U.S. Securities and Exchange Commission

STATEMENT

Poking Holes: Statement in Response to No-Action Relief for State Trust Companies Acting as Crypto Asset Custodians

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Today the agency greenlights state trust companies to act as custodians for crypto assets under the Investment Company Act and the Investment Advisers Act.[1] In other words, state entities, that are not federally-chartered banks, that generally are not allowed to accept deposits, may now be the ones responsible for the safety of crypto assets of investors from around the country.

Degrading our custody framework is a serious matter. The statutes and rules regarding custody are what stand between American investors, on the one hand, and the risk of theft, loss, or misappropriation of their assets, on the other. Or, in other words, our custody regime is designed to make sure that an investor's assets actually exist.[2] So, I am struck that we are eroding our rules to pave the

way for a new class of custodians who seem readily to admit they do not meet the current standards of our custody regime.

Today's no-action position lacks factual support in key areas and provides scant legal justification for poking holes in core statutory protections. In fact, the only justification for the relief seems to be a false narrative that no other entities are available to custody crypto assets consistent with our rules.[3] But today's relief jumps the gun: it gets ahead of Commission rulemaking, ahead of applications for federal charters with the OCC, and ahead of interest from trusted custodians who already operate within the relevant regulatory framework.[4]

Ironically, as this relief seeks to poke holes in our custody regime, it suffers from several glaring omissions of its own. So, to fill in the gaps, I will answer some questions that today's relief should have, but does not:

Do state trust companies differ from traditional custodians?

Yes, significantly.[5] Because of the trust we place in custodians, the Investment Advisers Act and the Investment Company Act identify a small and explicit population of entities allowed to hold and safeguard clients' assets. [6] Under the Investment Advisers Act, "qualified custodians" include banks, registered broker-dealers, and registered futures commission merchants.[7] Under the Investment Company Act, funds must place and maintain their securities and similar investments with certain enumerated custodians, often a bank.[8] These entities are included in the definitions under each of those Acts because they are subject to thorough regulation and oversight.[9]

For example:

- Banks must have robust internal controls ensuring that assets of each custody account are kept separate from the assets of the custodian;[10]
- They are subject to a comprehensive application process by the Office of the Comptroller of the Currency (OCC) before ever taking custody of customer assets;[11]
- In the event of failure, there is an OCC-directed receivership process.[12] State trusts may not have such a safety net in all cases;

- OCC has a well-resourced examination program (whereas state examination resources vary).[13]

Unlike traditional custodians, state trust companies are subject to an inconsistent hodgepodge of less rigorous rules and less oversight.[14] Some states, like Wyoming and New York, have created crypto-specific regimes.[15] But no state regime is as exacting as the federal regulatory framework.[16] For these, and other reasons, Commission staff has in the past expressed concerns with interpretations of the custody rules claiming that state trust companies meet the definition of a qualified custodian.[17] Notably, the relief does not acknowledge how state trust companies provide lesser protections to investors than traditional custodians even though these concerns were raised to the Commission as recently as days ago.[18]

Will the relief disadvantage existing players?

Yes, the relief picks favorites. As we speak, there are apparently multiple applicants who are, in good faith, seeking national charters from the OCC to offer crypto custody services.[19] With today's action, state trust companies can bypass the entire OCC application process in which others are participating conscientiously. But rather than create a level playing field we leave investors and the markets to gamble in an unnecessary game of 50 state regulatory roulette – just to accommodate crypto.

Why are we making this special exception just for crypto assets?

No idea! This relief doesn't contemplate the idea of allowing state trust companies to custody anything other than crypto assets. While the letter fails to address why, this feels like an admission that state trust companies do not otherwise meet the requirements of a custodian under our rules. And even though these assets have a notoriously *high* risk of loss,[20] we offer no real explanation for why we are comfortable with crypto assets receiving *less* custodial protections than traditional assets.

And what of the rest of our custody regime?

The relief seems to suggest that traditional custodians are still preferrable to state trust companies for non-crypto assets by specifically excluding non-crypto assets from its scope. Again, we don't know why because there is no discussion to be found of the impact of this relief on the rest of our custody regime. Of course, we have historically allowed for different custody requirements for privately offered securities, among other limited exceptions, due to their unique characteristics.[21] But those differences were the product of careful *rulemaking* with the benefit of public comment and an economic analysis weighing the costs and benefits. Today's action had no such input.

Shouldn't a change of this magnitude be done through rulemaking?

Yes. Executing a shift of this magnitude via no-action relief without public comment and without any economic analysis is ill-advised for many reasons, not least of which because it likely violates the Administrative Procedure Act, though this has become commonplace by this Commission. I am especially confounded by the timing of this relief right on the heels of the publication of the Commission's Spring 2025 Regulatory Flex Agenda which shows that the Commission will undertake rulemaking on the topic of crypto asset custody.[22]

So which is it: are we conceding that rulemaking is indeed required in this area or are we willing to take the easy way out with slapdash no-action relief pushed out the door just under the wire of a potential government shutdown? We are so desperate to accommodate the favored industry that we are willing to front-run – and perhaps obviate – our own rulemaking efforts.

Conclusion

The basic principle underpinning our statutes and rules regarding investment adviser and investment company custody is trust. Deciding whom to trust as a custodian is a high-stakes and important question. Historically, our custody

regime provided a clear mechanism for how to determine whether an entity is worthy of that trust. With limited factual support or legal analysis, this action bores a troubling hole in that regime – and I fear investors' assets may fall through the cracks.

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[1] Simpson Thacher & Bartlett, SEC No-Action Letter (Sept. 30, 2025), available at https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-investment-management-staff-no-action-interpretive-letters/simpsonthacherbartlett093025 (https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-investment-management-staff-no-action-interpretive-letters/simpsonthacherbartlett093025).

[2] The thorough protections we require around who may custody client and fund assets, and how they must do so, were born out of misconduct. In these cases, assets were stolen brazenly from clients by custodians entrusted with their safekeeping. As a result, the name "Madoff" is virtually synonymous with large scale financial fraud and custody failures. *See, e.g.,* Judgment, ECF Doc. Nos. 100, 4, *United States* v. *Madoff*, No. 09 Cr. 213 (S.D.N.Y. June 29, 2009); *see also* Order Granting Motion for Summary Judgment, *SEC* v. *Stanford International Bank, Ltd., et al.*, Civil Action No. 3:09-CV0298 (N.D. Tex. Apr. 25, 2013).

[3] *See* Letter from Anchorage to SEC Staff In Response to Staff Statement on WY Division of Banking's "NAL on Custody of Digital Assets and Qualified Custodian Status" (https://www.sec.gov/files/anchorage-041321.pdf) (Apr. 13, 2021) (hereinafter "Anchorage Letter").

[4] Nupur Anand, US Banks Tiptoe Toward Crypto, Awaiting More Green Lights from Regulators, Reuters (https://www.reuters.com/sustainability/boards-policy-regulation/us-banks-tiptoe-toward-crypto-awaiting-more-green-light-regulators-2025-05-28/) (May 28, 2025) (quoting Jamie Dimon, CEO of JPMorgan Chase, as saying "We're going to allow you to buy it, we're not going to custody it. … I don't think you

should smoke, but I defend your right to smoke. I defend your right to buy bitcoin.").

[5] The relief fails to adequately recognize these important differences from traditional custodians, and seems to assume – incorrectly – that all state trust companies are roughly comparable. And, even with conditions that seek to approximate some of the guardrails that traditional custodians provide, state trust companies simply do not offer the same benefits.

[6] Bizarrely, the relief admits that traditional custodians are reluctant to offer crypto asset custody services, but blames that hesitance on regulatory hurdles – with no cited evidence. In fact, certain large custodians have been quite vocal about their intentional avoidance of crypto asset custody and it doesn't have anything to do with regulatory burdens. *See* Nupur Anand, US Banks Tiptoe Toward Crypto, Awaiting More Green Lights from Regulators, Reuters (https://www.reuters.com/sustainability/boards-policy-regulation/us-banks-tiptoe-toward-crypto-awaiting-more-green-light-regulators-2025-05-28/) (May 28, 2025) ("Jamie Dimon, CEO of the largest U.S. bank, JPMorgan Chase, ruled out getting into custody - storing crypto assets for clients - or expanding significantly **even if regulations ease**."(emphasis added)). Either way, the fact that traditional custodians do not offer crypto asset custody under our rules as they exist today should not lead us to pretend like those rules shouldn't exist for the darling of the moment – would-be crypto asset custodians.

[7] *See* Investment Advisers Act, Rule 206(4)-2(c)(3) (defining "qualified custodian." In some cases, this definition may include certain foreign financial institutions).

[8] *See* Investment Company Act, Sections 17(f) and 26(a).

[9] *See* Proposed Rule: Custody of Funds or Securities of Clients by Investment Advisers, [Release No. IA-2876; File No. S7-09-09] 4 n.4.

[10] *Id.*

[11] *Id.*

[12] *See* 12 CFR Part 51 ("The final rule incorporates the framework [...] for the Comptroller to appoint a receiver for [national banks]").

[13] *See* https://www.occ.treas.gov/about/index-about.html (https://www.occ.treas.gov/about/index-about.html) (stating that the OCC employs over 2,000 examinations staff); Anchorage Letter, *supra* note 3 (noting that the OCC is the premier banking regulator, in part, due to its examination resources, including its staff).

[14] "With nearly 70% of all commercial banking assets under its purview, a higher than 2:1 ratio of OCC examiners to banks supervised, and more than 150 years of setting standards for and overseeing the proliferation of what has come to be known as the federal banking system, the OCC simply sets the highest regulatory bar that a bank can reach." Anchorage Letter, *supra* note 3, at 5.

[15] *See* Congressional Research Service Report: An Analysis of Bank Charters and Selected Policy Issues (https://www.congress.gov/crs-product/R47014) (Jan. 21, 2022) (describing the crypto-related state trust company regimes in New York and Wyoming, specifically).

[16] *See* Anchorage Letter at 4 ("[W]e do not believe it is presently possible to make a blanket determination around whether all state chartered trust companies possess characteristics similar to those of the types of financial institutions the Commission identified as qualified custodians.").

[17] *See* SEC Staff Statement: WITHDRAWN: Staff Statement on WY Division of Banking's "NAL on Custody of Digital Assets and Qualified Custodian Status" (https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-investment-management-staff-no-action-interpretive-letters/statement-im-finhub-wyoming-nal-custody-digital-assets) (Issued: Nov. 9, 2020; Withdrawn: May 6, 2025) ("SEC Staff Statement on WY Div. of Banking NAL").

[18] Letter from Bank Policy Institute, Association of Global Custodians, et al ., to SEC Chairman Paul S. Atkins (https://bpi.com/wp-content/uploads/2025/09/AGC-BPI-FSF-Custody-Comment-Letter-9-18-25.pdf) (Sept. 18, 2025) ("The level of oversight of state-chartered trust companies varies across jurisdictions, creating inconsistent regulatory standards that fail to ensure uniform investor protection. Allowing state trust companies with lesser oversight to serve as qualified custodians may lead to the advent of a "bank lite" solution that leaves client assets vulnerable to insufficiently rigorous capital and liquidity standards, incomplete operational risk management processes, inadequate operational continuity provisions, and unproven legal protections in insolvency.").

[19] *See* Gina Heeb & Vicky Ge Huang, Crypto Knocks on the Door of a Banking World That Shut It Out (https://www.wsj.com/finance/currencies/crypto-knocks-on-the-door-of-a-banking-world-that-shut-it-out-082b3968?mod=hp_lead_pos5), The Wall Street Journal (Apr. 21, 2025).

[20] *See* Federal Bureau of Investigation: 2023 Cryptocurrency Fraud Report Released (https://www.fbi.gov/news/stories/2023-cryptocurrency-fraud-report-released) (Sept. 10, 2024) ("Losses related to cryptocurrency fraud totaled over $5.6 billion in 2023, a 45% increase in losses since 2022, according to a report from FBI's Internet Crime Complaint Center (IC3) published on September 9, 2024."); *see also* SEC Press Release, *SEC Charges Crypto-Focused Advisory Firm Galois Capital for Custody Failures* (Sept. 3, 2024), *available at* https://www.sec.gov/newsroom/press-releases/2024-111 (https://www.sec.gov/newsroom/press-releases/2024-111).

[21] *See* Investment Advisers Act, Rule 206(4)-2(b).

[22] *See* Spring 2025 Unified Agenda of Regulatory and Deregulatory Actions, available at: https://www.reginfo.gov/public/do/eAgendaMain (https://www.reginfo.gov/public/do/eAgendaMain).

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