BitGo

May 8, 2023

Vanessa Countryman
Secretary, Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Safeguarding Advisory Client Assets, File No. S7–04–23:

Dear Ms. Countryman,

BitGo Holdings, Inc. on behalf of itself and its subsidiaries (collectively, "BitGo"), appreciates the opportunity to provide comments on the Commission's proposed Rule 223-1 under the Investment Advisers Act of 1940 (the "Advisers Act"), which would reform the requirements for custody of assets managed by registered investment advisers (the "Proposal").[1] BitGo has long recognized the transformative impact of blockchain technology and digital assets on the securities industry, and we welcome the Commission's efforts to ensure proper safeguarding of client assets held through use of innovative blockchain technology. These efforts will certainly advance the Commission's three-part mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

Subject to our comments herein, BitGo supports the Proposal's approach to regulating custody of digital assets[2] managed by investment advisers registered under the Advisers Act ("RIAs"). Our comments are not directed at the custody of traditional securities and similar investments, as BitGo does not currently provide custodian services for these assets.

As discussed in further detail below:

- BitGo supports including state-chartered trust companies as "qualified custodians" because of the rigorous oversight provided by their supervisory authorities.
- BitGo does not support the proposed "required assurances" because they are too vague, unworkable and may conflict with prudential regulations.
- BitGo believes that segregating customer digital assets via ledger is safe, helpful to customers, and consistent with practices in other asset classes, and should be acceptable under the Proposal.
- BitGo agrees that customers are only protected by requiring RIAs to hold customer assets with a qualified custodian.
- Further to the preceding point, BitGo agrees that customer assets traded by an RIA should be protected in qualified custody until the time of settlement. There are innovative products that allow for this today, including BitGo's own Go Network.
- BitGo believes that the Proposal's definition of "possession or control" makes sense and is workable for digital asset custody, but would clarify that a qualified custodian does not have control of digital assets held in a wallet if it is the RIA or trading platform that holds the private keys controlling the wallet.

[1] Release No. IA–6240, Safeguarding Advisory Client Assets, 88 FR 14672 (2023).
[2] The Proposal defines a "digital asset" as "an asset that is issued and/or transferred using distributed ledger or blockchain technology, including, but not limited to, so-called 'virtual currencies,' 'coins,' and 'tokens.'" 88 FR 14676 n.25.

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Background on BitGo and its Custody Services

BitGo is one of the largest digital asset custodians in the world, with 20% of daily bitcoin transaction volume flowing through BitGo wallets across the globe by way of our services. BitGo serves more than 1,500 institutional clients in over 52 countries; a list that includes many regulated entities, governments, as well as the world's top cryptocurrency exchanges and platforms. In the recent FTX bankruptcies, BitGo was selected by John Ray III, acting CEO at FTX, to be the official custodian to safeguard assets during the bankruptcy proceedings. BitGo is also the custodian of the bitcoin recovered from digital asset trading platform Mt. Gox, which was hacked in 2014, ceased trading, and filed for bankruptcy. Creditors selected BitGo as the sole custodian of Mt. Gox assets.

BitGo has two state trust companies chartered to safeguard digital assets and funds on behalf of customers. BitGo Trust Company, Inc. ("Trust Co.") was chartered in 2018 by the South Dakota Division of Banking, and BitGo New York Trust Company LLC (the "New York Trust Co.") was chartered in 2021 by the New York Department of Financial Services. Further, BitGo has a German entity that is regulated by the Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin") and regulators in Italy, Poland and Greece, and a Swiss entity regulated by the Verein zur Qualitätssicherung von Finanzdienstleistungen ("VQF").

State-Chartered Trust Companies As Qualified Custodians

As the Commission is aware, the definition of a "bank" in the Advisers Act includes a "trust company, whether incorporated or not, 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 Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations."[3] BitGo supports leaving this definition in the Proposal's definition of a "qualified custodian." Our trust companies are as well qualified as any other financial institution to safeguard digital assets managed by an RIA.

As illustrated below, the prudential regulators in New York and South Dakota have developed and implemented rigorous frameworks for chartering and supervising digital asset trust companies, which exercise fiduciary powers similar to those of national banks.

Chartering and Supervision of New York Trust Companies

Our New York Trust Co. is supervised by the New York Department of Financial Services (the "DFS"). As a prudential regulator, the DFS has authority under the New York Banking Law[4] to monitor, examine, and enforce requirements imposed on limited purpose trust companies, such as New York Trust Co. The DFS's Superintendent recently testified to the DFS's comprehensive, rigorous, hands-on regulation of trust companies operating in the digital asset space.[5] Generally, "[a]pproval for a [Bit]license or [trust] charter requires that companies meet

[3] Advisers Act, § 202(a)(2)(C).
[4] Chapter 2 of McKinney Consolidated Laws of New York Annotated (West 2021).
[5] Understanding Stablecoins' Role in Payments and the Need for Legislation, Hearing before the H, Subcommittee on Digital Assets, Financial Technology, and Inclusion (Apr. 19, 2023) (statement of Adrienne A. Harris, Superintendent, New York State Department of Financial Services), https://www.dfs.ny.gov/system/files/documents/2023/04/st_supt_harris_testimony_us_hfsc_20230419.pdf ("Superintendent Harris Testimony").

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the standards of DFS's comprehensive assessment of controls regarding financial crimes, cybersecurity, capitalization, financial/accounting, character and fitness of controlling parties, operational risk, consumer disclosures, and more."[6] "In addition, when an entity is approved to be licensed or chartered, DFS creates a detailed supervisory agreement that is tailored to the specific risks presented by the company's business model."[7] "Supervisory agreements are updated on an as-needed basis to take account of changing business models, market conditions, or other relevant considerations. Licensed companies also must get approval from [DFS] for material changes of business, including for new product offerings and stablecoin issuance."[8]

Other key requirements and supervisory expectations relevant to the custody of digital assets include:

- DFS examines trust companies for digital asset specific controls to protect customers, including protection from the risk of hacks, among other safeguards required by DFS's cybersecurity regulation;[9]
- Trust companies must hold on a one-for-one basis the amount of digital assets received from or acquired by their customers for safekeeping;[10]
- Trust companies must maintain capital based on the specific risks of their business models and other safety and soundness factors;[11]
- Trust companies must provide customers with proper disclosures and transaction receipts, and resolve complaints in a fair and timely manner;[12] and
- Trust companies must have programs to safeguard against illicit transactions.[13]

Section 36 of the New York Banking Law ("NYBL") grants the DFS broad authority to conduct examinations as to New York Trust Co.'s financial condition, the security afforded to those by whom its engagements are held, the policies of its management, whether the requirements of law have been complied with in the administration of its affairs, and such other matters as the Superintendent may prescribe. Examinations are conducted at least annually, and more frequently if the Superintendent deems proper, unless subject to an exception as described in that section.

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[6] *Id*. at 3.
[7] *Id*.
[8] *Id*.
[9] *See generally* 23 NYCRR Part 500.
[10] *See* DFS, Guidance on Custodial Structures for Customer Protection in the Event of Insolvency (Jan. 23, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230123_guidance_custodial_structures ("DFS Custodial Guidance"), Sections I and II.
[11] Superintendent Harris Testimony at 5.
[12] *Id.* at 6.
[13] *See generally* 3 NYCRR Part 504.

For trust company examinations, the DFS broadly follows the Federal Reserve System's Commercial Bank Examination Manual.[14] Exams lead to reports with enumerated issues requiring attention, issues requiring immediate attention, an overall rating, and if appropriate, fines. Outstanding issues are subject to follow-up exams or oversight on a risk basis. Under Section 37 of the NYBL, trust companies are required to provide periodic reporting documentation as directed at the discretion of the Superintendent and at minimum twice per year. In practice, the Superintendent typically requires information such as what is contained in Federal Financial Institutions Examination Council call reports.

Under Sections 40, 41, 44, and 44-a of the NYBL, the Superintendent may remove officers and directors or impose fines and penalties, up to and including revocation of a trust company's charter, in the event that a trust company fails to make reports, fails to satisfy exam expectations, or if other enumerated deficiencies are identified. Section 39(2) of the NYBL also gives the DFS authority to order a licensed institution to discontinue any "unsafe and unsound practice" and to impose penalties based on those practices.

Chartering and Supervision of South Dakota Trust Companies

Our South Dakota trust company is supervised by the South Dakota Division of Banking (the "DOB"), a leading banking regulator with a long track record.

The DOB's director ("Director") reviews all initial applications from trust companies and periodically examines trust companies established under South Dakota law.[15] Without the written consent of the Director, no person who has been convicted of a felony or any crime involving dishonesty or a breach of trust may serve as a board member, officer, or key employee of a trust company. All initial and new incorporators, organizers, board members, managers, officers, and key employees of a trust company are required to submit to a criminal background investigation conducted by the South Dakota Division of Criminal Investigation and the Federal Bureau of Investigation.[16] Further, all officers and employees involved in the care or handling of funds by the trust company must be bonded.[17]

The DOB distributed specific guidance to South Dakota trust companies in February 2022 relating to crypto asset products and services (defined as "CAPS" by the DOB). In the guidance, the DOB acknowledged and highlighted the unique risks posed by CAPS and noted that trust companies must obtain the Director's approval to hold CAPS in custodial relationships. The guidance also highlighted the additional steps that a trust company must take in connection with any business line involving CAPS, including (i) the retention of qualified personnel, (ii) the adoption of written plans addressing the CAPS products, security requirements, and monitoring of any third party vendors engaged in connection therewith, (iii) retention of cyber insurance, (iv) development of an incident response plan should a CAPS product be subject to a cyber attack or fraud, and other enhanced requirements. The DOB specifically noted that trust companies that engage in CAPS related programs will be required to post and maintain increased capital levels and pledge amounts (as compared to statutory minimum levels) to support the additional risks presented by CAPS.

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[14] *See* Bd. of Governors of the Fed. Rsrv. Sys., Div. of Supervision & Regul., Commercial Bank Examination Manual (Supp. 53, May 2021), https://www.federalreserve.gov/publications/files/cbem.pdf.
[15] SDCL 51A-6A-4, 51A-6A-11, and 51A-6A-31.
[16] See SDCL 51A-6A-17.
[17] SDCL 51A-6A-14.

South Dakota trust companies are subject to regular examination and oversight by the DOB. Trust companies must submit annual reports to the Director and the Director has authority to seek more frequent periodic reports in his or her discretion.[18] Trust companies are further required to adopt a "Statement of Principles of Trust Management" in a form prescribed by the DOB, which includes a requirement to obtain annual audits. The auditor's reports are reviewed by the trust company's board of directors and senior management. The DOB also requires trust companies to submit a quarterly report to the DOB outlining its fiduciary assets and providing certain additional financial reporting.

The DOB monitors the reports submitted by trust companies and has broad authority to request additional reports, including daily updates. Consistent with the supervisory role, the Director has the power to take enforcement actions against trust companies, including the ability to force the company to correct unsafe or unsound conditions and the authority to appoint a special assistant to take charge of a noncompliant trust company.[19] By statute, the Director is required to examine a trust company no less than once every 3 years.[20]

Exercise of Fiduciary Powers by New York and South Dakota Trust Companies

States that have chartered trust companies to conduct digital asset custodial services (including New York and South Dakota) require those trust companies to act as a fiduciary.[21] Under federal banking law, as interpreted by the Office of the Comptroller of the Currency ("OCC"), these fiduciary powers are clearly "similar to those permitted to national banks." In a January 2021 interpretive letter, the OCC's Chief Counsel explained that a national trust bank "performing in a fiduciary capacity for purposes of state law and operating consistent with the parameters provided for in relevant state laws and regulations may be deemed to be performing in a fiduciary capacity" under federal banking law.[22] Consistent with those principles, the OCC has repeatedly affirmed that state-chartered trust companies who provide digital asset custodial services as a fiduciary under applicable state law (including New York and South Dakota law) could also provide those services as a fiduciary after becoming a national bank.[23]

The Proposed "Assurances" Are too Vague and May Conflict with Prudential Regulation

The Proposal includes five "reasonable assurances" that an RIA would need to obtain in writing from a qualified custodian. While BitGo appreciates that these assurances are intended to "provide consistent investor protections across all qualified custodians,"[24] we believe that supervisory authorities, such as (in the case of prudentially regulated custodians) the OCC,

[18] SDCL 51A-6A-34.
[19] SDCL 51A-6A-40.
[20] SDCL 51A-6A-31.
[21] *See* Section 100 of the New York Banking Law and South Dakota Consolidated Laws Section 51A-6A-1(13) and (14), (29); *see* Superintendent Harris Testimony at 3.
[22] OCC Chief Counsel's Interpretation on National Trust Banks, Interpretive Letter #1176 (Jan. 2021), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1176.pdf.
[23] *See* OCC, Re: Application by Anchorage Trust Company, Sioux Falls, South Dakota to Convert to a National Trust Bank (Jan. 13, 2021) (applying South Dakota law), https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6a.pdf; *see also* OCC, Re: Application to Charter Paxos National Trust, New York, New York (Apr. 23, 2021) (applying New York law), https://occ.gov/news-issuances/news-releases/2021/nr-occ-2021-49a.pdf.
[24] 88 FR 14693.

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NYDFS and South Dakota DOB, are better positioned to regulate the relationship between a custodian under its jurisdiction and its customers, and already provide those assurances. As noted in the Proposal, the entity types permitted to act as qualified custodian all operate under government oversight already, are subjected to periodic inspection and examination, have familiarity with providing custodial services, and are in position to attest to custodial customer holdings and transactions. We believe that deference to existing regulatory standards would be the most efficient and effective way to ensure protection of customer assets held in custody.

We also believe that regulatory clarity is a critical concern for Rule 223-1 and that the vague terminology of the assurances will undermine this goal. Therefore, our responses to the following questions posed in the Proposal are negative for the reasons provided.

Should the rule include the due care reasonable assurances requirement?[25]

While BitGo exercises due care in the performance of its duties and believes other qualified custodians should as well, the Proposal would require "due care in accordance with *reasonable commercial standards*" and "implement[ation of] *appropriate measures* to safeguard client assets." This presupposes that "commercial standards" and "appropriate measures" have been agreed upon for every type of asset. Yet the Proposal concedes that "because crypto assets and distributed ledger technology are still evolving, we expect the methods used to safeguard crypto assets will likewise evolve, which may lead to reevaluation of best practices in the future."[26] This evolution will lead to periods in which there may not be agreement as to the best means of safeguarding digital assets, or even widely accepted best practices, exposing qualified custodians to being second guessed as to whether they are complying with this assurance. This is why qualified custodians and customers need to negotiate the specific methods that will be used to safeguard the customers' assets, and this will necessarily be an ongoing discussion as blockchain technology and digital assets continue to evolve.

In addition, the measures required to safeguard client assets are already subject to regulation and oversight by supervisory authorities, as explained in the Superintendent Harris Testimony. Under this existing regulation and oversight, these measures are tailored to the specific risks posed by the qualified custodian's business model, and thus will provide better protection than boilerplate assurances to comply with ill-defined commercial standards. While well intentioned, requiring this assurance is unlikely to enhance the protection of client assets.

Should the proposed rule include the reasonable assurances requirement requiring the qualified custodian to provide indemnity and have insurance arrangements in place to adequately protect its clients?[27]

BitGo does not believe the Rule should include these requirements.

[25] 88 FR 14699, Question 56.
[26] 88 FR 14694.
[27] 88 FR 14700, Question 60.

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As a preliminary matter, BitGo has been an industry leader in procuring insurance to protect digital assets in custody. We presently maintain a $250 million insurance policy on digital assets held in qualified custody. Specifically, our policy covers: (i) copying and theft of private keys; (ii) insider theft or dishonest acts by BitGo employees or executives; and (iii) loss of keys. The insurance policy is complemented by a host of risk mitigants including our encouraging customers to maintain no more than $150 million in assets in any single one of its wallets.

Notwithstanding BitGo's long standing use of insurance to protect its custodial assets, we believe the proposed assurance requirements would oversimplify a complex matter. Because of the opaque nature of insurance generally, we know that "insurance" at any two custodians is defined by unique facts and circumstances for each of those custodians; just because both custodians claim to be "insured", does not mean that the two have equal or comparable cover. Each policy contains its own statement of facts, its own exclusions, its own jurisdictions, its own deductibles, and unique underwriters.

How would RIAs and qualified custodians determine what is "adequate" protection? Any level short of the (constantly changing) value of the clients' assets might be second guessed. Further, crypto custodians in aggregate would be unable to obtain coverage for the full value of all digital assets under custody in the entire marketplace at any given time, regardless of premium to be paid. There is simply not enough insurance coverage today to protect every single digital asset held in custody. We also note that it is difficult to compare digital asset custody insurance policies across custodians, or even across insurers, on an apples-to-apples basis for numerous reasons. This insurance market is notoriously opaque and bespoke. Further, these insurance policies are structured very differently depending on the provider and target market. Consider how an RIA's examiner would assess an RIA custodian's insurance under this standard: What deductibles and exclusions would be permitted? Would the examiner look to whether the insurance must cover market value of assets at the time of incident or the time of recovery? Are indirect and consequential damages meant to be covered by the insurance policy? Is the insurance policy meant to cover geographic redundancy? Hacks?

We believe that there should be deference to the qualified custodian's existing regulatory overlay respecting whether the qualified custodian is reasonably equipped to protect customer assets held in custody. Qualified custodians are already subject to risk mitigation requirements, capital requirements, risk standards and regulatory exams. The proposed requirements for independent verification of the qualified custodian's internal controls[28] would provide additional comfort. We also note that the proposed insurance requirement would have the likely effect of requiring custodians to obtain a Commission mandated level of insurance for all custodied assets, not just assets of RIA clients. A supervisory authority would not give RIA clients priority over other custodial customers in making claims on insurance. This would make the costs of the Proposal much higher than the Commission has estimated.

Finally, respecting the indemnification requirement, as a matter of practice, custodians and their customers typically agree that it is not reasonable to require a custodian to indemnify for losses that are orders of magnitude beyond the fees the custodian will earn. Yet, the Proposal does not allow for limits on indemnification. Given the potential impact of unlimited indemnification on

[28] See subsection (a)(1)(C) of rule 223-1.

the soundness of a qualified custodian, a supervisory authority may not permit indemnification to the extent contemplated by the Proposal.

Should the rule include the proposed reasonable assurances of segregation of client assets requirements? Are these requirements sufficiently clear?[29]

Supervisory authorities already require segregation of assets as appropriate.[30] For example, the DFS has issued the following guidance on segregation of digital assets:

> Customer virtual currency should be maintained in either (i) separate on-chain wallets and internal ledger accounts for each customer under that customer's name or (ii) one or more omnibus on-chain wallets and internal ledger accounts that contain only virtual currency of customers held under the VCE Custodian's[31] name as agent or trustee for the benefit of those customers. Where a VCE Custodian chooses to hold customer virtual currency in an omnibus account, the VCE Custodian should maintain appropriate records and maintain a clear internal audit trail to identify customer virtual currency and account for all customer transactions, so that each individual customer's beneficial interest is always evident and up-to-date.[32]

If the final version of Rule 223-1 includes a segregation requirement, the Commission should make it clear that the requirement is consistent with this guidance, which is functionally equivalent to segregation by a securities custodian that maintains a separate omnibus or customer account at the Depository Trust Company or a Federal Reserve Bank and controls transfers of securities to and from the account.

Would a custodian for crypto assets be able to satisfy the proposed possession or control requirement?[33]

A custodian for crypto assets would be able to satisfy the proposed possession or control requirement. In fact, this requirement is a strong differentiator between the services of true regulated qualified custodians and those of mere software providers of wallet software for RIAs or other third parties to hold private keys on their own. BitGo's qualified custody is structured such that our trust companies generate and maintain all private keys for cold storage wallets holding customer assets. These private keys are needed to transfer beneficial ownership of the customer assets. Under no circumstance is an RIA or any other third party able to change beneficial ownership of the digital asset without passing through the trust company's robust security procedures. This is not the case with unregulated software – these products simply do not address investor risks meant to be mitigated through Rule 223-1.

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[29] 88 FR 14700, Question 62.
[30] Superintendent Harris Testimony at 5 ("Entities must have in place policies, processes, and procedures to appropriately segregate customer funds and provide appropriate disclosures.")
[31] Under the DFS Custodial Guidance, VCE Custodians include "entities chartered as limited purpose trust companies under the New York Banking Law, to engage in virtual currency business activity, including custody services." DFS Custodial Guidance at n. 2.
[32] DFS Custodial Guidance, Section I.
[33] 88 FR 14690, Question 47.

Further, the Commission is entirely correct to consider those risks associated with RIAs pre-funding trades on digital asset trading platforms that directly settle the trades placed on their own platforms. These risks include risk of misappropriation of client assets by the trading platform or the RIA itself. These are risks that are not theoretical, as demonstrated with FTX.

To address these risks, BitGo has introduced its Go Network platform to enable RIAs to trade digital assets on behalf of customers while maintaining customer assets under protection of BitGo Trust Co.'s cold wallet qualified custody until the point at which Trust Co. either settles the trade or returns assets to the customer. With Go Network, the RIA uses BitGo to safekeep customer assets in cold storage custody for the benefit of the customer. BitGo provides assurances to a trading platform approved by the RIA that customer assets will be held for the customer in the customer's custodial account until settlement or until such time there are no pending orders or trades. In event of settlement, BitGo would transmit the customer's funds or digital assets to the trading platform and in exchange, would receive assets on the customer's behalf from the trading platform. Those assets would be received into the customer's custodial account at Trust Co. Go Network would enable BitGo's qualified custody platform to comply with the proposed definition of "possession or control" as:

- BitGo would be required to participate in transmitting the customer's digital assets to the trading platform on which they are traded;
- BitGo's transmission would effectuate the change in beneficial ownership from the customer to the trading platform; so,
- BitGo's involvement would be a condition precedent to the change in beneficial ownership of the digital assets.

On a related point, BitGo believes that the Commission should make clear that a trading platform should not be permitted to act as a qualified custodian.[34] This type of arrangement would be fraught with potential conflicts between the trading platform's financial interest in trading and settling trades and the client's interest in safeguarding its assets. We therefore recommend that Rule 223-1 prohibit RIAs from trading assets on a platform that is controlled[35] by the qualified custodian or, at a minimum, that the qualified custodian must be operationally independent[36] from any such trading platform. This would be a logical step in the development of a more robust digital assets market structure that advances customer protection.

Do advisers with discretionary authority over a client's assets (regardless of settlement method) currently have safeguards in place that effectively limit the risks to clients of loss, misuse, theft, or – in particular – misappropriation? If so, what are they? Do these

[34] "[T]his practice [of transferring digital assets and funds to a trading platform prior to executing trades] would also constitute a violation of the proposed rule for an adviser with custody of client crypto assets if the adviser trades those assets on a crypto asset trading platform that does not satisfy the definition of "qualified custodian.'" 88 FR 14689.
[35] "Control" would be defined in subsection (d)(2) of Rule 223-1.
[36] "Operationally independent" would be defined in subsection (d)(7) of Rule 223-1.

safeguards differ depending on whether the arrangement involves a qualified custodian?[37]

We believe the answer to the Commission's first question is a strong no - today's investment advisers are generally not qualified to fully understand and reasonably mitigate the unique risks of loss, misuse or theft associated with blockchains and digital assets. This is part of the reason why it makes abundant sense to require an RIA to use a qualified custodian to possess or control the private keys to its customers' digital assets.

Prior to forming two regulated qualified custody trust companies in the United States, BitGo was created as a technology and security company to prevent the loss of digital assets[38]. BitGo's experienced technology team pioneered multi-signature security and institutional cold storage for safekeeping of digital assets. Both of these technologies are widely considered to be the gold standard of security protocols today. These technologies emerged for digital assets due to digital assets (and specifically, the private keys to digital assets) constituting bearer instruments, meaning that whoever holds the private keys to these assets holds the assets, and further, that the nature of blockchain is such that loss of these private keys is equivalent to losing the asset itself.

BitGo appreciates that the Commission recognizes the unique risks associated with risks of theft, loss and unauthorized and accidental use of the private keys necessary to access and transfer digital assets held in custody.[39] Based upon our decade of experience in digital asset security and offering cutting edge solutions for private key management, we believe that most investment advisers simply do not have the technical controls, operational controls, financial controls, or monitoring controls in place to deal with the unique safeguarding requirements associated with this asset class, such as:

- malware prevention;
- phishing attacks;
- hacking of networks, mobile phones, and desktops;
- creating and maintaining backups suitable to withstand physical losses such as fire, natural disaster, computer failures, hard disk crashes, etc.;
- implementing controls to prevent insider theft;
- safe selection of passwords, software, and tools;
- building physical vaulting, security cameras and security guards to protect physical storage mediums; and
- coercion.

Further, as noted by the Commission, blockchain and DLT technology evolves quickly. Most market participants are simply not equipped to continually update the systems and control processes in the manner necessary to keep pace.

In contrast, crypto-native qualified custodians that have been operating in the digital asset space have built these controls with audited SOC and security reports available to prove they have done so. We would be happy to work with the Commission on this topic in more detail.

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[37] 88 FR 14680, Question 10.
[38] See, e.g., https://www.bitgo.com/company/about-bitgo.
[39] See, for example, Statement and Request for Comment respecting Custody of Digital Asset Securities by Special Purpose Broker-Dealers (December 23, 2020), https://www.sec.gov/rules/policy/2020/34-90788.pdf.

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Conclusions

BitGo has long advocated for greater clarity as to the custodial requirements for digital assets managed by RIAs, and therefore supports adoption of a new safekeeping rule that would advance this goal. Most importantly, BitGo believes that the rule should, as proposed, confirm Congress's intent to allow a trust company subject to supervision by a state banking authority to serve as a qualified custodian. The Superintendent Harris Testimony provides compelling evidence that state banking authorities can be relied upon to protect the digital assets held by these trust companies on behalf of RIA clients.

Given that qualified custodians are already subject to oversight by one or more federal and state authorities, they do not need additional oversight by scores of individual RIAs each of which is tasked with monitoring "reasonable assurances." The proposed assurances are overly simplistic and vague, and the Commission should not suppose that RIAs will be adept at implementing them. This is why we regard the proposed assurances as counterproductive—as they will reduce the clarity and increase the cost of the rule without enhancing the safekeeping of customer assets.

Finally, BitGo agrees that the rule will only accomplish its objectives if the qualified custodian obtains possession and control, as proposed to be defined, when an RIA's customer first acquires a digital asset and maintains possession and control until the final disposition of the digital asset. Control of the relevant private keys is the hallmark of control of most digital assets, which should be vested in the qualified custodian and not in the RIA or the trading platform used by the RIA. BitGo believes that this can be accomplished with current technology.

Thank you for considering our comments. Please contact us if you have any questions or require additional information relevant to the Proposal.

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