

SEC FAQs Say No Special Rules for BDs Holding Crypto Securities

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On May 15, 2025, the SEC Division of Trading and Markets (“Staff”) and FINRA withdrew a 2019 Joint Staff Statement (the “2019 Statement”) on broker-dealer custody of digital asset (“digital asset” or “crypto asset”) securities and issued new FAQs in their place. The 2019 Statement was issued in response to questions regarding the application of federal securities laws and FINRA regulations to a broker-dealer’s role in intermediating digital asset securities transactions, including the broker-dealer’s possession and control sufficient to meet the custody requirements of Rule 15c3-3, also known as the Customer Protection Rule. It cautioned broker-dealers about compliance challenges around maintaining custody of crypto asset securities and distinguished non-custodial broker-dealer activities involving digital asset securities that do not raise the same level of concern, providing several examples of those activities.

The Staff’s FAQs essentially roll back the stricter criteria for digital asset securities articulated in the 2019 Statement. It appears that now, the Staff requires nothing more than the standard application of Rule 15c3-3 and its custody requirements, rules designed for traditional securities that do not reflect the risks and realities of crypto assets. The 10 FAQs are detailed below.

The Customer Protection Rule Is Sufficient For Crypto Asset Securities

- The Customer Protection Rule requires broker-dealers to segregate customer assets from proprietary assets and maintain control of securities for customer accounts and “PAB” accounts, the proprietary accounts of other brokers or dealers.
- The Staff’s guidance starts off with FAQ 1 which confirms that the possession or control requirement does not apply to non-security crypto assets. Thus, it does not apply to a BDs custody of Bitcoin or other non-security crypto assets. The SEC is leaving this to the states, apparently.

Establishing Control of Securities

- Broker-dealers can establish control over crypto asset securities even if not in certificated form, something that is *not* permitted for traditional securities.
- According to FAQ 2, uncertificated crypto asset securities may still be under the BDs control if held at qualifying locations, such as banks. Thus, control of digital asset securities can pass even if uncertificated can be established while traditional securities are required to be in certificated form.
- This change from the 2019 Statement exposes client funds to fraud or theft because the custodian – whether a good control location or the BD itself – does not have the same assurance of exclusive control over the digital asset securities, and incurs the risk of transfer to an unidentifiable recipient without the possibility of reversing or canceling that mistaken or fraudulent transfer. It’s like your grandma getting the text message that she is overdrawn on her EZ-Pass account.

Special Purpose Broker-Dealer Custody Guidance Is Rolled Back

- According to FAQ 3, compliance with the SEC's 2020 Special Purpose Broker-Dealer ("SPBD") Statement is not required if broker-dealers can establish control over crypto asset securities.
- The 2020 SPBD Statement explained that broker-dealers that held custody of only crypto asset securities could avoid enforcement under the Customer Protection Rule if they complied with strict asset segregation, disclosure, and operational requirements. The SPBD Statement provides a temporary safe harbor for broker-dealers that only custody crypto asset securities that expires in 2026.
- The SPBD Statement also provided that control can be established if the broker-dealer "has access to the digital asset securities and the capability to transfer them on the associated distributed ledger technology." However, since the SPBD Statement did not amend Rule 15c3-3, there's no other requirement than that stated in paragraph 15c3-3(c).
- The SPBD Statement pointed out that "As noted above, the loss or theft of digital asset securities may cause the firm and its digital asset customers to incur substantial financial losses. This, in turn, could cause the firm to fail, imperiling its traditional securities customers as well as the broker-dealer's counterparties and other market participants. However, there are measures a broker-dealer can employ to comply with Rule 15c3-3 and mitigate these risks."
- The FAQs return those risks to customers by making the SPBD Statement risk mitigation compliance procedures optional, eliminating any distinction between the risks associated with traditional securities and crypto securities.

In-Kind Creations and Redemptions

- According to FAQ 4, broker-dealers can facilitate in-kind creations and redemptions for spot crypto ETPs without violating custody capital requirements.
- A spot crypto ETP (Exchange-Traded Product) is a type of investment that provides investors with exposure to the price of a specific cryptocurrency, like Bitcoin or Ether, by holding the actual cryptocurrency as the underlying asset. This is in essence no different from an investor's perspective upon loss, than having the investment directly in the digital asset security.
- The Staff states that it will not object if a BD treats that proprietary position as being "readily marketable" for purposes of determining whether the 20% haircut applicable to commodities under Rule 15c3-1 (the Net Capital Rule). Here again, the SEC is allowing non-securities assets in the form of commodities to lessen the amount of actual securities that are required by the Net Capital Rule.

SIPA Doesn't Apply – What Can You Do?

- FAQ 5 makes clear that non-security crypto assets are not protected under the Securities Investor Protection Act (SIPA). Because investment contracts are not securities under SIPA they are not the subject of a registration statement filed under the 1933 Act and are not protected by SIPA.
- FAQs 6 and 7 address the protection of customer claims for non-security crypto assets. FAQ 6 states that being held by a SIPC member broker-dealer does not extend SIPA protection to non-security crypto assets. FAQ 7 provides some potential avenues for return of non-security crypto assets in the instance that the broker-dealer becomes insolvent. The Staff suggests that broker-dealers can help ensure the return of non-security crypto assets to customers upon insolvency by treating them as “financial assets” that are carried in a “securities account” as stated in Article 8 of the UCC. This is an overreach of the SEC regarding treatment of non-security crypto assets which, by definition as a non-security, are beyond the SEC’s jurisdiction. Also, the UCC??

Don’t Downgrade Recordkeeping

- According to FAQ 8, the Staff leaves no doubt that prudent recordkeeping is essential for investor protection and compliance with audit requirements. Not much of a stretch there.
- Broker-dealers should maintain records and employ the same procedures for non-security crypto activities as those in place for securities activities.

Transfer Agent Registration

- FAQ 9 provides guidance, though no definitive answer, regarding whether transfer agents for crypto asset securities may need to register if engaging in specific activities. Transfer agents providing services for crypto asset securities should (i) determine whether those securities are Section 12 securities, and (ii) analyze the services performed with respect to those securities qualify as 3(a)(25) activities to inform their decision on registration.
- FAQ 10 permits a registered transfer agents to utilize distributed ledger technology for maintaining securityholder records and need not duplicate the master security holder file, provided that the transfer agent complies with all applicable federal laws.

While this new guidance provides significant flexibility for broker-dealers holding custody of digital asset securities, tread with caution. Adopting these relaxed standards and lessening custodial controls already in place can expose the broker-dealer to something of a negative “inference” in the instance that a loss does occur. The increased risk to broker-dealer customers will likely in the future cause regulators to question the broker-dealer’s motivations in lessening the protections. Keep your compliance up!