

June 8th, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

File No. SR-CboeBZX-2021-019

Re: Non-Fungible Tokens & Fractionalized Ownership of Real Property & Companies

Dear Secretary Countryman,

Okada & Company (“Okada”) is a commercial real estate organization with 53 years of history in the New York City Commercial Real Estate Industry. With a heavy focus on complex commercial real estate acquisition, development, sales, leasing, and lending transactions, we are seeking clarification, guidance, & rules regarding the use of Non-Fungible Tokens (NFT’s) and their utility or application towards real property & related holding companies or partnerships.

We believe existing securities laws that were written in the 1930s require an update for the regulation of NFTs. We encourage the SEC to publish a concept release on the regulation of NFTs to provide suitable guidance to the industry followed by the adoption of a new regulation on the same.²

I. Background

Okada believes the development of NFTs presents a unique challenge to SEC's ability to protect investors from products that may be illegally offered securities.

A. Digital Assets

There has been an increasing number of digital assets that rely on distributed ledger technology commonly known as blockchain, exist in a variety of forms and provide industry actors with a variety of benefits.³ Digital assets use blockchain technology to create a secure, distributed network for transactions.⁴

The SEC has defined digital assets as "an asset that is issued and transferred using distributed ledger or blockchain technology."⁵ Digital assets include, but are not limited to virtual currencies, coins, and tokens.⁶ A digital asset may in certain instances be deemed a security under the federal securities laws. While not defined in the securities laws, the SEC often refers to digital assets that are securities as a "digital asset securities."⁷

B. Non-Fungible Tokens

NFTs use blockchain technology to establish authenticity, ownership, and transferability of a unique asset. NFTs differ from other digital assets such as Bitcoin which are fungible. NFTs can be purchased and sold peer-to-peer or on dedicated platforms. NFTs are commonly associated with art, gaming and digital collectibles. Projects including Gary Vaynerchuk’s “VeeFriends” created an estimated \$50M on its first release, and an additional \$40M on its second release, and Mike

Winkelmann, also known as Beeple, recently used an NFT to sell his digital art "Everydays - The First 5000 Days" for \$69 million. With hundreds of Billions of dollars exchanged for Non-Fungible Tokens, we are requesting clarification, direction, safe guards, and treatment of NFT's.

II. Are NFTs Securities?

The SEC evaluates digital assets in the same manner as traditional assets to determine whether they are securities. Unlike initial coin offerings which are a type of digital asset that has drawn a considerable level of attention from the SEC staff, NFTs have not been the subject of interpretative guidance by the SEC. The SEC has not initiated an enforcement action against the creator of an NFT or the operator of a platform that facilitates the offer and sale of NFTs. The issue of when an NFT is a security is unclear.

The definition of "security" under the Securities Act of 1933 (the "Securities Act") and Securities Exchange Act of 1934 (the "Exchange Act") are nearly identical and broad enough to cover some NFTs. Section 2(a)(1) of the Securities Act defines a "security" as:

*“any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, ... or, in general, any interest or instrument commonly known as a "security.”*⁸

The definition of security is sufficiently expansive to grant the SEC broad authority to regulate a variety of products as securities. While the definition of security is very broad, it does not explicitly include digital assets or NFTs. In enforcement actions, the SEC has argued offerings of digital assets are investment contracts.⁹

What constitutes an investment contract is determined based on the test articulated by the U.S. Supreme Court in *Securities and Exchange Commission v. W J. Howey Co.* Under the *Howey* test, an investment contract is 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. The *Howey* Test brings many non traditional offerings within the scope of the term security.

While the SEC has not provided guidance on when an NFT is a security, the SEC staff has noted:

*“the main issue in analyzing a digital asset under the Howey test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others. A purchaser may expect to realize a return through participating in distributions or through other methods of realizing appreciation on the asset, such as selling at a gain in a secondary market.”*¹⁰

If an NFT relates to an existing asset and is marketed as a collectible with a public assurance of authenticity on the blockchain, it should not be deemed a security. If an NFT promises a return on investment from the efforts of others, the NFT could be deemed a security. However, as noted by the SEC staff in its 2019 Framework, "Price appreciation resulting solely from external market forces (such as general inflationary trends or the economy) impacting the supply and demand for an underlying asset generally is not considered 'profit' under the *Howey* test."¹¹

As NFTs proliferate, new regulatory questions will arise. Okada believes NFT's used to purchase fractions of real property ownership, real assets, or their holding companies & other partnerships be

considered a security. While NFTs are meant to be non-fungible, fractional NFTs that allow numerous purchasers to acquire a partial ownership interest in the NFT, increases the likelihood the NFT could be deemed a security. We encourage the SEC to provide guidance on the fractional ownership of a company, partnership, or real property.

III. Requests

Okada is requesting the SEC to:

1. Publish a concept release on the regulation of NFTs
2. Clarify the allowable uses, utility, and any restrictions regarding those uses & utility.
3. Direct companies selling NFT's backed by fractional ownership or real property or companies on proper filings or procedures.
4. Propose rules to address NFT's when they are treated like securities.

As was the case with the proliferation of ICOs in the last several years, the number of FinTech firms facilitating the issuance and trading of NFTs is growing rapidly. Like ICOs, NFTs are attracting the attention of prominent athletes, entertainers, the media, and the public. Unlike the ICO frenzy of several years ago which was met with guidance and enforcement actions, the SEC has not published guidance on the regulation of NFTs as digital asset securities.

The regulation of NFTs presents the SEC with an opportunity to satisfy its statutory duties - protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation - by engaging in a constructive dialogue with the FinTech industry on how to regulate NFTs.

V. Conclusion

NFTs have already become a multi-billion dollar industry, however, function as traditional securities and do not fit clearly under the existing regulatory framework. We believe the pace of change must be addressed by the statutory duties of the SEC to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. To help promote stability and innovation in the industry, Okada believes the SEC should publish a concept release on the regulation of NFTs that clearly defines when an NFT is a security, and what type of registration is required by firms facilitating the trading of NFTs.

We hope that you, the Commissioners, and the staff find these comments informative. Okada welcomes the opportunity to discuss with you how the SEC may develop a regulatory framework that harnesses the potential of the industry by creating more transparency and efficiency.

If Okada or I can be of any further assistance to you in this matter, please do not hesitate to contact me at the above address or at cno@okadaco.com or 212-244-4240

Very truly yours,

Christopher Okada
Chief Executive Officer
Okada & Company

¹ Rulemaking petition regarding the regulation of digital assets and blockchain technology (Mar. 15, 2017), *available at*: <https://www.sec.gov/rules/petitions/2017/petn4-710.pdf> *see also* Rulemaking petition on digital asset mining (Revised) (Apr. 4, 2019), *available at*: <https://www.sec.gov/rules/petitions/2019/petn4-743.pdf> Request for rulemaking to address how digital assets are regulated once a trade occurs (Dec. 12, 2018), *available at*: <https://www.sec.gov/rules/petitions/2018/petn4-736.pdf> and Rulemaking petition related to issuance of initial coin offerings that took place prior to the promulgation of related guidance by the Commission (Jan. 26, 2018), *available at*: <https://www.sec.gov/rules/petitions/2018/petn4-719.pdf>

² The SEC and other agencies such as the Office of the Comptroller of the Currency (the "OCC") have taken important steps in acknowledging the growing importance of FinTech in the broader financial services industry.

³ *See* RICHARD 8. LEVIN ET AL., REAL REGULATION OF VIRTUAL CURRENCIES, HANDBOOK OF DIGITAL CURRENCY, 328-31 (2015).

⁴ *See id.* at 331-32.

⁵ Statement on Digital Asset Securities Issuance and Trading, Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets, SEC (Nov. 16, 2018), *available at*: <https://www.sec.gov/news/public-statement/digital-asset-securities-issuance-and-trading>

⁶ *Id.*

⁷ *Id.*

⁸ Securities of 1933 § 2(a)(1).

⁹ *see e.g.*, *SEC v. FUK, et al.* (Sep. 10, 2020), *available at*: <https://www.sec.gov/litigation/complaints/2020/comp-pr2020-207.pdf> *In the Matter of Boon.Tech, et al.* (Aug. 13, 2020), *available at*: <https://www.sec.gov/litigation/admin/2020/33-10817.pdf> *SEC v. ICOBox, et al.* (Sep. 18, 2019), *available at*: <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-181.pdf> *SEC v. Kik Interactive Inc.* (June 4, 2019), *available at*: <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-87.pdf> *In the Matter of Gladius Network LLC* (Feb. 20, 2019), *available at*: <https://www.sec.gov/litigation/admin/2019/33-10608.pdf> *In the Matter of Floyd Mayweather, Jr.* (Nov. 29, 2018), *available at*: <https://www.sec.gov/litigation/admin/2018/33-10578.pdf> *In the Matter of Khaled ("DJ Khaled")* (Nov. 29, 2018), *available at*: <https://www.sec.gov/litigation/admin/2018/33-10579.pdf> *In the Matter of Paragon Coin, Inc.* (Nov. 16, 2018), *available at*: <https://www.sec.gov/litigation/admin/2018/33-10574.pdf> *In the Matter of CarrierEQ, Inc., d/b/a Airfox* (Nov. 16, 2019), *available at*: <https://www.sec.gov/litigation/admin/2018/33-10575.pdf> *In the Matter of Zachary Coburn* (Nov. 8, 2018), *available at*:

<https://www.sec.gov/litigation/admin/2018/34-84553.pdf> *SEC v. 8/ockvest LLC, et al.* (Oct. 11, 2018), *available at*:

<https://www.sec.gov/litigation/complaints/2018/comp-pr2018-232.pdf> *TokenLot LLC, Lenny Kugel, and Eli Lewitt* (Sep. 11, 2018),

available at: <https://www.sec.gov/litigation/admin/2018/33-10543.pdf> *In the Matter of Tomahawk Exploration LLC and David T.*

Laurance (Aug. 14, 2018), *available at*: <https://www.sec.gov/litigation/admin/2018/33-10530.pdf> *SEC v. Titanium Blockchain*

Infrastructure Services Inc., et al. (May 22, 2018), *available at*: <https://www.sec.gov/litigation/complaints/2018/comp-pr2018-94.pdf>

SEC v. Sharma, et al. (Apr. 2, 2018), *available at*: <https://www.sec.gov/litigation/complaints/2018/comp-pr2018-53.pdf> *In the Matter of*

Munchee, Inc. (Dec. 11, 2017), *available at*: <https://www.sec.gov/litigation/admin/2017/33-10445.pdf> *SEC v. REcoin Group*

Foundation, LLC, et al. (Sep. 29, 2017), *available at*: <https://www.sec.gov/litigation/complaints/2017/comp-pr2017-185.pdf>

¹⁰ Framework for "Investment Contract" Analysis of Digital Assets (2019), *available at*: <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>

¹¹ *Id.*

¹² 15 U.S.C. § 78c(a)(1).

¹³ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Securities and Exchange Commission Release No. 81207 (July 25, 2017), *available at*:

<https://www.sec.gov/litigation/investreport/34-81207.pdf>