

Congress of the United States
Washington, DC 20515

July 15, 2022

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Dear Chair Gensler,

We are writing to you today to express our concerns regarding the Securities and Exchange Commission (SEC) staff's issuance of Staff Accounting Bulletin 121 (Bulletin or SAB 121). The Bulletin provides interpretive staff guidance from the Division of Corporation Finance and the Office of the Chief Accountant (OCA) regarding the accounting of, and associated disclosures relating to, entities holding digital assets on behalf of consumers. In this emerging market, consumer protection is important. However, if SAB 121 is applied as currently written it could have a chilling impact on all market participants that engage in custodial services of digital assets and ultimately harm consumers engaging in the market. We further believe that adherence to a transparent process that allows for public input would be beneficial to ensure complete understanding of the guidance's impact to the industry.

As written, the Bulletin could be read to broadly obligate entities, including banks, engaged in digital asset products or services to adjust their accounting treatment of these assets from off-balance sheet to on-balance sheet.¹ This potential interpretation would significantly alter, or perhaps distort the accounting treatment of custodied digital assets.

For example, custody of consumer assets is a core banking function. As pointedly stated by Federal Reserve Chairman Jerome Powell, "Custody assets are off balance sheet, have always been".² This function has an existing regulatory infrastructure that keeps these consumer assets off the bank's balance sheet and ensures consumers remain whole in the event of bankruptcy or other activities that might harm the consumer. Further, in 2021, the Office of the Comptroller of the Currency (OCC) issued its Interpretive Letter 1170, which provided banks guidance on the custody of digital assets.³ Subsequently, the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and OCC engaged in a crypto-asset policy sprint initiative, which identified custody as a key area where they intend to provide greater clarity.⁴

¹For the purposes of SAB 121, we understand "entities that have obligations to safeguard crypto-assets held for their platform users" could reasonably include banks—i.e. national and state-chartered banks or other institutions receiving deposit insurance from the Federal Deposit Insurance Corporation.

²Statements before the United States Senate Committee on Banking, Housing, and Urban Affairs 117th Congress hearing on The Semiannual Monetary Policy Report to Congress (June 22, 2022) (Jerome Powell, Chairman of the Board of Governors of the Federal Reserve System).

³OCC Interpretive Letter No. 1170, Re: Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers (July 22, 2020).

⁴Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, Joint Statement on Crypto-Asset Policy Sprint Initiative and Next Steps (November 23, 2021).

These efforts provided the opportunity for banks to confidently be involved in the digital asset ecosystem provided that the banks engage in a safe and sound manner. Such confidence from clear guidance promotes banks to engage in innovative digital asset use cases that leverage the existing regulatory and accounting treatment of custodied assets which will help bring the regulatory oversight and controls desired by so many to the digital asset space.

Without amendment or clarification to the Bulletin, the implication of digital assets held by custodial service providers including banks, on-balance sheet would make custody of digital assets economically infeasible.

We are also concerned about the SEC's approach to emerging crypto activities and the broader market. Particularly, we believe the SEC has not adhered to a proper process, transparency, or public engagement. On the contrary, the SEC has taken an enforcement-first approach and relied on staff guidance, citing purported "increased risks" presented by digital assets. Due to the emerging nature of digital assets in the financial services ecosystem, the Bulletin functions as de facto rulemaking to the industry that creates enforceable obligations for firms. The creation of enforceable obligations is beyond the remit of staff guidance, and therefore should have been issued pursuant to a formal notice of proposed rulemaking from the SEC in concert with other agencies.⁵

In closing, we request that you withdraw SAB 121 as written and permit a comment period for such a significant accounting change. Further, it is our belief that the SEC should recognize the importance and benefit of the regulatory environment that exists for industry participants that choose to hold digital assets in their custody, as well as the precedent in accounting treatment for traditionally custodied assets.

Sincerely,



Trey Hollingsworth
Member of Congress



Warren Davidson
Member of Congress



Bill Huizenga
Member of Congress



Ted Budd
Member of Congress

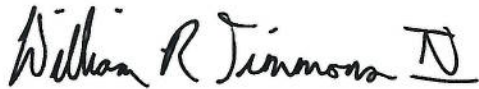
⁵ The Administrative Procedures Act, 5 U.S.C. §553(b) (2022) ("General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.")



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