



February 14, 2024

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

Dear Chair Gensler:

The Bank Policy Institute (“BPI”), the American Bankers Association (“ABA”), the Financial Services Forum (“the Forum”), and the Securities Industry and Financial Markets Association (“SIFMA”) (collectively, the “Associations”<sup>1</sup>) write to request that the Securities and Exchange Commission (“Commission”) consider targeted modifications to Staff Accounting Bulletin No. 121 (“SAB 121”) to address recent policy developments and the challenges that SAB 121 has posed for U.S. banking organizations since it was issued on March 31, 2022.<sup>2</sup>

As the two-year anniversary of the issuance of SAB 121 approaches, the Associations believe now would be an appropriate time to examine and discuss the implications of SAB 121 for regulated banking organizations.<sup>3</sup> There have been several relevant developments during this two year period, including the GAO report issued in October,<sup>4</sup> approval of certain Spot Bitcoin ETPs,<sup>5</sup> and the SEC’s proposed rule on Safeguarding Advisory Client Assets that would cover the custody of digital assets if finalized as proposed.<sup>6</sup> The Associations believe that SAB 121 can be modified to mitigate the specific challenges identified herein without undermining the stated policy objectives of the

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<sup>1</sup> More information about the Associations is available in Appendix A.

<sup>2</sup> Staff Accounting Bulletin No. 121, Securities and Exchange Commission (March 31, 2022) ([link](#)). SAB 121 includes interpretive questions addressing: (i) How covered entities should account for their obligations to safeguard crypto-assets held for platform users (the “on-balance sheet requirements”), (ii) what disclosures staff would expect in those circumstances (“the disclosure requirements”), and (iii) when the guidance in SAB 121 should be applied to financial statements.

<sup>3</sup> For purposes of this letter, the term “banking institution” should also be taken to include securities broker-dealers that are regulated by the SEC. SAB 121 impacts regulated broker-dealers as a result of the net capital rule (15c3-1), which treats the on-balance sheet items as non-allowable assets.

<sup>4</sup> GAO: “Securities and Exchange Commission—Applicability of the Congressional Review Act to Staff Accounting Bulletin No. 121,” File B-334540 (Oct. 31, 2023) ([link](#)).

<sup>5</sup> See Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units, Securities Exchange Act Release No. 34-99306 (Jan. 10, 2024) ([link](#)).

<sup>6</sup> SEC Release No. IA-6240, 88 FR 14,672 (March 9, 2023) ([link](#)).

Commission to enhance the information received by investors and other users of financial statements.

The Associations are happy to continue to serve as a resource and work collaboratively with the Commission to provide recommendations that would ensure that investors are provided the requisite disclosures while allowing responsible innovation to occur. The Associations and Commission share the common goals of ensuring the highest levels of investor protection and implementing policies that advance principles of market integrity and financial stability.

We believe the recommendations set forth in this letter are consistent with those principles and would remove unintended barriers for well-regulated U.S. banking organizations to engage in certain activities. Below we describe the drivers behind this request and suggest targeted modifications to SAB 121.

## I. Background

Since SAB 121 was issued in 2022, the Associations have articulated their concerns regarding the Bulletin to the Commission both in writing and in meetings with Commission staff.<sup>7</sup> The foremost concern identified and discussed is how the on-balance sheet requirement of SAB 121 negatively impacts U.S. banking organizations and investors due to the associated prudential implications. The Associations have underscored that on-balance sheet treatment will preclude highly regulated banking organizations from providing a custodial solution for digital assets at scale. Moreover, the Associations have highlighted that the on-balance sheet requirement, coupled with the overly-broad definition of “crypto-asset” in SAB 121, will have a chilling effect on banking organizations’ ability to develop responsible use cases for distributed ledger technology (DLT) more broadly.<sup>8</sup>

U.S. banking organizations’ experience over the past two years has confirmed that SAB 121 has curbed the ability of the Associations’ members to develop and bring to market at scale certain digital asset products and services. In comparison, in-scope entities of SAB 121 *other than U.S. banking organizations* have not suffered the same effects. For example, digital asset custodial services are currently offered by various non-banking organizations, thereby keeping activity outside the prudential perimeter and avoiding the necessary oversight by regulators. Indeed, if regulated banking organizations are effectively precluded from providing digital asset safeguarding services at scale, investors and customers, and ultimately the financial system, will be worse off, with the market limited to custody providers that do not afford their customers the legal and supervisory protections provided by federally-regulated banking organizations. The Associations continue to urge the Commission to work with industry to adopt solutions that could mitigate the described challenges.

## II. Concrete Examples of the Impact of SAB 121 on U.S. Banking Organizations

The Associations highlight two specific examples of the negative impact of SAB 121 on banking organizations, investors, and the financial ecosystem:

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<sup>7</sup> See letter from ABA, BPI, and SIFMA re: SAB 121 to the Office of the Chief Accountant of the SEC, the OCC, the FDIC, the Federal Reserve Board, and the Department of the Treasury (June 23, 2022) ([link](#)); letter from ABA and SIFMA re: request for deferral of effective date of SAB 121 to the Office of the Chief Accountant of the SEC (May 27, 2022) ([link](#)); letter from ABA and SIFMA re: Update on Efforts to Implement SAB 121 to the Office of the Chief Accountant of the SEC (June 27, 2022) ([link](#)).

<sup>8</sup> SAB 121 defines a “crypto-asset” as “a digital asset that is issued and/or transferred using distributed ledger or blockchain technology using cryptographic techniques.”

- (1) Spot Bitcoin ETPs: The Commission recently approved 11 Spot Bitcoin ETPs,<sup>9</sup> allowing investors access to this asset class through a regulated product. However, notably absent from those approved products are banking organizations serving as the asset custodian, a role they regularly play for most other ETPs. These ETPs have already experienced billions of dollars in inflows, but it is practically impossible for banks to serve as custodian for those ETPs at scale due to the Tier 1 capital ratio and other reserve and capital requirements that result from SAB 121. This raises important questions about the safety and stability of this ecosystem. We believe that this result could raise concentration risk, as one nonbank entity now serves as the custodian for the majority of these ETPs. That risk can be mitigated if prudentially regulated banking organizations have the *same ability* to provide custodial services for Commission regulated ETPs as qualified nonbank asset custodians. SAB 121 does not appear to contemplate this type of concentration risk, in part perhaps because Spot Bitcoin ETPs or similar products were not an approved product at the time SAB 121 was issued.
  
- (2) Use of DLT to record traditional financial assets: Banking organizations are increasingly exploring the use of DLT to record traditional financial assets, such as bonds. The use of DLT has the potential to expedite and automate payment, clearing, reconciliation and settlement services, and multiple central banks outside the United States are partnering with banks to explore the adoption of DLT. However, SAB 121 has proven to be a barrier to banking organizations' ability to meaningfully engage in DLT-based projects due to the breadth of the definition of "crypto-asset" in SAB 121: "a digital asset that is issued and/or transferred using distributed ledger or blockchain technology using cryptographic techniques."<sup>10</sup> Under this definition, a traditional financial asset issued or transferred using DLT could be considered a "crypto asset" and thus within scope of SAB 121, regardless of the applicable risks. SAB 121 makes no distinction between asset types and use cases, but instead generally states that crypto-assets pose certain technological, legal, and regulatory risks requiring on-balance sheet treatment. However, there are significant differences between a cryptocurrency like Bitcoin that exists on a public, permissionless network versus a traditional financial instrument that is recorded on a blockchain network where access is controlled and transactions can be cancelled, corrected, or amended. The past two years have underscored these differences, as the turmoil in the crypto market has been wholly unrelated to banks' use of permissioned DLT. DLT does not change the underlying nature or risks of traditional assets, nor do they present the risks SAB 121 purports to address, and thus SAB 121's application to those assets should be reconsidered. Clear indication from the Commission that the use of DLT to record or transfer traditional financial assets is consistently outside the scope of SAB 121 would alleviate associated challenges.

### III. Proposed Modifications and Clarifications

The Associations request that the Commission consider the following targeted modifications to SAB 121 to address the above concerns:

- *Narrow the definition of "crypto-assets" to clarify and confirm the exclusion of certain asset types and use cases.* SAB 121 is premised on the risks posed exclusively by cryptocurrencies, and traditional financial assets recorded or transferred using blockchain networks should be excluded because they do not present the same risks as cryptocurrencies; the use of DLT does

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<sup>9</sup> See Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units, Securities Exchange Act Release No. 34-99306 (Jan. 10, 2024) ([link](#)).

<sup>10</sup> SAB 121 ([link](#)), note 3.

not change the underlying nature or risk of traditional assets. Moreover, certain exclusions for products wherein the underlying activity relates to the offering of a Commission-approved product should be clarified.

- *Exempt banking organizations from on-balance sheet treatment but maintain the disclosure requirements:* As described previously, SAB 121 answers three questions, and the Associations' and its members' are primarily concerned with the first question: how an entity should account for its obligations to safeguard crypto-assets (the on-balance sheet treatment). *We do not object to the requirements imposed in the answer to the second question (disclosures in financial statements).* Exempting banking organizations from the on-balance sheet treatment but requiring them to make certain disclosures about their digital activity would mitigate the concerns raised by banking organizations without undermining the goal of SAB 121 to promote disclosures to investors. Balance sheet disclosure may be appropriate where the controls are not adequate to protect investors from the risk of custodied assets, which is not the case for banking organizations that are subject to robust oversight from the federal banking agencies. The required disclosures in the answer to the second question are broad and may include disclosures in the description of business, risk factors, and management's discussion and analysis of financial condition and results of operation, and such information will still "enhance the information received by investors and other users of financial statements about these risks, thereby assisting them in making investment and other capital allocation decisions."<sup>11</sup>

#### IV. Conclusion

The Associations and their members appreciate your attention to the issues raised in this letter. Given the upcoming two-year anniversary of the issuance of SAB 121, certain policy developments, the experience of U.S. banking organizations, and the evolution in technology since the guidance was first issued, we believe it is an appropriate time to reflect on the intended goals of SAB 121. We request a meeting with you and Commission staff to discuss the issues and proposed modifications set forth above.

We appreciate the Commission's attention to this important topic and look forward to engaging with you further. If you have any questions, please contact Paige Pidano Paridon at [paige.paridon@bpi.com](mailto:paige.paridon@bpi.com) or 703-887-5229.

Respectfully submitted,

**Bank Policy Institute**  
**American Bankers Association**  
**Financial Services Forum**  
**Securities Industry and Financial Markets Association**

cc: The Honorable Hester M. Peirce, Commissioner  
The Honorable Caroline A. Crenshaw, Commissioner  
The Honorable Mark Uyeda, Commissioner  
The Honorable Jaime Lizárraga, Commissioner

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<sup>11</sup> SAB 121 ([link](#)).

## Appendix A

The **American Bankers Association** is the voice of the nation's \$23.4 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard \$18.6 trillion in deposits and extend \$12.3 trillion in loans.

The **Bank Policy Institute** is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ nearly 2 million Americans, make nearly half of the nation's bank-originated small business loans and are an engine for financial innovation and economic growth.

The **Financial Services Forum** is an economic policy and advocacy organization whose members are the chief executive officers of the eight largest and most diversified financial institutions headquartered in the United States. Forum member institutions are a leading source of lending and investment in the United States and serve millions of consumers, businesses, investors, and communities throughout the country. The Forum promotes policies that support savings and investment, financial inclusion, deep and liquid capital markets, a competitive global marketplace, and a sound financial system.

The **Securities Industry and Financial Markets Association** is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.