

April 9, 2021

U.S. Securities & Exchange Commission

Via online

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SEC Policy Statement: *Custody of Digital Asset Securities by Special Purpose Broker-Dealers*

To the Commission,

As members of Global Blockchain Convergence (“GBC”), we would like to provide feedback on the policy statement referenced above (the “Custody Statement”). GBC is an informal global organization whose primary mission is to create organic opportunities for collaboration and self-organizing communities of professionals from diverse segments of the global blockchain ecosystem. We are dedicated to writing about, generating proposed approaches to and advocating business, market and policy frameworks that facilitate adoption of blockchain and complementary technologies and that also advance entrepreneurship and inclusion. Our membership has increased to more than 200 professionals, many with extensive backgrounds in legal, compliance and operations, and members volunteer time and resources in working groups, monthly meetings and projects to help further initiatives and education. GBC aims to achieve its objectives by developing networking, collaboration and friendship opportunities. Participants are creative about how to use GBC as a platform for education, change, fun and learning. Participants are encouraged and empowered to create their own events and activities and incorporate GBC colleagues into existing efforts. This response represents one of those collaborations.

We appreciate the Commission’s willingness to engage on topics relating to digital asset securities and hope that our feedback proves fruitful to these continued discussions. We believe additional guidance concerning a range of areas related to digital asset securities would be helpful to issuers, broker-dealers, investment advisers, transfer agents, investment companies and other market participants. The Custody Statement represents an important element of that guidance but is by no means the only area upon which we believe the Commission should focus. We urge the Commission to act in other areas , [including](#) with respect to formally proposing the safe harbor [proposal](#) advanced by Commissioner Peirce on February 6, 2020, (see March 15, 2021 [speech](#) by Commissioner Peirce).

The Custody Statement

Our comments on the Custody Statement address two concerns. The first is the overarching issue of regulating digital asset securities differently than securities that are represented by more traditional methods based solely on the underlying technology. We believe this approach is flawed for reasons both specific to the Custody Statement and more generally. We favor technology neutral regulation. The second area of comment poses specific questions related to the custody of digital asset securities that we believe the Custody Statement should address in order to provide more complete guidance within its existing framework.

Part One: Technology Neutral Regulation. Our leading concern related to the Custody Statement, and indeed much of the Commission’s approach to blockchain, and digital asset securities in particular, is the lack of a technology neutral approach. We do not believe that regulating digital assets securities differently than more traditionally represented securities based on the underlying technology is the ideal or even most appropriate approach. It is important to note that not all digital assets are securities (see, e.g., CFTC Digital Assets [Primer](#)), something that the Commission has acknowledged (see, e.g., [Framework](#) for Investment Contract Analysis of Digital Assets). Therefore, it is important to distinguish

digital asset securities from the broader category of digital assets. There is significant diversity across the types of assets that may be deemed digital assets based on the use of blockchain technology making the application of a universal approach extremely problematic and incapable of addressing many of the open questions posed to date by users, stakeholders and market participants.

More crucially, many securities utilize digital technologies other than blockchain for their creation, maintenance, recordkeeping, trading, settlement and custody. By defining digital asset securities solely by reference to the use of blockchain or distributed ledger technology, there is a significant risk that the federal securities laws will be applied in a disjointed and inequitable fashion. It also means that when a new technology comes along, new regulations will once again be required.

A blockchain-specific approach to regulation also presupposes that a blockchain representation of securities is inadequate or poses more investor risk than traditionally represented securities. The Custody Statement reflects this assumption, using it as the basis to require, among other things, the creation of a bifurcated regulatory for broker-dealers seeking to self-custody digital asset securities with a range of disclosures and policies, none of which is imposed on securities held in digital form at DTC, bank custodians, or an issuer. Moreover, we recognize and accept that blockchain is a newer technology and that it is incumbent on broker-dealers (as well as issuers, registered investment advisers and others subject to the federal securities laws) to have a solid understanding of the operational, technological and other aspects of blockchain as an underlying technology for their activities. We stress, however, that this is no different than what is required with respect to any new technology utilized or deployed by a broker-dealer.

We do not agree with imposing special treatment of digital asset (blockchain) securities for a number of reasons. We have seen no evidence that they pose special dangers or risks to investors, either from a trading standpoint or an operational standpoint. If the Commission has a basis for its assertion that there is increased risk around securities represented on a blockchain, particularly when compared to traditionally represented securities, it should provide the specific facts underlying that concern in order to better guide the development of policies and implementations across blockchain and digital asset securities stakeholders.

We also believe that promulgation of blockchain-specific regulation ignores the fact that these digital asset securities are built on technology that allows an issuer to burn and reissue blockchain securities that are subject to theft or incorrect transfer. As such, there is not a greater risk of loss or theft than with traditional securities, there is in fact substantially less risk.

The Custody Statement takes the unprecedented step of creating a new regulatory framework for broker-dealers seeking to custody digital asset securities, referred to in the Statement as special purpose broker-dealers, or "SPBD". The Custody Statement imposes this new framework notwithstanding the lack of evidence supporting a finding of greater risk inherent to digital asset securities. The Custody Statement is also problematic in that it ignores the considerable time and expense incurred to date by a range of digital asset broker-dealers that have obtained FINRA approval to facilitate transactions in digital asset securities operations following existing guidance issued by FINRA. Many of these broker-dealers engage in a traditional securities private placements business with an additional authorization for transactions in digital asset securities. The digital asset securities industry is relatively nascent and as such, these broker-dealers often must rely on traditional securities business as well to generate enough revenue to continue operations. The Custody Statement eliminates the ability for a broker-dealer seeking to custody digital asset securities from also transacting in traditionally

represented securities, a change that will undoubtedly be costly to comply with (opening a second broker-dealer), and a framework that is contrary to the advice that FINRA has given over several years.

Forcing a broker dealer to make a choice to operate solely in the digital asset security space will likely result in fewer broker-dealers being willing to operate in the space. Further, limiting a SPBD from custodying non-security digital assets (such as stablecoins) provides additional hurdles to operational success. In addition, requiring the SPBD to analyze whether a digital asset is a security or not creates significant risk and liability, and acts as a further deterrent to broker dealers considering this space.

As the above makes clear, technology-specific regulation will inhibit the development of competition, stifle technology innovation that holds promise for all stakeholders under the federal securities laws, and otherwise creates a climate of regulatory uncertainty without supporting evidence. As such, we strongly urge the Commission to rethink its approach under the Custody Statement and with respect to digital asset securities more generally. An approach more consistent with the Commission's traditional requirements when broker-dealers utilize new technologies would be more appropriate.

Part Two: Unanswered Questions. We now turn to a number of significant issues not addressed by the Custody Statement that we believe are critical to a complete understanding of how market intermediaries should be approaching the digital asset security space. For brevity, we provide the list in question format with a short explanation of each issue. To be clear, we pose these questions based on the policies mandated by the Custody Statement and not based on how we would have envisioned custody of digital asset securities to work.

Questions:

1) Can a registered investment adviser utilize a SPBD to custody digital asset securities and satisfy the qualified custodian requirement?

The answer to this question is critical for registered investment advisers seeking to satisfy the compliance obligations established under [Rule 206-4\(2\)](#), and for SPBDs seeking to provide services to registered investment advisors.

2) Can the qualifying SPBD constitute a good control location for digital asset securities for another broker-dealer?

The Custody Statement prohibits a single broker-dealer from maintaining custody of both traditional and digital asset securities. As a result, we anticipate that traditional securities broker-dealers will want to utilize the SPBDs as good control locations in order to offer their customers access to digital asset securities. Clarity on whether a SPBD can offer these services is critical.

3) Can the SPBD utilize a third-party bank as a good control location?

The Custody Statement is not clear on this point, which will be important because some digital asset securities may be limited to certain custodians by the issuer or other factors.

4) If a bank can be considered a good control location, what type of banking license is required for it to offer digital asset securities custody?

The Office of the Comptroller of the Currency (OCC) has provided [explicit](#) permission with respect to banks and the custody of digital assets. The OCC's interpretive letter does not group digital assets into specific categories such as securities, commodities, stablecoins, or other cryptocurrencies. The Commission should make clear that banks are good control locations for digital asset securities.

5) Can the SPBD provide custody for traditional securities by using a good control location for the traditional securities and having possession of the digital asset securities?

The Custody Statement prohibits a SPBD from self-custodying traditional securities but does not make clear whether that prohibition extends to a SPBD providing custody of traditional securities through a third-party good control location such as a bank, for example.

6) Can the SPBD hold investment contract securities that are pre-sold or pre-mined?

The assets have been minted but not distributed yet, so the SPBD would be holding them in escrow. In effect, the SPBD would hold these digital asset securities on behalf of the issuer, until the issuer sells or otherwise distributes them, directly or indirectly.

7) May any SEC registered financial services company (broker-dealer, SPBD, registered investment adviser) provide custody services for non-security digital assets?

The Custody Statement does not make clear whether a registered broker-dealer or investment adviser or the new SPBD can provide custody of digital assets that are not securities, if there is client demand for it.

8) Does the Custody Statement apply to both traditional security digital asset securities and investment contract digital asset securities?

The Custody Statement does not distinguish between a stock or bond that is a digital asset security and an investment contract that is a digital asset security, so we assume it applies equally to both but wanted to clarify.

9) Does the Statement apply to public company digital asset securities and privately issued digital asset securities?

The Custody Statement does not distinguish between the two, so we assume it applies equally to both but wanted to clarify.

10) What if any special requirements are associated with the annual audit report?

Broker-dealers are required to produce and file a number of annual [reports](#), including audited financial statements and Form Custody. The Custody Statement does not make clear if it imposes any special requirements in connection with those reports.

11) How should the SPBD report digital asset securities it has in custody on its FOCUS reports?

Broker-dealers, presumably including SPBDs must file FOCUS [reports](#) either monthly or quarterly. The Custody Statement does not make clear if there are special requirements associated with the custody of digital asset securities.

12) Are there any special points for the 15c3-3 calculation associated with providing custody of digital asset securities?

Broker-dealers, presumably including SPBDs, must make a daily [calculation](#) of customer and PAB reserve requirements. The Custody Statement does not make clear if there are special requirements associated with the custody of digital asset securities.

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We reiterate our appreciation to the Commission for their interest in engaging on subjects critical to the success of businesses interested in digital asset securities. We would welcome the opportunity to discuss the items raised in this letter, as well as other relevant topics.

With Regards,

/S/ Global Blockchain Convergence

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