



The delay has subsided with custody of digital asset securities by special purpose broker-dealers (SPBDs). By way of background, on July 8, 2019, SEC and FINRA staff issued a [joint statement](#) addressing how registered broker-dealers could facilitate transactions in digital asset securities without taking custody of the assets. The solution involved bilateral clearance and settlement of the transactions.

A year later, the SEC's Division of Trading Markets staff issued a [no-action letter](#) to FINRA articulating the staff's position on how alternative trading systems (ATs) could facilitate trading in digital asset securities using a three-step process. However, per its terms, the no-action letter requires the ATs to not take custody of the digital asset securities.

Finally, on December 23, 2020, custody entered the equation for digital asset securities. The [SEC introduced](#) the concept of an SPBD framework that would allow a broker-dealer or a broker-dealer operating an ATS to both custody and facilitate transactions in digital asset securities. The "walled garden" approach under the SPBD release requires the following of the broker-dealer or ATS:

- Demonstrate exclusive and actual possession of the digital asset security.
- Provide written disclosures to potential customers conveying acknowledgment of possession or control of digital asset securities and material risks of crypto assets.
- Enter into a written terms of service agreement with respect to transacting in crypto asset securities.

- Prohibit custody where the broker-dealer is aware of material security or operational problems regarding the access or transfer rails.
 - Diligence the digital securities DLT and associated network.

- Prohibit holding traditional securities, other than for hedging purposes or net capital compliance.
- Prepare and enforce written supervisory procedures to ensure that the digital asset securities were offered pursuant to compliance with federal securities laws.

It has been two-and-a-half years since the SPBD release, but in May 2023, FINRA [approved an application](#) for the first known special purpose broker-dealer to custody digital assets. The approval demonstrates a successful and even expected path for crypto market participants to follow if they choose to engage in the business of facilitating transactions in digital asset securities and providing custody.

Given the nascent nature of this space, however, new entrants into the space should expect to face additional challenges in the future as regulators and market participants become comfortable applying the customer protection rule to digital asset securities. On a 2022 SEC Speaks panel, Michael A. Macchiaroli, associate director in the Office of Broker-Dealer Finances in the Division of Trading and Markets, [noted](#) that regulators had "no experience at all as to how this would work but we would like to see it in practice . . . [W]e've left it up to the broker-dealer, subject to our examination of their processes and procedures."

Moreover, the no-action relief provided in the SPBD release was limited to five years and will expire in February 2026. The SEC noted that "the five-year period was intended to "provide market participants with an opportunity to develop practices and processes that will enhance their ability to demonstrate possession or control over digital asset securities. It also will provide the Commission with experience in overseeing broker-dealer custody of digital asset securities to inform further action in this area." Therefore, it is possible that the SEC could extend the no-action relief the statement provides, revise the conditions detailed in the SPBD release and issue a new no-action letter, propose and adopt a new rule regarding the custody of digital assets, or let the no-action relief expire without taking additional action.

As the SEC, FINRA, and market participants continue to attempt to navigate the complexities associated with trading digital asset securities and developing best practices for safeguarding and transacting them, investor security will continue to be the driver of conversations around this new asset class and the formation of innovative solutions by all parties involved.

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