

March 31, 2017

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Re: Distributed Ledger Technology: Implications of Blockchain for the  
Securities Industry (the “**Report**”)

Dear Ms. Asquith:

Overstock.com, Inc. (“**Overstock**”) and t0.com, Inc. (“**t0.com**”), a financial technology (“**FinTech**”) subsidiary of Overstock, are submitting this letter in response to FINRA’s request for comment on the above referenced Report. As pioneers in the application of distributed ledger technology (“**DLT**”), we welcome the opportunity to engage with FINRA and other regulators on this important topic and to offer our perspective on the potential for DLT to transform the securities industry.

#### *Background*

Overstock is an online retailer based in Salt Lake City, Utah, that sells a broad range of consumer products at low prices. As an early proponent of DLT, in January 2014, we became the first major online retailer to accept the digital currency bitcoin for payment. In late 2014, we began working on initiatives to develop and advance DLT, launching Medici Ventures, a wholly owned subsidiary created to manage and oversee our investments in firms building solutions leveraging and servicing DLT. t0.com, a Medici Ventures investment, focuses on the development and commercialization of FinTech that is based on cryptographically secured, decentralized ledgers. t0.com has pioneered the effort to bring greater efficiency and transparency to capital markets through the integration of DLT.

On December 15, 2016, Overstock announced the closing of the first ever SEC-registered public offering of digital securities. The digital securities issued in this historic offering, Overstock’s Blockchain Voting Series A Preferred Stock, are directly registered in the stockholder’s name (rather than “street” name) and trade exclusively on a registered alternative trading system operated by t0.com’s wholly-owned subsidiary, PRO Securities LLC, utilizing the t0 Platform. The t0 Platform is an integrated suite of software applications that utilize DLT and replicate the necessary operational and regulatory functionality required for any company to issue securities and enable those securities to trade in a closed-system secondary market. This historic offering demonstrated that there is indeed a path toward applying DLT to capital markets in a way that complies with regulatory requirements and is accessible and practical for both issuers and investors. Through the t0 Platform’s utilization of DLT, trades in Overstock digital securities settle on the same day that they are executed, rather than pursuant to the

industry-standard three-day (or the newly enacted two-day) settlement cycle. Secondary trading is recorded on a permissioned network (referred to as our proprietary ledger) and also embedded, without shareholder personal identifying information, into the bitcoin blockchain.

### *The Regulatory Environment for DLT Innovation*

We firmly believe that DLT has the potential to revolutionize the securities industry and to deliver improved efficiency, faster processing, enhanced transparency and lower costs to the capital markets. We also believe that DLT provides substantial improvements to investor protection and market integrity, by reducing risk and enhancing transparency. Consequently, we believe that a supportive regulatory framework for innovation is in the interest of regulators, investors and other market participants as well as DLT innovators.

In the Report, FINRA notes that when adopting DLT and revamping current processes, broker-dealers should be cognizant of all applicable federal and state laws, rules and regulations, including FINRA and SEC rules. While DLT applications can be implemented in a manner that complies with the letter of existing regulatory requirements, it is important for FINRA and other regulators to consider that rapid technological development occurs against the backdrop of an underlying legal and regulatory framework that was enacted for a previous technological era, reliant on ticker tape and typewriters, to address an entirely different operational paradigm. In this regard, we encourage regulators to consider carefully whether, in connection with innovative DLT applications, a rigid approach to compliance with the letter of the law might ultimately inhibit innovation in the United States and potentially frustrate the ability of DLT applications to fulfill the *spirit* of existing regulations better.

While many market participants have, as the Report notes, focused to date on discrete applications and devised limited-scale experiments related to the implementation of DLT, we have a fully functional technology suite in operation. We encourage regulators to consider whether the limited implementation by others might be motivated, in part, by uncertainty regarding the application of existing regulations and the excessive cost of ensuring compliance with regulations (that are in the context of DLT) anachronistic. In considering the appropriate regulatory approach to DLT, it is our view that innovation, investor protection and market integrity can all be served through the implementation of a consistent and predictable principles-based application of regulations. Innovation will flourish when innovators are confident that regulators will not rigidly enforce so-called “foot faults” or technical violations that do not undermine investor protection and market integrity. Here, we would encourage FINRA and other regulators to provide explicit and clear interpretive guidance.

In addition, we also encourage regulators to take affirmative steps to create space for DLT innovation and to ensure that existing regulation does not inhibit the development and adoption of DLT applications. In this regard, the regulatory framework would benefit from a comprehensive review of, and where necessary, revision of, specific rules that may inhibit DLT innovation by codifying an outdated technological regime.

For example, we encourage regulators and lawmakers:

- to review Exchange Act Rule 15c3-3, which requires, among other things, that broker-dealers obtain and maintain physical possession or control of certain customer securities, to determine whether this custody requirement remains appropriate with respect to customer securities that take the form of on-network or on-ledger digital assets.
- to revisit books and records regulations, such as Exchange Act Rules 17a-3 and 17a-4 and FINRA Rule 4511, and introduce appropriate revisions to make these rules technologically neutral such that they can accommodate the immutable records that DLT generates;
- to revisit the need for a central securities register in contexts where DLT may serve as a master securityholder file and, in such circumstances, evaluate the applicability and utility of transfer agent regulations;
- to evaluate the utility of the current reporting framework for OTC transactions as well as customer confirmation and account statement requirements and consider whether these obligations impose unnecessary burdens in circumstances where DLT applications already provide the market and individual customers with real-time transparency; and
- in each case, to consider whether strict compliance with existing regulations imposes unnecessary burdens on DLT applications by requiring the introduction of additional, otherwise unnecessary intermediaries solely to ensure legal compliance, thereby increasing risk, cost and complexity.

We fully recognize that any new technology, including DLT, with the potential to bring about an industry-wide paradigm shift will, by its nature, result in some level of disruption. Under the existing regulatory regime, there are substantial challenges in eliminating intermediaries. In the short term, we expect that intermediaries, which include clearing agencies, trading platforms and transfer agents, will adapt DLT to their businesses to become more efficient, accurate and secure. However, in the longer-term, we expect that DLT will fundamentally call into question the need for many of the intermediaries that play a role under the current paradigm. As the paradigm shifts, we have no doubt that intermediaries with entrenched interests in the preservation of the status quo will fervently argue for their continued relevance. We recommend that regulators critically assess such arguments with the recognition that under our current market structure countless intermediaries profit from the system's own need for such a complex web of intermediaries. For the United States securities industry to stand out as a leader in innovation, it will be necessary for regulators to chart a courageous path forward, notwithstanding protestations from entrenched interests.

#### *Implementation Considerations*

##### *Governance, Operational Structure and Network Security*

The Report highlights key considerations for market participants in implementing a DLT network, including governance, operational structure and network security. We fully agree with FINRA that these areas are of utmost importance and demand careful consideration by market participants implementing a DLT network. Nevertheless, while DLT standards certainly must be established, we believe that this



task should largely fall on the shoulders of the DLT community itself. While the questions presented by FINRA with respect to each of these key considerations are appropriate and worthy of consideration, we recommend that regulators clearly convey to market participants that such questions serve solely as a starting point for dialogue and are not intended to indicate any application or approach that is preferred by regulators. A failure to make this point clear at the outset risks frustrating the novelty and originality that DLT innovators might otherwise arrive at. For example, in contrasting a decentralized system with private DLT networks that impose a governance structure, the Report might suggest—in our view, incorrectly—that there is not a sliding scale of possibilities between these two poles. Of course, this may not have been FINRA’s intention. Nevertheless, we believe that clarification from FINRA would be helpful to assure potential innovators that the Report, by posing questions for consideration, does not betray any underlying regulatory preference.

We believe that it is important that FINRA convey such reassuring signals. Jurisdictions across the globe are actively competing to serve as incubators for DLT applications, and if the United States intends to remain the center of global finance, it is important that it remain a viable competitive option to innovators. If the United States imposes too high of a regulatory burden and innovators depart to more supportive jurisdictions, regulators might risk losing their ability to bring the benefits of this revolutionary technology to the U.S. financial system.

#### Regulatory Considerations

As noted above, we believe that the key contribution that regulators can make to ensuring that the United States remains a frontrunner of innovation will be to provide sufficient space for DLT pioneers to innovate—through the active reevaluation, and a commitment to the flexible interpretation, of existing regulations. In each case, such tasks should be undertaken against the backdrop of a market structure that bears little resemblance to the structure that existed when these regulations were adopted.

To this end, for example:

- while the Report asks broker-dealers to consider how they would account for obligations to maintain physical possession or control over cryptosecurities, we also ask that regulators consider inquiring of themselves whether existing concepts of physical possession and control ought to be proactively addressed in a manner that will foster innovation in DLT applications;
- while the Report cautions that broker-dealers seeking to maintain books and records on a DLT network consider whether this approach would meet the requirements of Rules 17a-3 and 17a-4, we also ask that regulators consider putting forward an interpretive view as to whether, or under what circumstances, they would consider such a use of a DLT network to be in violation of these rules; and
- while the Report notes that market participants may wish to consider whether any of their activities in the DLT environment meet the definition of a clearing agency and whether corresponding clearing agency registration requirements would be applicable, we suggest that a more effective approach would be to provide clear upfront guidance so that potential

innovation is not stifled by the apprehension that onerous registration requirements might be inadvertently triggered.

A regulatory framework in which flexible, forward-looking interpretive guidance is affirmatively put forward would establish the United States as a jurisdiction committed to ensuring that effective and efficient DLT applications are developed. While we believe that strict compliance with existing regulation is possible, we suggest that it is not the most effective way to foster innovation and may, in certain circumstances, be counter-productive—for example, in artificially maintaining involvement of numerous intermediaries with the effect of increasing costs and opportunities for operational risk to enter the system. We also caution that an overly rigid regulatory framework for broker-dealers could leave a void into which other, less regulated, intermediaries step in with novel technologies. If broker-dealers are displaced from the system by other intermediaries, FINRA may become less relevant to the development of DLT absent a broader regulatory mandate.

### *Conclusion*

Overstock and t0.com are grateful for the opportunity to comment on the Report. The Report is an important step in establishing a dialogue among the industry, key FinTech innovators, the regulatory community and other stakeholders. We are in complete agreement with FINRA that it is imperative that market participants and regulators collaborate early in the process to enable the industry to reap fully the benefits of this groundbreaking technology. We encourage regulators considering the impact of DLT applications to forge a bold path forward through flexible, principles-based guidance and are confident that this approach can ensure the protection of investors and the maintenance of market integrity, while also clearing a path for a bold new paradigm of efficiency and transparency.

As always, we welcome the opportunity to discuss our uses of DLT and to discuss any issues with you to continue the dialogue commenced by the Report. Should you wish to discuss our comments or our views on DLT, please do not hesitate to call me, Jonathan Johnson (Chairman of the Board of Directors of Overstock.com) or Ralph Daiuto, Jr. (Chief Operating Officer and General Counsel, t0.com).

Sincerely,



Dr. Patrick M. Byrne  
Chief Executive Officer, Overstock.com, Inc.

cc: Jonathan Johnson, Chairman of the Board of Directors, Overstock.com, Inc.  
Ralph A. Daiuto, Jr., Chief Operating Officer and General Counsel, t0.com  
Robert L.D. Colby, FINRA, Chief Legal Officer  
Haimera Workie, FINRA, Senior Director, Office of Emerging Regulatory Issues  
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Hon. Michael S. Piwowar, SEC, Acting Chairman  
Hon. Kara M. Stein, SEC, Commissioner