch, including the number of Tokens to be issued in an initial allocation. Explain how the offering price was determined.
- Explain the number of Tokens sold in any prior offerings and sales.
- Provide information about any potential dilution of Tokens or Token supply.

Use of Proceeds

- Provide an estimate of what the net cash proceeds from the offering and sale of the Tokens will be (approximately \$[] million, after deducting estimated offering expenses of \$[] million and assuming that the maximum proceeds of the cash offering of \$[] million are received).
- Provide information about the proceeds from any prior Token sales.
- Provide information about any agreements for the distribution of Tokens in an offering and sale and the purchase price of those agreements.
- Provide an overview of the intended use of proceeds from the Token sales, including whether the intended use of proceeds will be used for working capital and other general corporate purposes, such as the development of the Tokens and the Network, payment of salaries, hiring employees and consultants, organizing and hosting educational and developer events, and/or making investments in the development of applications for the Network.
- Describe the intended use of the proceeds from prior offerings and sales, if any, including whether use of proceeds will include general categories, such as (i) payment of compensation and hiring of employees and retaining of consultants and developers, (ii) continuing development of the Network and underlying blockchain, and supporting the application ecosystem, as applicable, (iii) payment of federal and state income taxes (and any estimates on tax amounts), (iv) allocation for research and development, (v) marketing and education, and (vi) any other anticipated use of proceeds.
- Explain who will use the proceeds from the sale of Tokens. If applicable, note any risks related to the failure to apply these funds effectively and whether such risks could have a material adverse effect on the value of the Tokens.

Appendix

Assumptions

The proposed guidelines are based on the following assumptions:

1. The proposal does not use the term “issuer” or designate any particular party as responsible for making the disclosures due to the difficulty in establishing a definition for the term “issuer” or determining who the “issuer” might be in certain factual situations. Who should be responsible for making the disclosures is also dependent on the particular facts and circumstances and may change over time.
2. The proposal provides guidelines which are flexible and can be adopted as requirements under different regulatory regimes and industry standards.
3. The proposal takes no position on penalties or liability for failure to make the disclosures.
4. This proposed regime is centered on Tokens that are on a blockchain or other distributed ledger technology but might be helpful for other types of digital assets created on other types of technologies, including centralized databases.

