

Alert | Blockchain



August 2019

SEC/FINRA Joint Statement on Broker-Dealer Custody of Digital Assets

The SEC's Division of Trading and Markets and the Office of the General Counsel of FINRA (Financial Industry Regulatory Authority) published on July 8, 2019, a [joint staff statement](#) (Custody Release) on broker-dealer custody of digital assets. The statement has been eagerly awaited by market participants, including broker-dealers, given significant uncertainty in the application of securities laws to novel digital asset transactions.

In the new digital world, broker-dealers currently grapple with possession and control to safeguard customers' digital asset securities and their own duties and responsibilities under Rule 15c3-3 of the Securities Exchange Act of 1934, also known as the Customer Protection Rule. This rule requires broker-dealers to safeguard customer assets and to keep customer assets separate from the broker's assets, thus increasing the likelihood that customers' securities and cash can be returned to them in the event of the broker-dealer's failure. Digital assets present heightened risk for broker-dealers charged with maintaining custody of the assets. Unlike having possession of a tangible stock certificate stored in a vault, in the digital asset realm, a broker-dealer could be victimized by fraud or theft through the loss of a "private key" necessary for the transfer of the asset, and potentially have no recourse.

The Custody Release additionally addresses financial responsibility rules, the maintenance of books and records, noncustodial broker-dealer models, regulatory approvals needed for existing broker-dealers engaging in digital asset securities for the first time, and limited coverage under SIPA (Securities and Investor Protection Act of 1970) unless the security meets the definition of a "security" under SIPA (which

is different than under the Securities Act of 1933 by, in general, limiting it to securities which are subject to a filed and approved registration statement). If the digital asset security does not meet the definition of “security” under SIPA, protection likely would not apply in the event of failure of the broker-dealer and holders of those digital asset securities would have only unsecured general creditor claims against the failed broker-dealer.

As a practical matter, the Custody Release makes clear that broker-dealers are encouraged to engage with the SEC Staff to discuss solutions for compliance issues. Unregistered broker-dealer entities that intend to engage in broker-dealer activities involving digital assets will be required to submit New Membership Applications to FINRA. Existing registered broker-dealer firms will be wise to now evaluate the need for a Continuing Membership Application (CMA). Under FINRA rules, an existing broker-dealer is prohibited from changing its business operations to incorporate material digital asset securities activities for the first time without FINRA’s prior approval of the CMA.

This GT Alert is part of the firm’s Blockchain & Cryptocurrency Newsletter - Spring/Summer 2019, available [here](#).

Author

This GT Alert was prepared by **Rebecca G. DiStefano**. Questions about this information can be directed to:

- [Rebecca G. DiStefano](#) | +1 561.955.7654 | distefanor@gtlaw.com
- Or your [Greenberg Traurig attorney](#)

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. [~]Houston. Las Vegas. London. ^{*}Los Angeles. Mexico City. ⁺Miami. Milan. [»]Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul. [∞]Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. [^]Tokyo. [»]Warsaw. ⁻Washington, D.C.. West Palm Beach. Westchester County.

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. [~]Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ^{}Operates as a separate UK registered legal entity. ⁺Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [»]Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [∞]Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. [^]Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. [»]Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [~]Greenberg Traurig’s Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2019 Greenberg Traurig, LLP. All rights reserved.*