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SEC GRANTS NO-ACTION RELIEF TO REGISTERED INVESTMENT ADVISERS AND CERTAIN REGISTERED INVESTMENT COMPANIES TO TREAT A STATE TRUST COMPANY PROVIDING CRYPTO ASSET CUSTODY SERVICES AS A "BANK"

On September 30, 2025, the staff of the Division of Investment Management (the "Staff") of the U.S. Securities and Exchange Commission ("SEC") granted no-action relief (the "No-Action Letter" or "NAL")[1] that allows, subject to numerous conditions: (i) investment advisers registered under the Investment Advisers Act of 1940, as amended (the "Advisers Act" and such advisers, "RIAs"); and (ii) investment companies registered under the Investment Company Act of 1940, as amended (the "1940 Act") and entities that have elected to be regulated as business development companies under the 1940 Act, (collectively, "Regulated Funds") to treat a State Trust Company[2] as a "bank" as defined in the Advisers Act and the 1940 Act with respect to the placement and maintenance of Crypto Assets[3] and cash and/or cash equivalents reasonably necessary to effect transactions in Crypto Assets.

BACKGROUND

While interest from RIAs and Regulated Funds in investing in Crypto Assets has grown significantly over the past ten years, the availability of permissible service providers to custody such assets has not kept pace. State Trust Companies have sought to fill this void, but their uncertain status as "banks" under the Advisers Act and the 1940 Act (as well as under other federal securities laws such as the Securities Exchange Act of 1934 (the "Exchange Act")[4]) has provided a speedbump to more widespread

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[1] SEC Staff No-Action Letter (Sept. 30, 2025), available at https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-investment-management-staff-no-action-interpretive-letters/simpsonthacherbartlett093025.

[2] The NAL defined a "State Trust Company" as a legal entity organized under state law that is: (i) supervised and examined by a competent state authority charged with bank supervision; and (ii) permitted to exercise fiduciary powers under applicable state law.

[3] The NAL defined "Crypto Assets" as assets that are digital representations of value that are recorded on a cryptographically secured distributed ledger.

[4] See the definition of "bank" in Section 3(a)(6) of the Exchange Act. Subject to certain conditions set forth in SEC Rule 15c3-3(c)(5), a "bank" can qualify as a good control location for the custody of fully paid securities (and excess margin securities) carried by a broker-dealer for the account of customers. The NAL only addresses the status of a State Trust Company as a "bank" for purposes of the custody provisions of the Advisers Act and the 1940 Act.

usage, and through the years the SEC and its Staff have largely declined to provide definitive guidance on the issue.[5]

However, in February 2023, the SEC proposed an amendment to Rule 206(4)-2 under the Advisers Act (the "Custody Rule") that would have, among other changes, brought Crypto Assets squarely within the custody framework for investment advisers (and perhaps in its adopted form would have addressed the status of State Trust Companies as banks under the Custody Rule). Ultimately, however, this proposal was not adopted, and in fact was withdrawn by the SEC in June 2025. In September 2025, the SEC included in its regulatory agenda a new set of custody-related proposals under both the Advisers Act and the 1940 Act that the SEC has stated will address, among other things, the custody of Crypto Assets.[6]

Summary of Applicable Regulatory Requirements

The Custody Rule under the Advisers Act requires, among other things, that any RIA with custody over client funds or securities maintain those assets with a qualified custodian, which includes a "bank" as defined in Advisers Act Section 202(a)(2). Similarly, Sections 17(f) and 26(a) of the 1940 Act generally requires Regulated Funds to maintain their securities and "similar assets" with certain enumerated custodians, which includes most "banks" as defined in Section 2(a)(5) of the 1940 Act.[7] The term "bank" is defined substantially the same in both Acts, and includes, among others, a "trust company" "doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the [OCC]," and is "supervised and examined by State or Federal authority" charged with bank supervision.[8]

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[5] *C.f.* SEC Staff Statement on WY Division of Banking's "NAL on Custody of Digital Asset and Qualified Custodian Status," (Nov. 9, 2020) (withdrawn May 6, 2025) (stating that investment advisers should conduct a facts and circumstances analysis of whether State Trust Companies fall within the definition of "bank" under the Advisers Act).

[6] The Division of Trading and Markets is also considering recommending that the SEC amend Rules 15c3-1 and 15c3-3 under the Exchange Act to address the application of these rules to Crypto Assets.

[7] To qualify as a custodian under Section 17(f), a bank must meet the qualifications of being a trustee for a unit investment trust, i.e., it must possess not less than $500,000 in aggregate capital, surplus, and undivided profits.

[8] 15 U.S.C. § 80b-2(a)(2). In addition, the trust company cannot be "operated for the purpose of evading the provisions" of the 1940 Act or Advisers Act, as applicable. *C.f.* Bishop Trust Co., SEC Staff No-Action Letter (publicly available Mar. 26, 1985) (in this and subsequent letters, the staff declined to respond to questions of whether a non-depository trust company was operated for such purposes). The Staff noted that under both the 1940 Act and the Advisers Act, the definition of "bank" also includes, among others, member banks of the Federal Reserve System, including, for example, a member national trust bank. The Staff made clear that a Regulated Fund or RIA may custody Crypto Assets (or related cash and/or cash equivalents) with such banks, citing Office of the Comptroller of the Currency ("OCC") Interpretive Letter 1183 (Mar. 2025). That letter reaffirmed that national banks may provide crypto-asset custody services under applicable statutory authority. Presumably, because the NAL addressed only State Trust Companies, custodying Crypto Assets with other types of custodians for Crypto Assets (e.g., broker-dealers and foreign financial institutions) would be permissible, provided that other applicable requirements are satisfied.

Notably, only a handful of states, such as Alaska, Minnesota, and Texas, currently allow State Trust Companies to take deposits[9] -- meaning that the majority of State Trust Companies will need to rely on the "fiduciary powers" prong of the definition.[10] This, however, introduces ambiguity because it requires that a "substantial portion" of a particular State Trust Company's business consist of "exercising fiduciary powers similar to those permitted to national banks," which necessitates a facts and circumstances analysis.

Key Representations from the Incoming Letter

The Staff highlighted the following representations from the incoming letter in its determination that State Trust Companies can be treated as banks under certain conditions:

i. State Trust Companies are currently integral providers of custody services for Crypto Assets.

ii. State Trust Companies offering such services have implemented sophisticated operational and technological controls to ensure the safekeeping of Crypto Assets, which "typically" include:
   - Deep cold storage of Crypto Assets;
   - Third-party annual audits of financials;
   - Third-party reports regarding internal controls;
   - Cybersecurity, physical security, and business continuity policies and procedures;
   - Encryption and multi-step verification for asset movement; and
   - Policies and procedures around private key generation and storage.

iii. State Trust Companies operate within state regulatory frameworks that "generally" include:
   - Licensing eligibility and review;
   - Ongoing supervision, examinations, and enforcement authority for noncompliance by competent state authorities;
   - Minimum capital requirements;
   - Financial condition reporting; and
   - Comprehensive recordkeeping requirements.

[9] Alaska Stat. Ann. §§ 06.26.050, 06.26.370; Minn. Stat. Ann. §§ 48A.04(4), 48A.07(3); Tex. Fin. Code Ann. §§ 182.001(e), 184.301; *see also* Colo. Rev. Stat. Ann. § 11-109-201(d) (authorizing Colorado trust companies to take deposits if they obtain federal deposit insurance).

[10] Arguably a State Trust Company that does not take deposits or exercise fiduciary powers (e.g., provides only non-fiduciary custody services) could still be a bank for purposes of the 1940 Act and the Advisers Act by becoming a member of the Federal Reserve System. *See* 12 U.S.C. §§ 221, 321 (defining eligibility requirements for member banks). As a practical matter, it is unclear whether the Federal Reserve would permit such an entity to become a member or that doing so would be worth it in light of the regulatory burden imposed on member banks.

RELIEF GRANTED

Based at least in part on the representations summarized above, the Staff granted no-action relief allowing RIAs and Regulated Funds to custody Crypto Assets and related cash and/or cash equivalents with State Trust Companies, subject to the following requirements:[11]

i. Due Diligence and Ongoing Review

Before engaging and annually thereafter, RIAs or Regulated Funds, as applicable, must establish a reasonable basis, after "due inquiry", that the State Trust Company: (a) is authorized by its state banking authority to provide Crypto Asset custody services; and (b) maintains and implements written internal policies and procedures "reasonably designed" to safeguard assets from the risk of theft, loss, misuse, and misappropriation. The policies and procedures need to address, among other topics, private key management and cybersecurity.

In making this determination, the RIA or Regulated Fund must review the State Trust Company's most recent:

- Annual financial statements and confirm that the financial statements have been subject to an audit by an independent public accountant and have been prepared in accordance with Generally Accepted Accounting Principles ("GAAP");[12] and
- Written internal control reports prepared by an independent public accountant (e.g., SOC-1 report or SOC-2 report) during the current or prior year, and confirm that the internal control report includes an opinion of the independent public accountant that controls have been placed in operation as of a specific date and are suitably designed and are operating effectively to meet control objectives relating to custodial services, including the safeguarding of Crypto Assets and related cash and/or cash equivalents during the year.

ii. Written Custodial Agreement

RIAs (or the RIA's client) or Regulated Fund, as applicable, must have a written agreement with the State Trust Company that (a) prohibits it from directly or indirectly lending, pledging, or rehypothecating assets without prior written consent from the relevant RIA client or Regulated Fund (and then only for the account of such RIA Client or Regulated

[11] The NAL does not alter other obligations or requirements of RIAs or Regulated Funds under their applicable custody requirements, including, for example, the requirement to undergo a surprise examination for RIAs subject to the Custody Rule.

[12] Alternatively, in the event that the State Trust Company's financial statements are presented on a consolidated basis with its parent and other affiliates that have substantive activities, the RIA or Regulated Fund must obtain a written certification or representation from the State Trust Company that the most recent annual financial statements of its parent have been subject to an audit by an independent public accountant and have been prepared in accordance with GAAP. The written certification or representation *should* include information regarding results of the audit.

Fund); and (b) requires segregation of the relevant counterparty's assets from those of the State Trust Company.

iii. Risk Disclosure

RIA's must disclose to their clients, and Regulated Funds must disclose to their boards of directors/trustees (if applicable), any *material* risks of using a State Trust Company to custody Crypto Assets and related cash and/or cash equivalents.

iv. Best Interest Determination

The RIA or Regulated Fund (and the fund's board of directors/trustees, if applicable) must reasonably determine that using the State Trust Company's custody services is in the best interest of the RIA's client or Regulated Fund's shareholders, as applicable.[13]

OPEN ISSUES

The No-Action Letter leaves a number of open issues, including:

- *Non-Crypto Custody*: As noted in SEC Commissioner Caroline Crenshaw's dissent to the No-Action Letter, the NAL did not address whether State Trust Companies are permitted to custody any non-Crypto Assets, such as traditional securities.[14]
- *Fiduciary vs. Non-Fiduciary Custody*: The NAL does not distinguish between State Trust Companies that custody Crypto Assets in a fiduciary capacity and those that custody Crypto Assets in a non-fiduciary capacity (e.g., safekeeping, bailments), even though this could be relevant to the best interest determination required under the conditions.[15]
- *Bankruptcy/Resolution*: Neither the NAL nor the incoming letter address bankruptcy and resolution processes for State Trust Companies. In certain states, State Trust Companies may not be eligible to be debtors under the federal Bankruptcy Code,[16] and because many State Trust Companies are not insured by the Federal Deposit Insurance Corporation, they

[13] The Staff did not provide guidance in the NAL on the criteria that RIAs and Regulated Funds should consider as part of this best interest determination. Presumably, such a determination would, at a minimum, consider an analysis of the other conditions set forth above (e.g., the safekeeping procedures used by the custodians and their financial condition), but would also likely need to address other relevant factors, which could include, among others, the relative costs of different custodians, variations in the bankruptcy or resolution authority for different types of custodians, and other material risks. Given the lack of guidance, we expect that the criteria considered are likely to evolve over time, and accordingly RIAs and Regulated Funds that intend to rely on the NAL should adopt carefully considered procedures to support this determination and review them to help ensure they stay current with market trends.

[14] SEC Commissioner Caroline A. Crenshaw, *Poking Holes: Statement in Response to No-Action Relief for State Trust Companies Acting as Crypto Asset Custodians* (Sept. 30, 2025), available at https://www.sec.gov/newsroom/speeches-statements/crenshaw-093025-poking-holes-statement-response-no-action-relief-state-trust-companies-acting-crypto.

[15] *See e.g.*, OCC Interpretive Letter 1170 at n.40 (July 2020) ("National banks acting as fiduciaries are usually subject to heightened standards of care under applicable law in comparison to non-fiduciaries"). Note, however, that the NAL defined "State Trust Company" as an entity that, among other things, is *permitted* to exercise fiduciary power under state law.

[16] 11 U.S.C. § 109(b)(2); *E.g., In re Trade Fin. Bank*, 163 B.R. 558 (Bankr. D.S.D. 1994); *In re First Indep. Tr. Co.*, 101 B.R. 206 (Bankr. E.D. Cal. 1989).

cannot be resolved under the Federal Deposit Insurance Act.[17] This means that an insolvent State Trust Company would be resolved through state insolvency law proceedings that are administered by state authorities.[18] As above, this could be relevant to the best interest determination required under the conditions.

[17] 12 U.S.C. § 1821(c).

[18] *E.g.,* N.Y. Banking L. § 606; 205 ILCS 620/6-1; *In re Commissioner of Banks and Real Estate*, 327 Ill. App. 3d 441 (2001); *Levin v. Nationar*, 634 N.Y.S.2d 73 (1st Dep't 1995).

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