

United States Senate

WASHINGTON, DC 20510

June 15, 2022

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Dear Chair Gensler,

We write to express concerns regarding the Securities and Exchange Commission's issuance of Staff Accounting Bulletin 121 ("SAB 121" or "Bulletin"). The Bulletin provides interpretive staff guidance from the Division of Corporation Finance and the Office of the Chief Accountant regarding the accounting of, and associated disclosures relating to, a platform holding digital assets on behalf of consumers.

Although the underlying interpretation may or may not be appropriate, as currently drafted, the SAB 121 is regulation disguised as staff guidance. As you know, staff typically only provide interpretive guidance on existing regulations. Here, there is no underlying regulation being interpreted. Moreover, the Bulletin leaves no doubt that staff expects regulated entities to comply – indicating the Bulletin is enforceable. Staff guidance cannot create enforceable obligations. The SEC should not be taking steps that could invite litigation, which undermines the American people's confidence in the agency, and in our shared desire to promote strong protections for investors.

Agencies must conduct rulemaking under the Administrative Procedure Act, which incorporates process and transparency designed to ensure that the public and all affected by a proposed rule have the opportunity to provide comment, resulting in sound, well-designed regulations. The SEC's approach to the emerging crypto market has not promoted process, transparency, or public engagement. Instead, the Commission has led with enforcement and relied on staff guidance, citing purported "increased risks" presented by crypto.¹ The SEC's job is to mitigate these risks first by developing a knowledge base through engagement with the industry and market participants, then by proposing rules, and, once the risks and rules are clear, only then ensure compliance through enforcement. A comprehensive custody regime, tailored to the unique properties of digital assets, could provide a clear regulatory framework and legal protections for investors. Investor protection is a core obligation of the Commission and should not be left to a back-door staff-led approach that creates more questions than answers.

¹ <https://www.sec.gov/oca/staff-accounting-bulletin-121>

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Staff should not make policy. We hope you will withdraw SAB 121 and follow the proper procedure for such a significant accounting change. If the Commission agrees the goals of SAB 121 are appropriate, we welcome a rulemaking to be issued through the proper notice and comment regime to allow for proper stakeholder engagement.

Regardless of your next steps, please provide any economic analysis done on the potential impact of this bulletin – including the effect on capital requirements and retail investor protections – as well as a description of any stakeholder feedback and interagency review.

Sincerely,



Bill Hagerty
United States Senator



Thom Tillis
United States Senator



Cynthia M. Lummis
United States Senator



Mike Crapo
United States Senator



M. Michael Rounds
United States Senator