



May 19, 2022

Senator Cynthia Lummis
124 Russell Senate Office Building
Washington, DC 20510

Re: SEC Staff Accounting Interpretation Regarding Crypto-Assets

Dear Senator Lummis:

On behalf of the Securities Industry and Financial Markets Association and the Bank Policy Institute, we thank you for your continued focus and Congressional oversight of the emerging digital and crypto assets market and related fintech innovations. Our members believe policy makers, including Congress, have a critical role to play in developing a regulatory framework for these emerging market products. Following the lead of you and other Members of Congress, the Administration has issued an executive order directing federal prudential and market regulators to undertake a “whole of government” review of the digital and crypto market and make policy recommendations. Any such recommendations will ultimately and appropriately be subject to Congressional oversight and consideration. As such, it is important that policy makers carefully consider every aspect of this emerging market including investor and consumer protections and the role of federal regulators. Such review should consider the interrelated nature of the U.S. financial regulatory structure to avoid conflicts or unintended consequences and provide for ample stakeholder engagement.

To that end, we are concerned that a recent Securities and Exchange Commission (SEC) staff accounting interpretation affecting the treatment of crypto-assets held in custody by public companies, including regulated banks, raises significant process, policy, and related concerns. Given the lack of stakeholder engagement, the apparent conflict with other financial rules affecting regulated banks, and the aforementioned Executive Branch review of the emerging market, for reasons we discuss herein, our members believe the SEC should exempt regulated banks from recording a liability and corresponding asset on their balance sheets at fair value for accounting purposes for crypto-assets held in custody, while applying disclosure requirements regarding these assets; or, at a minimum, immediately delay the implementation of Staff Accounting Bulletin 121 (SAB 121) so that Congress, the SEC, other federal regulatory agencies, and public stakeholders can thoughtfully consider the implications of SAB 121, including possible negative collateral consequences.

SEC Staff Accounting Bulletin 121

In late March 2022, SEC staff issued SAB 121. SAB 121 reflects the staff’s view on accounting for obligations to safeguard crypto-assets an entity holds for its platform users. SEC staff has determined that, because of risks particular to crypto-assets, companies covered by SAB 121 should record a liability and corresponding asset on their balance sheets at fair value, and sets out disclosure requirements to investors regarding these assets. The staff

highlights technological, legal, and regulatory risks associated with safeguarding crypto-assets and an increased risk of financial loss as support for the position taken in SAB 121.

Given the lack of notice provided prior to public issuance and the failure to solicit public input prior to the issuance of SAB 121, and the short implementation timeline,¹ various stakeholders are in the process of evaluating the impact of SAB 121. Many possible policy and technical issues remain unclear and require thoughtful evaluation. However, the SEC's process in issuing the accounting bulletin does not provide affected parties sufficient time to properly evaluate these new requirements or their potential implications.

For example, one area where stakeholder concern seems to be coalescing is the negative impact on the traditional custody of securities, which has many benefits to customers with regard to the protection of their assets. Additionally, among other things, SAB 121 will also likely limit customer choice and have disparate impact on different types of potential participants. These concerns should be more thoughtfully considered through a more thorough process.

The issuance of SAB 121 fits a troubling pattern. The SEC is pursuing important policy decisions without providing for appropriate and timely stakeholder input and effective coordination with other government agencies. Rather than publicly and transparently engaging in a dialogue with stakeholders, SEC chose to issue a staff level interpretation with limited prior notice to affected persons. SIFMA, BPI, and 23 other trade associations (25 Trades Letter) highlighted this general pattern in a recent letter to the SEC Chair. The 25 Trades Letter discusses the SEC's broad regulatory agenda and various SEC process concerns.²

SAB 121 seems to have been issued with minimal consultation with impacted stakeholders including Accounting Firms and Bank regulators, which could have highlighted the likely effect of the guidance on various stakeholders, including regulated banking organizations. In fact, SEC Commissioner Peirce questioned the process for issuing SAB 121 stating that SAB 121 “. . . is yet another manifestation of the [SEC's] scattershot and inefficient approach. . .” to crypto-asset regulation and “[m]y concern is . . . with the way th[is] change is being made.”³ Further, Commissioner Peirce notes: “. . . a staff accounting bulletin may not be the appropriate vehicle through which to make this accounting change and communicate it to the public. SAB 121 is unusual among SABs [in many respects] . . .”⁴

And, as noted, the issuance of SAB 121 without sufficient public and private stakeholder engagement seems at odds with:

¹ SAB 121 was effective April 11, and, for entities that are already public, applies to quarterly reports beginning with the second quarter, according to SAB 121.

² <https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods/>.

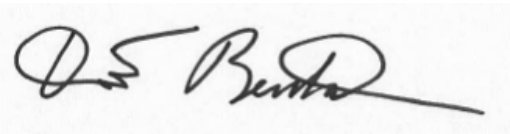
³ <https://www.sec.gov/news/statement/peirce-response-sab-121-033122>.

⁴ <https://www.sec.gov/news/statement/peirce-response-sab-121-033122>.

- President Biden’s Executive Order directing a coordinated federal government approach to the regulation of the crypto-asset industry.⁵
- Treasury Secretary Yellen’s call for “. . . policymakers and businesspeople, advocates, scholars, inventors, and citizens” to “work together to ensure responsible innovation” and that “responsible innovation should reflect thoughtful public-private dialogue and take account of the many lessons we’ve learned throughout our financial history. This sort of pragmatism has served us well in the past and I believe it is the right approach today.”⁶
- Banking Agencies’ well-publicized “crypto sprint” under which the agencies announced that in 2022 they intend to “provide greater clarity on whether certain activities related to crypto-assets conducted by banking organizations are legally permissible, and expectations for safety and soundness, consumer protection, and compliance with existing laws and regulations,” including with respect to crypto-asset safekeeping and traditional custody services.⁷
- Congressional review and consideration including possible congressional legislative initiatives directed at the crypto-asset industry. In 2021, for example, Congress introduced 35 Bills focused on crypto-asset policy.⁸ Further, the President’s Working Group Report on Stablecoins issued on November 1, 2021 specifically recommended Congressional action.⁹
- Chair Gensler’s April 4, 2022, prepared remarks on crypto markets, in which he tasked SEC staff to “work with platforms to . . . best ensure the protection of customers’ assets, in particular whether it would be appropriate to segregate out custody,” which would seem to suggest that custody of crypto with third parties, such as banks, would be a desired outcome for investors.¹⁰

As such, we believe the SEC should exempt regulated banks from recording a liability and corresponding asset on their balance sheets at fair value for accounting purposes for crypto assets held in custody though apply disclosure requirements to investors regarding these assets, or, at a minimum immediately delay the implementation of SAB 121 so that Congress, the SEC, other federal regulatory agencies, and public stakeholders can thoughtfully consider the implications of SAB 121, including possible negative collateral consequences.

Sincerely,



Kenneth E. Bentsen, Jr.
President and CEO
Securities Industry and Financial Markets Association



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⁵ <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>.

⁶ <https://home.treasury.gov/news/press-releases/jy0706>.

⁷ <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20211123a1.pdf>

⁸ <https://www.forbes.com/sites/jasonbrett/2021/12/27/in-2021-congress-has-introduced-35-bills-focused-on-us-crypto-policy/?sh=401f3743c9e8>.

⁹ <https://home.treasury.gov/news/press-releases/jy0454>

¹⁰ <https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422>