



September 12, 2022

Hon. Raja Krishnamoorthi  
United States Congress  
1701 East Woodfield Rd., Suite 704  
Schaumburg, IL 60173

Re: Crypto Regulations/Coinbase

Congressman Krishnamoorthi:

My name is Marc Fitapelli. I am the owner and founder of MDF Law, a national law firm that represents investors in complex securities litigation matters. I am writing to you concerning your recent inquiries related to crypto currency regulations. Your concerns regarding fraud in the crypto currency sector are well founded. Based on my experience with victims of fraud from their crypto currency accounts, I share your concerns. Due to gaps in the current regulations and their enforcement, such victims have little to no recourse against the exchanges that are often negligent in protecting their assets. I am hopeful that your efforts will result in a better mechanism of accountability for the exchanges and recovery for victims. I hope you find this information useful.

***Cryptocurrencies are “securities”***

As you know, the Securities and Exchange Act of 1934 governs how our securities markets are regulated. The Securities and Exchange Commission and its current Chairperson believe that most cryptocurrencies are “securities,” as defined by the Act. This belief, which I share, is based on the *SEC v. Howey* precedent and its application to cryptocurrencies. Because most cryptocurrencies are “securities” under this precedent, then most cryptocurrency exchanges must also register as broker-dealers under the Exchange Act.<sup>1</sup>

According to the Securities and Exchange Commission, any entity that is considered a broker-dealer must: (1) register with the Commission by filing Form BD; and (2) join a self-regulating

---

<sup>1</sup> A “broker” includes an entity “engaged in the business of effecting transactions in securities for the account of others.” 15 U.S.C. § 78c(a)(4)(A). A “dealer” includes an entity “engaged in the business of buying and selling securities ... for such person’s own account,” insofar as such transactions are part of that person’s “regular business.” 15 U.S.C. § 78c(a)(5).

organization or SRO.<sup>2</sup> The Financial Industry Regulatory Authority, or FINRA, is an example of a self-regulating organization. There are some members of FINRA that offer cryptocurrency to their customers, but none of the major exchanges targeted by your letters, including Coinbase, are members of FINRA or any other SRO.<sup>3</sup>

### ***Existing Law Requires Exchanges to Register with the SEC***

It is my opinion that existing law already requires most cryptocurrency exchanges, including Coinbase, to register with the Securities and Exchange Commission and join an approved SRO. I believe Chairperson Gensler agrees with this statement, but is not enforcing the law.<sup>4</sup> In public statements, he has “invited” exchanges to register, but he has not gone further. It is time to get tough and enforce the law that already exists.

### ***FINRA Already Regulates Crypto Currency Broker-Dealers***

Although the exchanges you targeted in your letter have not, many companies that offer cryptocurrency are registered with the SEC and FINRA. Because of this, beginning in 2018, FINRA began regulating firms that sold cryptocurrency and related securities. See Regulatory Notice 18-20.<sup>5</sup> FINRA has done this for at least the last four years, if not longer. FINRA continues to actively regulate its member firms that sell cryptocurrency and related investments. In fact, in June 2022, FINRA’s CEO Robert Cook publicly declared at a conference that FINRA urgently needed to hire attorneys and investigators with expertise in cryptocurrency.<sup>6</sup>

While FINRA’s system is not perfect, it’s tested and generally considered fair. Its rules were the product of years of public debate by Congress, investors, brokerage firms and anyone else who cared to express an opinion. Conversely, the dispute resolution rules for crypto exchanges were created in secret by highly skilled attorneys whose sole objective was to craft rules that advantage

---

<sup>2</sup> Guide to Broker-Dealer Registration, available here: <https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html>

<sup>3</sup> Senators Cynthia Lummis and Kirsten Gillibrand have proposed legislation to create a crypto specific SRO.

<sup>4</sup> Chairman Gensler recently released a YouTube video “inviting” crypto exchanges to register. Available here: <https://youtu.be/aWl55tTZ50Q>

<sup>5</sup> Available here: [https://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory-Notice-18-20.pdf](https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-18-20.pdf)

<sup>6</sup> Wall Street watchdog to laid-off crypto employees: work for us, *Reuters*, June 14, 2022, available here: <https://www.reuters.com/markets/us/wall-st-watchdog-finra-bulk-up-crypto-capabilities-ceo-says-2022-06-14/>

their client, the exchange. It's more than an unfair competitive advantage over registered companies that sell crypto – it's illegal and should stop.<sup>7</sup>

This isn't just my opinion. Recently, a federal district court declared Coinbase's customer agreement unconscionable. *see e.g. Bielski v. Coinbase, Inc.*, 2022 U.S. Dist. LEXIS 101748 (N.D. Cal., June 7, 2022). As you may know, voiding an otherwise valid contract because of "unconscionability" rarely happens in practice because the legal standard is so high. Coinbase subsequently attempted to seek an emergency stay of this decision, but was denied by the Ninth Circuit and then the Supreme Court.

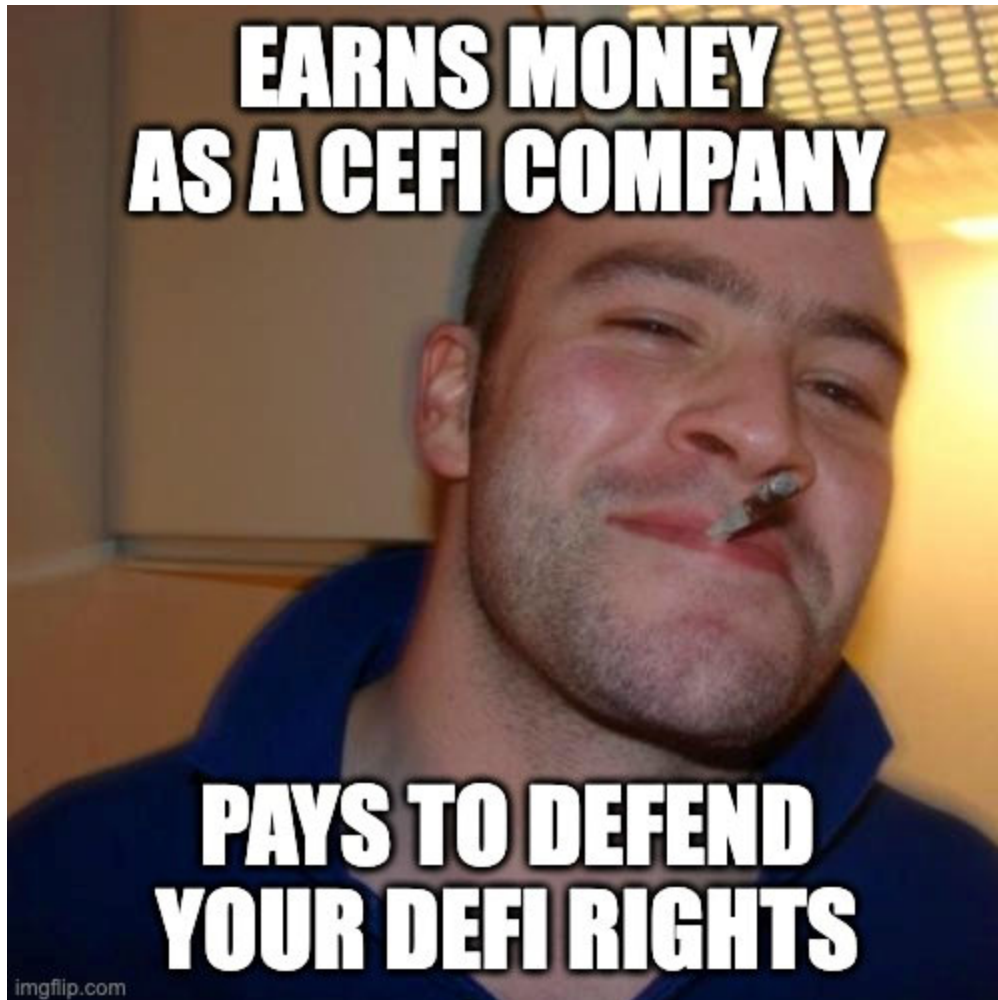
### ***Coinbase Flouts US Laws***

Coinbase, of all the exchanges you wrote to, has particularly exploited our legal system to harm investors. The company recently boasted publicly about funding a litigation involving Tornado Cash. Tornado Cash is a "mixer" and its services are used by individuals who want to make their transactions on the blockchain anonymous. The Treasury Department recently sued Tornado Cash because its platform was used to launder \$455 million in crypto currency that was stolen by the government of North Korea as part of the largest crypto theft in history.

Brian Armstrong, the CEO of Coinbase publicly boasted about defending Tornado Cash and re-tweeted this image to his followers on September 8, 2022:

---

<sup>7</sup> Broker-dealers that join FINRA are prohibited from placing unfair or unreasonable conditions in their new account forms FINRA Regulatory Notice 21-16 (Pre-dispute Arbitration Agreements in Customer Agreements). Available: <https://www.finra.org/sites/default/files/2021-04/Regulatory-Notice-21-16.pdf>



I applaud you for investigating the crypto currency exchanges, I hope you find this letter and the information contained in it helpful to your investigation. Please let me know if I can be of assistance to you or the committee.

Best regards,

*/sMarc Fitapelli*