SEC Staff Input Eases Path For Broker-Dealer Crypto Activities

By **David Katz, Andrew Sioson and Lilya Tessler** (June 3, 2025)

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On May 15, the staff of the U.S. Securities and Exchange Commission's Division of Trading and Markets provided significant guidance in the form of frequently asked questions to address various considerations for SEC-registered broker-dealers[1] and (2) SEC-registered transfer agents with respect to certain activities involving crypto-assets.[2]

Concurrent with the issuance of the FAQs, the SEC staff, together with the Financial Industry Regulatory Authority staff, withdrew[3] the Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities that was issued in July 2019.[4]

The FAQs address the application of certain broker-dealer financial responsibility rules and transfer agent regulations to crypto-asset activities and distributed ledger technology, or DLT.

In particular, the FAQs provide significant easing from the guidance set forth in the joint statement regarding the ability of a broker-dealer to carry crypto-assets — both securities and nonsecurities — for the account of any customer. In this regard, the FAQs could be viewed as welcome change by many blockchain market participants and traditional financial institutions, including those looking to expand or establish services related to crypto-assets.

Although the SEC's 2020 statement, titled Custody of Digital Asset Securities by Special Purpose Broker-Dealers, has not been rescinded,[5] the FAQs provide a path for broker-dealers that are not special purpose broker-dealers to engage in the same activities as a special purpose broker-dealer within an existing broker-dealer — although doing so may require review or approval by FINRA through an informal materiality consultation or a more formal continuing membership application.[6]

The FAQs address both crypto-assets that are securities and those that are not, and discuss:

- The applicability of SEC Rule 15c3-3 to crypto-asset securities;
- The permissibility of broker-dealers to facilitate in-kind creations and redemptions in connection with spot crypto exchange-traded products, or ETPs;
- The applicability of the Securities Investor Protection Act to crypto-asset securities in a broker-dealer insolvency;
- Broker-dealer recordkeeping practices for crypto-asset securities and nonsecurities crypto-assets; and
- Obligations of transfer agents engaged in crypto-related activities or using DLT.

The staff notes that the FAQs represent their view and are not a rule, regulation or statement of the SEC. The staff further notes that the SEC has neither approved nor disapproved the responses and that they "have no legal force or effect" and "do not alter or amend applicable law." As a practical matter, however, it would presumably be unlikely that the SEC would recommend enforcement action if a broker-dealer or transfer agent followed the guidance in the FAQs, and such FAQs will likely be respected and followed by FINRA.[7]

The Application of Rule 15c3-3 to Crypto-Assets

SEC Rule 15c3-3(b)(1) requires a broker-dealer to promptly obtain, and thereafter maintain, the possession or control of all fully paid securities and excess margin securities[8] "carried for the account of customers."[9] If a broker-dealer is carrying a fully paid or excess margin security for the account of a customer, the broker-dealer is required to either maintain (1) the possession of such security or (2) the control of such security in accordance with SEC Rule 15c3-3(c), which specifies certain "good control locations."[10]

The FAQs clarify that with respect to the carrying of crypto-assets for a customer, the requirements set forth in SEC Rule 15c3-3(b)(1) and (c) apply only to crypto-assets that are securities, and, thus, such requirements do not apply to crypto-assets that are not securities.

Moreover, in contrast to the SEC's 2020 statement on special purpose broker-dealers, the same broker-dealer is permitted to carry for the account of a customer (1) crypto-assets that are securities, (2) crypto-assets that are not securities, and/or (3) traditional securities that are not crypto-assets.

For crypto-assets that are securities, the FAQs state that broker-dealers may establish control in accordance with paragraph (c) of Rule 15c3-3, in particular via SEC Rule 15c3-3(c)(5), where the custodian is a "bank" as defined by SEC Rule 15c3-3(a)(7) — essentially, a "bank" as defined in Section 3(a)(6) of the Exchange Act.[11]

In contrast to the 2019 joint statement, the staff clarified in the FAQs that a broker-dealer may now establish control over crypto-assets that are securities, for the purposes of SEC Rule 15c3-3(b)(1), by ensuring that such securities are held, or custodied, in a control location specified in SEC Rule 15c3-3(c), such as a bank, subject to a no-lien agreement.

The joint statement had previously cast doubt on the ability of broker-dealers to demonstrate good control of crypto-asset securities lodged in, or custodied by, a bank, which is now clearly permitted under the FAQs.[12] As also noted above, the FAQs clarify that the 2020 statement is a safe harbor and that special purpose broker-dealer status is not mandatory for broker-dealers seeking to custody crypto-asset securities for customers.

The FAQs also note that the staff expects broker-dealers to maintain accurate books and records for any nonsecurity crypto-asset activities. The FAQs state that this could be accomplished by the broker-dealer in the same manner as for its securities activities.

That said, there are important ramifications for a broker-dealer that elects to carry crypto-asset securities for the account of a customer.

Once the securities are reflected on the broker-dealer's stock record, per SEC Rule 17a-3(a)(5), the broker-dealer is subject to a quarterly count, verification or examination obligation per SEC Rule 17a-13. The failure to comply therewith can have an adverse impact

on the broker-dealer under the customer reserve formula and the SEC's net capital rule for short security differences, and could require the broker-dealer to buy in securities that are the subject of a short security difference.

Also, pursuant to SEC Rule 17a-5(d)(3), as part of the requirement for a broker-dealer to file annual audited financial statements and an annual audited compliance report with applicable regulators, and any related requirements of other regulators, a broker-dealer's external auditor must be able to audit the broker-dealer's internal financial controls in accordance with Public Company Accounting Oversight Board requirements to ensure against any material weakness with respect to, among other things, the broker-dealer's possession or control obligation under SEC Rule 15c3-3(b)(1) as well as with respect to the broker-dealer's quarterly count obligation under SEC Rule 17a-13.

A broker-dealer that elects to proceed with maintaining custody of a customer's crypto-assets that are securities in accordance with the FAQs may want to first vet their processes and controls with their auditor, and also may want to discuss those processes and controls with FINRA.

In-Kind Creations and Redemptions in Connection With Spot Crypto ETPs

The FAQs also address whether broker-dealers are permitted to facilitate in-kind creations and redemptions involving crypto-assets in connection with spot crypto ETPs. To date, existing spot crypto ETPs use a cash-only creation and redemption structure, despite the stated preference of many sponsors during the listing approval process to permit the creation and redemption of shares by broker-dealers using crypto-assets.

The SEC has previously advised broker-dealers against receiving and transmitting crypto-assets — in particular, bitcoin — in connection with the ETP creation and redemption process. So the FAQs also provide a significant easing for broker-dealers to now engage in such activities.[13]

According to the FAQs, broker-dealers may facilitate such transactions, including by taking proprietary positions in crypto-assets underlying ETPs — bitcoin or ether — as long as those positions are properly reflected in their net capital calculations under Exchange Act Rule 15c3-1.[14]

In this regard, the FAQs state that the staff would not object if broker-dealers were to treat proprietary positions in bitcoin or ether — the assets underlying the ETPs — as readily marketable commodities for purposes of applying the 20% haircut required under Appendix B to Rule 15c3-1, although it is not clear from the FAQs if such guidance is limited to situations where the broker-dealer acquires bitcoin or ether in connection with ETP creations and redemptions, and is, in effect, flat or in a riskless principal position.

That said, this position provides helpful guidance, as the status of crypto-assets under the net capital rule, and whether such positions would be subject to the 100% haircut applied to nonmarketable securities under Rule 15c3-1(c)(2)(vii), had heretofore been unclear. By permitting application of the standard 20% haircut for commodities, the staff has opened the door to greater broker-dealer participation in crypto ETP markets.

Importantly, although the FAQs state that bitcoin and ether can be treated as readily marketable as described above, this guidance appears to be limited to situations where the broker-dealer acquires bitcoin or ether to facilitate creations and redemptions of ETPs and not necessarily broader proprietary trading activity by the broker-dealer.

SIPA Protection

The FAQs reaffirm the staff's prior position that SIPA protection does not extend to investment contracts that are not registered under the Securities Act of 1933 and that SIPA would probably not support a customer net equity claim in the event of a broker-dealer's insolvency and liquidation under SIPA for certain crypto-assets that are not securities, including bitcoin and/or ether, even if the bitcoin or ether is deposited with the broker-dealer for the purpose of purchasing securities.

However, the FAQs suggest that broker-dealers may mitigate the risk of loss of customer assets in an insolvency by contractually agreeing with customers to opt in to Article 8 of the Uniform Commercial Code such that customer assets do not become part of the broker-dealer's estate if the broker-dealer is placed in a liquidation under SIPA or the Bankruptcy Code.

Transfer Agent Activities

The FAQs also discuss how the SEC's transfer agent rules apply to crypto-asset securities and the use of DLT by transfers agents.

The FAQs confirm the ability of registered transfer agents to rely on DLT for maintaining their master securityholder file.[15] Notably, the FAQs clarify that transfer agents are not required to maintain a duplicate or digital twin of their master securityholder files exclusively off-chain, provided applicable requirements under the federal securities laws are met.

Rule 17Ad-9 states that the master securityholder file of a registered transfer agent may consist of multiple linked, automated files in the limited context of uncertificated securities of companies registered under the Investment Company Act.[16] However, in an expansion of this concept, the FAQs explain that the master securityholder file may also comprise multiple files or systems in the context of DLT.

The transfer agent may choose to record certain of the required information on-chain, while recording other parts of the required information off-chain. The FAQs state that this bifurcated model is acceptable, provided the transfer agent complies with applicable rules, including ensuring that its records are at all times secure, accurate, up-to-date and produceable to the commission and staff in an easily readable format.

The FAQs also clarify that persons acting as a transfer agent with respect to crypto-asset securities may not be required to register with the SEC in all cases, depending on the services performed and whether the securities are Section 12 securities.[17] This is the same analysis for transfer agent registration that applies for traditional securities that are not crypto-assets.

Takeaways

In a statement issued alongside the FAQs, Commissioner Hester Peirce described the FAQs as "incremental, not comprehensive."[18]

While the FAQs do not carry the force of law and are not binding, they are suggestive of a new openness by the staff to adopting a more constructive regulatory posture with respect to crypto-asset activities. This marked change in tone may portend increased engagement

by existing and new-entrant securities intermediaries with the SEC and FINRA, including registration of new broker-dealers and transfer agents that integrate blockchain infrastructure in securities markets and crypto-assets into traditional financial services operations.

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[1] In 2019, Sidley published a proposal addressing key questions under Rule 15c3-3. See Lilya Tessler, David Katz, Steffen Hemmerich & Daniel Engoren, Custody of Digital Asset Securities: A Proposal to Address Open Questions for Broker-Dealers Under the SEC's Customer Protection Rule, Sidley (Mar. 18, 2019), https://www.sidley.com/-/media/publications/custody-of-digital-assets.pdf. The FAQs align with our recommendations set forth in the proposal.

[2] https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/frequently-asked-questions-relating-crypto-asset-activities-distributed-ledger-technology.

[3] https://www.sec.gov/newsroom/speeches-statements/withdrawal-joint-staff-statement-broker-dealer-custody-digital-asset-securities?utm_medium=email&utm_source=govdelivery&_ftn2.

[4] https://www.sec.gov/newsroom/speeches-statements/joint-staff-statement-broker-dealer-custody-digital-asset-securities.

[5] See Custody of Digital Asset Securities by Special Purpose Broker-Dealers, Exchange Act Release No. 90788 (Dec. 23, 2020), 86 FR 11627 (Feb. 26, 2021).

[6] See FINRA Rule 1017(a)(5) and Notice to Members 00-73 of the formal National Association of Securities Dealers, Inc, the predecessor to FINRA.

[7] State securities or "Blue Sky" laws are preempted by federal requirements regarding, among other things, customer protection, net capital, and books and records established under the Exchange Act.

[8] The term "fully-paid securities" is defined in SEC Rule 15c3-3(a)(3) to contemplate securities carried long in a customer's brokerage account, that is, which securities are not collateralizing a margin debit balance. The term "excess margin securities" is defined in SEC Rule 15c3-3(a)(5), and related guidance, to mean, in general, securities carried for the account of a customer that have a market value in excess of 140% of the customer's "net"

or adjustment margin debit balance across all of the customer's security accounts carried by the broker-dealer. Because crypto-asset securities are, generally, not "margin securities" under Section 220.2 of Regulation T, as promulgated by the Federal Reserve Board under Section 7(c) of the Exchange Act, as a practical matter, a broker-dealer's obligation to comply with SEC Rule 15c3-3(b)(1) for these purposes is with respect to crypto-asset securities that are fully-paid securities.

[9] See SEC Rule 15c3-3(a)(2).

[10] Under SEC Rule 15c3-3(c)(7), the SEC may specify any other locations as good control locations for these purposes.

[11] Importantly, SEC Rule 15c3-3(c)(5) requires that the bank-custodian acknowledge in writing to the broker-dealer that the securities in question are not "subject to any right, charge, security interest, lien or claim of any kind in favor of the bank or any person claiming through the bank." As noted above, pursuant to SEC Rule 15c3-3(c)(7), a broker-dealer may make application to the SEC to designate other good control locations that are not specified in SEC Rule 15c3-3(c).

[12] See Div. of Trading and Mkts., SEC & Off. of Gen. Couns., FINRA, Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities (Jul. 8, 2019), https://www.sec.gov/newsroom/speeches-statements/joint-staff-statement-broker-dealer-custody-digital-asset-securities (withdrawn May 15, 2025).

[13] A broker-dealer should also consider the impact of state money transmitter requirements to any such proposed activities.

[14] 17 C.F.R. § 240.15c3-1.

[15] Defined in Rule 17Ad-9(b) as the "official list of individual securityholder accounts."

[16] 17 C.F.R. § 240.17Ad-9.

[17] That is, securities registered under Section 12 of the Exchange Act or that would be required to be registered except for the exemption from registration provided by Section 12(g)(2)(B) or Section 12(g)(2)(G) of the Exchange Act (i.e., certain securities issued by a registered investment company or an insurance company).

[18] Commn'r Hester M. Peirce, 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), https://www.sec.gov/newsroom/speeches-statements/peirce-tm-faq-051525.