February 17, 2017

VIA ELECTRONIC MAIL (pubcom@finra.org)
AND OVERNIGHT

Marcia E. Asquity
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, CD 2006-1506

Re: Distributed Ledger Technology: Implications of Blockchain for the Securities Industry

To Whom It May Concern:

Ouisa Capital, LLC ("Ouisa") writes this letter in response to the Financial Industry Regulatory Authority ("FINRA") Report on Distributed Ledger Technology (the "Report") and its solicitation for comments. Ouisa appreciates FINRA's invitation for comments and believes the request is particularly timely as distributed ledger technology ("DLT") continues to attract significant interest in the financial services and securities industries and the regulation and implications of the use of DLT by securities market participants is evolving.

I. Background

A. About Ouisa

Ouisa is a registered broker-dealer with the U.S. Securities and Exchange Commission (the "SEC") and is a member of FINRA. Ouisa operates an alternative trading system for the sale of unregistered securities (the "Platform"). Participation on the Platform to any entity regulated by a federal functional regulator and to any entity that meets the definition of a qualified institutional buyer under Rule 144A of the Securities Act of 1933 (the "Securities Act") or an accredited investor under Rule 501 of Regulation D of the Securities Act. Ouisa operates two businesses through the Platform: (i) a mechanism by which firms may display non-binding indications of interest related to unregistered securities (the "Quotation Bureau"); and (ii) a mechanism by which firms may facilitate purchases and sales ("Transactions") of the securities listed on the Platform (the "Trading Platform"). Ouisa plans to use DLT as a ledger to record and effect Transactions on its Trading Platform. Ouisa has a patent pending on the use of DLT for transaction, clearing, and settling of unregistered securities and other financial instruments.

B. The Report

In the Report FINRA identified potential applications for DLT in the securities industry, considerations for market participants that may develop and implement DLT technologies and

applications, and certain regulatory matters that may be implicated for broker-dealers that use DLT for issuing and trading securities, facilitating automated actions and maintaining transaction networks. The Report states that when adopting DLT and revamping current processes broker-dealers should be cognizant of all applicable federal and state securities laws, rules and regulations, including FINRA and SEC rules.

II. Comments

A. Potential Application of Securities Laws

Ouisa agrees that the laws, rules and regulations cited in the Report that apply to broker-dealers under the Securities Exchange Act of 1934 (the "Exchange Act") and FINRA rules are of paramount importance to broker-dealers as they use DLT. The SEC has indicated that transactions effected or recorded through DLT may be a transaction involving a security. Although the definition of "security" under U.S. securities law does not include digital assets or expressly contemplate DLT technology through enforcement actions the SEC has argued that investments in digital asset related schemes that make use of DLT technology are investment contracts - a contract, transaction, or scheme involving: (i) an investment of money, (ii) in a common enterprise, (iii) with the expectation that profits will be derived from the efforts of the promoter or a third party. *See, In the Matter of BTC Trading, Corp and Ethan Burnside*, Exchange Act Release No. 3-16307 (Dec.8, 2014).

When a digital asset constitutes a security that is exempt from registration under the Securities Act that security is not necessarily an "exempted security" under the Exchange Act. For example, a person who sells securities that are exempt from registration under Regulation D of the Securities Act generally must nevertheless register as a broker-dealer. For issuers of a digital asset that may be deemed a security, presumably the issuer's exception to registration would apply as such issuers would be selling securities for their own accounts and not for the accounts of others, and would not be buying and selling their securities for their own accounts as part of a regular business. Issuers whose activities go beyond selling their own securities, however, would need to consider whether they would need to register as broker-dealers. This includes issuers that purchase their securities from investors, as well as issuers that effectively operate markets in their own securities or in securities whose features or terms can change or be altered.). The employees and other related persons of an issuer who assist in selling its securities may be "brokers," especially if they are paid for selling these securities and have few other duties.

When the sale of a digital asset is a sale of security, in many cases there will be an applicable exemption from the registration requirements of the Securities Act for the issuer and an exemption from the broker-dealer registration requirement. However, as outlined below, in many market participants that effect transactions using DLT are not aware that their activities potentially give rise to various issues and requirements under federal and state securities laws. On the other hand, certain regulated persons operating in the financial industry, already or plan to, use DLT as part of their business operations and doing so in a manner that is compliant with applicable laws, rules, and regulations.

B. Existing Regulatory Framework

In addition to federal and state laws that apply to securities transactions, there already exist a significant number or rules and regulations that apply to persons that facilitate transactions of securities. For example:

Broker-dealers: The Exchange Act is the primary federal legislation governing "brokers" and "dealers" in securities. With certain exceptions, Section 15 of the Exchange Act requires registration with the SEC of all broker-dealers using interstate commerce or the facilities of any national securities exchange to effect transactions in securities (other than exempted securities and certain short-term debt instruments). The SEC has promulgated rules requiring the registration of all broker-dealers involved in over-the-counter transactions. Regulation of transactions on national securities exchanges was primarily granted to registered exchanges. Section 15(a)(1) compels registration of most broker-dealers by prohibiting the use by any broker or dealer of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered with the SEC in accordance with the Exchange Act.

Any party using DLT as part of their business to facilitate the sale of registered or unregistered securities must be registered as a broker-dealer unless they fall within an exemption from registration such as the issuer exemption. A registered broker-dealer is subject to extensive requirements and obligations, including those imposed under the Exchange Act and by FINRA.

Exchanges: Over the last twenty years, as the roles of broker-dealers and exchanges have blurred, the SEC has sought to distinguish these roles. Section 3(a)(1) of the Exchange Act defines an 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 . . .

Exchange Act Rule 3b-16(a) interprets the Section 3(a)(1) definition to mean any organization, association, or group of persons that:

- Brings together the orders of multiple buyers and sellers; and
- Uses established, nondiscretionary 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.

Absent an exemption, an exchange must register as a national securities exchange pursuant to Section 6 and Section 19(a) of the Exchange Act. Any platform that brings together buyers and

sellers of securities, including securities that rely on DLT, must either register as an exchange or an alternative trading system.

Alternative Trading Systems: In 1998, the SEC adopted Regulation ATS, which allows an ATS to choose whether to register as a national securities exchange or to register as a broker-dealer and comply with additional requirements of Regulation ATS. (Regulation ATS) An "alternative trading system" means any organization, association, person, group of persons, or system:

- that 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 within the meaning of Rule 3b-16 under the Exchange Act, and

- that does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or discipline subscribers other than by exclusion from trading. (Regulation ATS, Rule 300(a))

A platform that operates a market or platform that uses DLT to bring together purchasers and sellers of digital assets that are deemed securities, and it does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such platform, should be required to register as an ATS.

D. The Need for Overarching Guidance

Many participants in the financial industry that use DLT, including the operators of platforms that use it to facilitate transactions in digital assets, are unsure whether the transactions effected through the platforms involve a security that potentially require registration under the Securities Act; and/or whether their platform or activities would constitute the facilitation of a securities transaction that potentially requires the platform itself to register with the SEC and FINRA as an exchange, an ATS, or a broker-dealer. For example the operator of a platform that facilitates transactions in digital assets could be deemed to be effecting securities transactions[1] if it helps an issuer to identify potential purchasers of the digital assets. Similarly, the operator of a platform that facilitates trading of digital assets could be deemed to be effecting securities transactions if the assets are deemed securities. Further, an operator of a digital asset trading platform could be deemed to be effecting transactions because it is handling customer funds (digital currency) or securities (digital assets).

While the Report addressed various general issues regarding DLT and particular FINRA and SEC rules applicable to broker-dealers that could be impacted by the use of DLT, the Report did not address the threshold issues of whether certain types of digital assets are securities and whether platforms that use DLT for trading such assets must be registered with the SEC and FINRA in any capacity. Ouisa believes that instead of adding new regulations or rules or considering amendments to existing rule and regulations, it is first important for the SEC

[1] For example, an argument can be made that DAO tokens are investment contracts and thus "securities" under the federal securities laws.

or other regulatory bodies to clarify how existing laws and regulations apply to digital assets and DLT. To date, guidance in this area has come in the form of regulatory actions by the SEC, and isolated comments from SEC representatives. In similar contexts, other regulatory bodies have issued general guidance about the overall regulatory scheme applicable to financial technology companies and sought comments on the broader topic of overall regulation of new and emerging industries and financial practices[2]. Once more participants in the financial industry are aware that certain transactions and activities give rise to securities regulatory issues, Ouisa believes that is the time for FINRA and market participants to further analyze whether any existing regulations need to be modified to address DLT technology.

E. Recommendation

Ouisa believes that all platforms that facilitate transactions in digital assets that are securities (investment contracts) must take reasonable steps to ensure such transactions are effected in accordance with one or more exemptions under the Securities Act of 1933 (the "1933 Act"), such as (i) the intrastate offering exemption of Section 3(a)(11) of the 1933 Act; (ii) the private offering exemption of Section 4(a)(2) of the 1933 Act and Sections 3(b) and 3(b)(2) of the 1933 Act ("Regulation A" and "Regulation A+"); (iii) the exemptions under Regulation D of the Securities Act – Rule 504 and Rule 506; (iv) the accredited investor emption under Section 4(5) of the 1933 Act; and (v) the other exemptions under Section 4 of the Securities Act.

Ouisa also believe if the operator of a platform that uses DLT to facilitate transactions in digital assets that are securities should be deemed to be effecting transactions in securities because it is taking, routing or matching orders, or facilitating the execution of a securities transaction. Any platform that uses DLT that brings together the orders of multiple buyers and sellers and uses established, non-discretionary methods under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade should be deemed an exchange and required to register with the SEC unless it elects to register as an ATS. This approach would be consistent with the Exchange Act and applicable rules and regulations thereunder.

Benefits of DLT include that is a decentralized, immutable and programmable technology. In sum, this means that it is transparent to its users, difficult (if not impossible) to manipulate. DLT can be used to effect and record transactions in a verifiable, transparent and verifiable manner. Benefits of DLT to participants in the financial market place include increased efficiencies, decreased margin for error and a new, secure, verifiable manner to record and effect transactions. This, in turn, can lead to decreased transaction costs in the industry and a streamlined manner to audit transactions. These benefits are likely to benefit all participants in the financial industry, including investors, market participants and regulators who can more easily monitor and oversee the industry.

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[2] *See,* Office of the Comptroller of the Currency, Exploring Special Purpose National Bank Charters for FinTech Companies (Dec. 2016), available at: https://www.occ.treas.gov/topics/bank-operations/innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf

DLT has the potential to enhance improve many facets of the financial industry, but at its core the technology simply represents a new manner to effect and record transactions. While there is a need to clarify how the securities laws apply to platforms that use DLT, the securities laws should be applied to platforms that use DLT as a part of activities that bring them under the definition of a broker, an exchange, or an alternative trading system. Any platform that uses DLT to facilitate transactions in securities should be required to register with the SEC and FINRA and to ensure their practices meet the already existing regulatory schemes.

Ouisa believes the investing public will be better served if FINRA and the SEC provide guidance to firms using DLT to help them better understand when transactions effected through a platform require the participants to register as a broker, an exchange, or an alternative trading system. Having securities transactions effected through regulated entities increases transparency, provides stronger investor protection and affords regulatory bodies better a more clear path to enforce existing laws and regulations.

III. Conclusion

We commend FINRA for soliciting comments from the industry on the impact of DLT. The present regulatory model already imposes a significant number of rules and requirements on registered entities that engage in various forms of securities transactions. Many such market participants are already using DLT in their business and are doing so in conformance with the current securities laws and regulations. However, there are platforms that are not registered with the SEC or FINRA. We believe further guidance from FINRA and the SEC about the types of activities and transactions involving digital assets that are subject to regulation and registration is the first step to help promote industry awareness of the existing regulatory landscape and which activities lead to the requirement to register.

We welcome the opportunity to tell you more about Ouisa, its business model and the firm's use of DLT and to discuss these issues with you facilitate further guidance from FINRA and other regulatory agencies.

Should you are to discuss this letter or any other matter, please do not hesitate to call me or Ouisa's counsel, Richard B. Levin, of Polsinelli PC at 303-583-8261.

Very truly yours,

Vincent R. Molinari
Chief Executive Officer

Joseph K. Latona

cc: Robert W. Cook, President & CEO - FINRA
Robert L.D. Colby, Esq. – Chief Legal Officer - FINRA
Haimera Workie, Senior Director, Office of Emerging Regulatory Issues - FINRA
Kavita Jain, Director, Office of Emerging Regulatory Issues - FINRA
Hon. Michael S. Piwowar, Acting Chairman- SEC
Hon. Kara M. Stein, Commissioner