U.S. Securities and Exchange Commission

STATEMENT

Out of the Gray Zone: Statement on The Division of Investment Management's No-Action Letter Relating to the Custody of Crypto Assets with State Trust Companies

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Today, the staff of the Division of Investment Management issued a no-action letter (https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-investment-management-staff-no-action-interpretive-letters/simpsonthacherbartlett093025) (the "NAL") stating that it would not recommend enforcement action to the Commission against registered advisers or regulated funds for maintaining crypto assets and related cash and cash equivalents with certain state-chartered financial institutions ("State Trust Companies"). For too long, registered advisers and regulated funds have been caught up in a guessing game as to whether their entity of choice for crypto asset custody, which also may be the only available custodian for such service, is a permissible custodian under the custody provisions of the Investment Advisers Act of 1940 (the "Advisers Act") and Investment Company Act of 1940 (the "1940 Act"), respectively. The specific lingering question has been whether State Trust Companies meet the definition of a "bank" as defined in the Advisers Act and 1940 Act. The staff NAL is an

encouraging development for registered advisers and regulated funds that invest or want to invest in crypto assets.

The NAL does not expand the definition of a permissible custodian under the Advisers Act and 1940 Act. Rather, it provides a staff position regarding the use of entities for crypto asset custody that I would contend already are permissible custodians. The NAL applies to State Trust Companies operating within a regulatory framework that ensures investor protection and is similar in material respects to the regulatory frameworks applicable to other types of permissible custodians.

Registered advisers and regulated funds may maintain crypto assets with other permissible custodians without regard to the NAL, including national banks and State banks. While the number of other permissible custodians likely will grow following the rescission of Staff Accounting Bulletin No. 121 and clarifying statements made by the federal banking regulators on the crypto asset-related activities of banks, the NAL focuses on custody by a different set of potential custodians — state-chartered trusts exercising fiduciary powers similar to those permitted to national banks.

The scope of the NAL matters. The custody provisions of the Advisers Act and the 1940 Act apply only to "funds and securities" and "securities and similar investments," respectively. The NAL, therefore, only addresses client crypto assets held by registered advisers or crypto asset investments of regulated funds that are subject to the respective custody provisions. The NAL covers, in addition to the crypto assets that are native to crypto networks and applications and may be subject to the custody provisions, equity or debt securities that have been formatted as crypto assets on a crypto network (commonly known as "tokenized" securities).

Regulatory gray zones can harm investors, as this one has. I appreciate the Division of Investment Management responding to market participants' requests for clarity about the staff's views in this important area, which ultimately will benefit advisory clients and fund shareholders. This moment also presents us with an opportunity to consider whether the custody requirements applicable to registered advisers and regulated funds should be improved and modernized, such as through principles-based rules. I look forward to working further with the staff on that initiative.