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A Flurry of Activity at the SEC and Beyond

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December has brought a range of activity at the SEC and beyond. From the SEC issuing its first enforcement press release in several months, filing multiple actions including one for alleged accounting and disclosure fraud, to US prosecutors announcing criminal action on a matter that first hit the news just in September. But a pair of regulatory releases by the SEC's Division of Trading and Markets (TM) are also due attention. Our rundown of those releases follows in an area we are keeping watch.

- **For US Broker-Dealers, Another Piece of the Digital Asset Security Puzzle Falls into Place: Trading and Markets Staff Issues Guidance Re: "Physical Possession"**

On December 17, 2025, the TM staff (Staff) issued Guidance[1] explaining what it means for a broker-dealer to have "physical possession" of a crypto asset security (CAS), providing long-sought direction by enumerating the five things that a carrying broker-dealer must do to comply with paragraph (b)(1) of the Customer Protection Rule (Rule 15c3-3).[2]

According to the Guidance, a broker-dealer will have physical possession (as defined under the Customer Protection Rule, paragraph (b)(1)) of a CAS carried for the account of a brokerage customer if the broker-dealer:

1. Directly has access to the CAS and the capability to transfer it on the associated distributed ledger technology (DLT).
2. Before taking physical possession, and at reasonable intervals thereafter, establishes, maintains, and enforces reasonably designed written policies and procedures (hereafter, abbreviated as having WSPs) to conduct and document an assessment of the DLT and the associated network where transfers of ownership are recorded.[3]
3. Does not deem itself to possess a CAS if it is aware of any material security or operational problems or weaknesses with the DLT and the associated network used to access and transfer the CAS, or is aware of other material risks posed to the broker-dealer's business by custodying the CAS.[4]
4. Has WSPs aligned with industry best practices to protect against the theft, loss, or unauthorized or accidental use of the private key. This control should ensure that no other person – including the customer or any third party (including affiliates of the broker-dealer) – has access to the private key nor the ability to transfer the asset without the authorization of the broker-dealer.
5. Has WSPs to:
    - "specifically identify, in advance, the steps [the broker-dealer] will take in the wake of certain events that could affect the firm's possession of [CASs], including blockchain malfunctions, 51% attacks, hard forks, or airdrops"
    - enable compliance with a lawful order as to seizing, freezing, burning or prevention of transfer of the [CASs]; and
    - allow for the transfer of the [CASs] to another broker-dealer, trustee, receiver, liquidator, or person performing a similar function, or to another appropriate person, in the event the broker-dealer becomes defunct.

Background on the Bumpy Road Previously Traveled

Five years ago, on December 23, 2020, the SEC created a five-year grace period for a broker-dealer under specified conditions to custody digital asset securities.[5] The catch was that the broker-dealer had to limit its business exclusively to digital asset securities (a sort of "bad bank" theory of containing risk). Together with a July 2019 FINRA and SEC Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities,[6] the special purpose broker-dealer (SPBD) relief was meant to provide a roadmap for broker-dealers to facilitate digital asset securities trading. Only two firms ever registered as a SPBD.

On May 15, 2025, the SEC and FINRA withdrew the Joint Staff Statement, and the Staff published FAQs.[7] The FAQs, among other things, said that digital asset securities businesses and traditional securities businesses could be conducted within the same broker-

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dealer (that need not register as a SPBD). It also provided guidance as to what constitutes the broker-dealer having "control" of a customer's digital asset security, one prong of the Customer Protection Rule.[8] With the meaning of "control" clarified, the next piece of the puzzle was to explain what constitutes "physical possession."

- **Holiday Treat for Crypto ATSs: Trading and Markets Updates its FAQs on Crypto Securities and DLT & the Crypto Task Force Solicits Input on 16 Questions – Both Aimed at ATSs and National Securities Exchanges**

On December 17, 2025, the Staff made substantial additions to the FAQs[9] that were first published in May 2025. The December updates are directed at national securities exchanges ("Exchanges") and alternative trading systems ("ATSs") and focus on trading and settlement issues, including trading a CAS for a non-security crypto asset. In a related statement ("Statement"), Commissioner Peirce indicated that the FAQ updates are intended to signal that Staff is "ready to work with market participants who want to facilitate pairs trading on regulated platforms."[10] In this regard, Q&A 11 seems to lay the groundwork for seeking No Action relief, as opposed to providing a ready-made roadmap.[11]

Questions and answers relating to Form ATS disclosures (Q12), permissible activities of broker-dealers who operate ATSs (Q13), clearance and settlement by the broker-dealer operator of transactions occurring on the ATS (Q14), and exchange-traded products referencing crypto assets (Q15) are more actionable in terms of providing a roadmap for registrants to facilitate crypto security trading, settlement and custody prior to the completion of any forthcoming rulemaking initiatives.

Commissioner Peirce included in her Statement 16 questions designed to assist the Crypto Task Force that she leads in drafting a proposal for crypto regulatory policy, specifically regarding "ATSs that trade crypto asset securities or trade securities against crypto assets that are not securities" and how the SEC's rules applicable to Exchanges should be modified to facilitate crypto asset trading. While most of the questions relate to amendments to Reg ATS, six sought inputs on whether changes to Reg NMS may be warranted. Separately, TM is actively working on amendments to Reg NMS aimed at Rule 611, the order protection rule.

The releases provide more insight and clarity on the views from TM, though the road goes on (but not forever).

**With assistance from Of Counsel Lauren Cook Jackson.*

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[1] Division of Trading and Markets: Statement on the Custody of Crypto Asset Securities by Broker-Dealers (December 17, 2025), https://www.sec.gov/newsroom/speeches-statements/trading-markets-121725-statement-custody-crypto-asset-securities-broker-dealers.

[2] Rule 15c3-3(b)(1) states that: "A broker or dealer shall promptly obtain and shall thereafter maintain the physical possession or control of all fully-paid securities and excess margin securities carried by a broker or dealer for the account of customers."

[3] The assessment should include governance (e.g., how protocol updates and changes are determined and implemented) and identify significant weaknesses or other operational issues.

[4] This relates to material risks arising from possession of the relevant CAS, not other potential risks (e.g., market or reputational risk).

[5] Custody of Digital Asset Securities by Special Purpose Broker-Dealers, Exchange Act Release No. 90788 (Dec. 23, 2020), 86 FR 11627 (Feb. 26, 2021).

[6] See Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities, Division of Trading and Markets, U.S. Securities and Exchange Commission and Office of General Counsel, Financial Industry Regulatory Authority (Jul. 8, 2019) (https://www.sec.gov/newsroom/speeches-statements/joint-staff-statement-broker-dealer-custody-digital-asset-securities-joint-staff-statement-broker-dealer-custody-digital-asset-securities-withdrawn-may-15-2025)(withdrawn May 15, 2025).

[7] Division of Trading and Markets: Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technology (Updated December 17, 2025), https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/frequently-asked-questions-relating-crypto-asset-activities-distributed-ledger-technology at Question 2.

[8] Quoting the FAQ: "**Q2: Could a broker-dealer establish control of a crypto asset that is a security via paragraph (c) of Rule 15c3-3?** A2: In the Staff's view, yes. The Staff notes that although certain control locations in paragraph (c) of Rule 15c3-3 reference a security being in certificated form to establish control under that provision, the Staff will not object if such crypto asset securities are not in certificated form when held at an otherwise qualifying control location under paragraph (c) of Rule 15c3-3."

[9] Division of Trading and Markets: Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technology (Updated December 17, 2025), https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-

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questions/frequently-asked-questions-relating-crypto-asset-activities-distributed-ledger-technology.

[10] And Then Some: Request for Information Regarding National Securities Exchanges and Alternative Trading Systems Trading Crypto Assets, Commissioner Hester M. Peirce (December 17, 2025), https://www.sec.gov/newsroom/speeches-statements/peirce-12172025-then-some-request-information-regarding-national-securities-exchanges-alternative-trading-systems.

[11] The answer to Q11 couches its response with the phrase “provided the [entity] satisfies its statutory and regulatory requirements under the federal securities laws” and highlights the need for NMS plan amendments and rule changes by the Exchanges.

Related Capabilities

Securities Enforcement

Fintech and Digital Assets

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