

Memorandum

New Guidance From the SEC's Division of Trading and Markets Signals a Welcome Shift on the SEC's Approach to Crypto Asset Activities and Distributed Ledger Technology

May 20, 2025

Introduction

In a major development, the Staff of the Division of Trading and Markets of the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) released a new set of Frequently Asked Questions (the “FAQs”) designed to provide further guidance concerning the application of the federal securities laws to crypto asset activities involving broker-dealers and transfer agents.¹ The SEC Staff and FINRA Staff also withdrew their 2019 Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities (the “2019 Joint Staff Letter”), which outlined several regulatory considerations, mostly unworkable, for broker-dealers operating in the crypto asset markets.² The FAQs indicate fresh thinking at the SEC and FINRA, and serve as a major step forward in opening the crypto asset markets to traditional financial services intermediaries.

For context, Commissioner Hester Peirce issued a statement earlier this year seeking crypto market participants’ views on a range of topics, including several issues affecting broker-dealers and other market intermediaries.³ Since that time, numerous market participants have submitted written responses to Commissioner Peirce’s questions, and the SEC’s Crypto Task Force has hosted roundtable events focused on a range of key issues impacting the crypto asset markets, including issues related to broker-dealer custody and the crypto asset markets generally. Indeed, in recent remarks, SEC Chair Atkins recognized the existence of unresolved issues and explained how he has “directed Commission staff” to begin drafting rule proposals for the crypto industry.⁴

The SEC and FINRA previously issued several pronouncements related to the application of the federal securities laws and FINRA rules to broker-dealer activities, including the 2019 Joint Staff Letter, a Staff no-action letter, and the Commission’s 2020 statement entitled “Custody of Digital Asset Securities by Special Purpose Broker-

¹ SEC, Staff Guidance, *Division of Trading and Markets: Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technology*, (May 15, 2025), available [here](#).

² Commissioner Peirce recently stated in public remarks that “[n]othing in the federal securities laws or regulations currently restricts broker-dealers with an alternative trading system from offering trading in non-securities alongside securities, but further clarification from the Commission staff on this topic may be helpful to market participants as well.” See, Commissioner Hester M. Peirce, Speech, *New Paradigm: Remarks at SEC Speaks*, (May 19, 2025), available [here](#).

³ Commissioner Hester M. Peirce, Statement, *There Must Be Some Way Out of Here*, (Feb 21, 2025), available [here](#).

⁴ Chairman Paul S. Atkins, Speech, *Prepared Remarks Before SEC Speaks*, (May 19, 2025), available [here](#).

Dealers” (the “**SPBD Statement**”).⁵ In practice, very few broker-dealers have sought to operate in the crypto markets in reliance on the regulatory positions set forth in those pronouncements because they largely have been impracticable to follow. The new FAQs appear to be better informed, and much more realistic. Following is a description of the new guidance.

Broker-Dealer Financial Responsibility

The FAQs clarify the application of Rule 15c3-3 under the Securities Exchange Act of 1934 (the “**Exchange Act**” and Rule 15c3-3 thereunder, the “**Customer Protection Rule**” or the “**Rule**”) to certain crypto asset activities, as summarized below:

- Broker-Dealers Can Custody Customers’ Non-Security Crypto Assets: The Staff confirmed that paragraph (b) of the Customer Protection Rule, which requires broker-dealers to obtain and maintain physical possession or control of all fully-paid securities and excess margin securities carried by a broker-dealer, does not apply to non-security crypto assets. By clarifying that a broker-dealer that maintains custody of both securities and non-security crypto assets need only comply with the paragraph (b) with respect to the securities it holds for customer accounts, the FAQs indirectly confirm that broker-dealers can engage in both securities and non-security crypto asset activities within the same broker-dealer registrant. This represents a significant departure from the SPBD Statement, which provided that a broker-dealer that engages in crypto asset securities activities in reliance on the SPBD Statement could not be also engaged in non-securities activities, including activities relating to non-security crypto assets, such as bitcoin, ether, and others.
- Broker-Dealers Can Establish Control of a Crypto Asset That Is a Security: The FAQs also confirmed that a broker-dealer can establish control of a crypto asset security, for purposes of the Customer Protection Rule, by complying with paragraph (c) of the Rule.⁶ The Staff noted that, although certain control locations in paragraph (c) of the Rule reference a security being in certificated form to establish control under that provision, the Staff would not object if crypto asset securities are not in certificated form when held at an otherwise qualifying control location under paragraph (c). This too represents a significant change in regulatory posture. The 2019 Joint Staff Letter, for example, raised significant doubts about a broker-dealer’s ability to determine that it, or its third-party custodian, maintains custody of a crypto asset security given that a custodian may not be able to demonstrate that no other party has a copy of the private key related to the security.
- Compliance With the Special Purpose Broker-Dealer Statement is Not Mandatory: The Staff noted that compliance with the SPBD Statement is not mandatory for broker-dealers seeking to custody customer crypto assets securities. This also acts to confirm indirectly that a broker-dealer can engage in both

⁵ See, *Custody of Digital Asset Securities by Special Purpose Broker-Dealers*, Exchange Act Release No. 34-90788 (Dec. 23, 2020), 86 FR 11627 (Feb. 21, 2021), available [here](#).

⁶ Paragraph (c) of the Customer Protection Rule specifies the methods by which securities will be deemed to be securities that are under the control of a broker-dealer.

traditional securities and crypto asset securities business activities within the same broker-dealer registrant given the restrictions imposed by the SPBD Statement.

- Spot Activities Permitted; Bitcoin and Ether Are Readily Marketable (20% Haircut): The FAQs further explain that custody and capital requirements do not prohibit a broker-dealer from facilitating in-kind creations and redemptions in connection with spot crypto exchange-traded products (“ETPs”). The FAQs go on to note that broker-dealers holding proprietary positions in the assets underlying an ETP would need to account for those assets as part of their net capital calculations but could treat proprietary positions in bitcoin and ether as being readily marketable for purposes of determining whether the 20% haircut applicable to commodities applies to such crypto assets. Previously, crypto assets were generally regarded as non-allowable assets under the net capital rules that would be subject to a 100% haircut resulting in significant and burdensome carrying costs for broker-dealers. Although only bitcoin and ether were explicitly mentioned in the FAQs, Commissioner Peirce, in her corresponding statement to the FAQs, suggested that other crypto assets may also be considered readily marketable.⁷ Since this response was issued in the context of ETPs, however, it remains unclear whether bitcoin and ether (and any other crypto assets) would be viewed as readily marketable when not held as proprietary positions in connection with ETP creation and redemption activities.
- Unregistered Investment Contracts Not Protected by SIPC; Only Securities Covered by SIPC: In line with the definition of “security” under the Securities Investor Protection Act of 1970 (“SIPA”), the FAQs confirm that investment contracts that are not the subject of a registration statement filed under the Securities Act of 1933, as amended, are not protected under SIPA. Additionally, the FAQs clarify that non-security crypto assets similarly are not protected under SIPA since SIPA protection only extends to securities.

Transfer Agents

The FAQs also provide helpful guidance on the application of transfer agent registration and recordkeeping requirements to crypto asset activities. We outline the key points below:

- Transfer Agent Registration Remains a Facts/Circumstances Test: The Exchange Act defines a transfer agent to mean “any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates” (such activities, “**Transfer Agent Activities**”).⁸ In considering whether

⁷ Commissioner Hester M. Peirce, Statement, *An Incremental Step Along the Journey: The Division of Trading Markets’ Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technologies*, (May 15, 2025), available [here](#). (“The [FAQ’s] limitation to the capital treatment of bitcoin and ether does not mean that broker-dealers may hold only those crypto assets or that only those crypto assets may be readily marketable for purposes of the net capital rules.”).

⁸ 15 U.S.C. § 78c(a)(25).

a person acting as a transfer agent for an issuer of a crypto asset security is required to register with the SEC as a transfer agent, the FAQs confirm that transfer agent registration remains a facts and circumstances test. The FAQs nonetheless note that to determine whether transfer agent registration is necessary when providing services for crypto asset securities, persons should (i) determine whether those securities are securities registered under the Exchange Act (or are those securities that are exempt from registration) and (ii) analyze the services, functions, or activities they are performing with respect to those securities and determine whether any of those services, functions, or activities qualify as Transfer Agent Activities. In turn, the FAQs provide that if a person is not providing services for Exchange Act registered securities (or those securities that are exempt from registration) or is only providing services for such securities that do not qualify as Transfer Agent Activities, such a person would not be required to register as a transfer agent. Therefore, the FAQs provide much needed clarity around transfer agent registration activities for crypto industry participants.

- A Blockchain Can Serve as the Master Securityholder File: The FAQs make clear that a registered transfer agent can utilize distributed ledger technology (*e.g.*, a blockchain network) as its official Master Securityholder File. The FAQs also recognize that, so long as a transfer agent ensures that its records are at all times secure, accurate, up-to-date, produceable to the Commission and the Staff in an easily-readable format, and maintained for the required time periods under applicable rules, the specific technology, systems, or files that comprise the records would generally be within a transfer agent's discretion.

Conclusion

The FAQs represent the latest effort by the Staff to provide clarity to the crypto asset industry regarding the application of the federal securities laws and are further evidence of a major shift in regulatory posture toward crypto assets generally. Although there remain numerous unresolved issues under the federal securities laws for broker-dealers, investment advisers, and funds operating, or seeking to operate, in these markets, the FAQs provide significant clarity to market participants that may have been unwilling to provide crypto asset services based on prior regulatory positions. More broadly, the SEC's much-publicized retreat from aggressive enforcement in the crypto sector should give registrants comfort that good faith efforts to comply with emerging guidance will not later be second-guessed by the Staff, at least in the current Administration.

We will continue to monitor crypto-related developments and are available to assist asset managers and other financial services clients in navigating this evolving regulatory landscape.

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