November 15, 2023

The Honorable Martin Gruenberg  The Honorable Michael Barr  
Chairman of the Board  Vice Chair for Supervision  
Federal Deposit Insurance Commission  Board of Governors of the Federal Reserve System  
550 17th Street, NW  20th Street and Constitution Avenue, NW  
Washington, DC  20429-9990  Washington, DC  20551  

The Honorable Michael Hsu  The Honorable Todd Harper  
Acting Comptroller of the Currency  Chairman of the Board  
Office of the Comptroller of the Currency  National Credit Union Administration  
400 7th Street, SW  1775 Duke Street  
Washington, DC  20219  Alexandria, VA 22314  

Dear Vice Chair Barr, Chairman Gruenberg, Chairman Harper, and Acting Comptroller Hsu:

We write regarding Securities and Exchange Commission (SEC) Staff Accounting Bulletin 121 ("SAB 121") published on April 11, 2022.

Last month, the Government Accountability Office (GAO) issued a legal decision that SAB 121 is a rule for purposes of the Congressional Review Act.\(^1\) SAB 121 was issued without consultation with any of your respective agencies and would require custodians to recognize a liability and a corresponding offset on their balance sheets, measured at the fair value of the customer custodial digital assets. This accounting approach, which deviates from established accounting standards, would not accurately reflect the underlying legal and economic obligations of the custodian, and places consumers at greater risk of loss.

In its decision, GAO stated that “it is reasonable to believe that companies may change their behavior to comply with the staff interpretations found in the Bulletin”\(^2\) due to the SEC’s responsibility and authority in monitoring public disclosures and pursuing enforcement actions against noncompliant entities.

SAB 121 meets the definition of a rule under the Administrative Procedure Act (APA), and was never submitted to Congress or the GAO, nor was it subsequently published in the Congressional Record consistent with the requirements of the Congressional Review Act. Given that the SEC failed to meet these obligations, SAB 121 should have no legal effect and the

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\(^2\) Id. at 8.
Federal banking agencies and National Credit Union Administration should not require banks, credit unions and other financial institutions that provide custody services for digital assets to comply. This means that such entities need not recognize a liability and a corresponding asset offset on their balance sheets.

Enforcing this noncompliant rule would set a concerning precedent that would facilitate regulatory gamesmanship to circumvent the APA, effectively allowing the SEC to have regulatory authority over institutions which Congress did not authorize.

We therefore ask you to clarify, through guidance or other action, that SAB 121 is not enforceable in light of the recent GAO determination. Thank you for your attention to this matter.

Sincerely,

Patrick McHenry
Member of Congress

Cynthia M. Lummis
United States Senator

French Hill
Member of Congress

Kirsten Gillibrand
United States Senator

Ritchie Torres
Member of Congress

Mike Flood
Member of Congress

Wiley Nickel
Member of Congress