

## Digital Assets

### FINRA Encourages Firms to Notify FINRA if They Engage in Activities Related to Digital Assets

#### Summary

Last year, FINRA took several steps to engage with members regarding their current and planned activities relating to digital assets. These efforts included the issuance of *Regulatory Notice 18-20*, which encouraged firms to keep their Regulatory Coordinator informed if the firm, or its associated persons or affiliates, engaged, or intended to engage, in activities related to digital assets, including digital assets that are non-securities.<sup>1</sup> *Regulatory Notice 18-20* requested that firms provide these updates to Regulatory Coordinators until July 31, 2019. FINRA appreciates members' cooperation over the past year and is encouraging firms to continue keeping their Regulatory Coordinators abreast of their activities related to digital assets until **July 31, 2020**.

Questions concerning this *Notice* may be directed to:

- ▶ Kosha Dalal, Associate Vice President & Associate General Counsel, Office of General Counsel (OGC), at (202) 728-6903 or by email at [kosha.dalal@finra.org](mailto:kosha.dalal@finra.org);
- ▶ Racquel Russell, Associate General Counsel, OGC, at (202) 728-8363 or by email at [racquel.russell@finra.org](mailto:racquel.russell@finra.org); or
- ▶ Cara Bain, Assistant General Counsel, OGC, at (202) 728-8852 or by email at [cara.bain@finra.org](mailto:cara.bain@finra.org).

#### Background & Discussion

In 2018, FINRA undertook a multifaceted outreach initiative to engage with member firms regarding current and planned activities relating to digital assets, such as cryptocurrencies and other virtual coins and tokens.<sup>2</sup> FINRA requested that communication be ongoing and asked that, until July 31, 2019, each member keep its Regulatory Coordinator informed of new activities or plans regarding digital assets, including cryptocurrencies and other virtual coins and tokens (whether or not they meet the definition of "security" for the purposes of the federal securities laws and FINRA rules).<sup>3</sup> FINRA greatly appreciates the ongoing cooperation and outreach from members over the past year.

July 18, 2019

#### Notice Type

- ▶ Guidance

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Regulatory Reporting
- ▶ Senior Management
- ▶ Trading
- ▶ Training

#### Key Topics

- ▶ Blockchain
- ▶ Cryptocurrencies
- ▶ Definition of "Security"
- ▶ Digital Assets
- ▶ Distributed Ledger Technology
- ▶ Initial Coin Offerings
- ▶ Virtual Coin
- ▶ Virtual Token

#### Referenced Rules & Notices

- ▶ FINRA Rule 1017
- ▶ FINRA Rule 3210
- ▶ FINRA Rule 3270
- ▶ FINRA Rule 3280
- ▶ Notice to Members 00-73
- ▶ Regulation ATS
- ▶ Regulatory Notice 09-46
- ▶ Regulatory Notice 18-20
- ▶ Section 2(a)(1) of the Securities Act of 1933
- ▶ Section 3(a)(10) of the Securities Exchange Act of 1934

As securities regulators continue to provide guidance to members regarding the unique regulatory challenges presented by digital assets—*e.g.*, Joint Statement on Broker-Dealer Custody of Digital Asset Securities—FINRA believes it is important to keep the lines of communication with members open on this important topic.<sup>4</sup> As a result, FINRA is issuing this Notice to encourage each firm to continue to keep FINRA up to date on the firm’s new and planned activities relating to digital assets not previously disclosed.

As was the case under *Regulatory Notice 18-20*, FINRA asks that each firm promptly notify its Regulatory Coordinator if it, or its associated persons (including activities under Rules 3270 and 3280),<sup>5</sup> or affiliates, currently engages, or intends to engage, in any activities related to digital assets.<sup>6</sup> As a reminder, the types of activities of interest to FINRA if undertaken (or planned) by a member, its associated persons or affiliates, include, but are not limited to:

- ▶ purchases, sales or executions of transactions in digital assets;
- ▶ purchases, sales or executions of transactions in a pooled fund investing in digital assets;
- ▶ creation of, management of, or provision of advisory services for, a pooled fund related to digital assets;
- ▶ purchases, sales or executions of transactions in derivatives (*e.g.*, futures, options) tied to digital assets;
- ▶ participation in an initial or secondary offering of digital assets (*e.g.*, ICO, pre-ICO);
- ▶ creation or management of a platform for the secondary trading of digital assets;
- ▶ custody or similar arrangement of digital assets;<sup>7</sup>
- ▶ acceptance of cryptocurrencies (*e.g.*, bitcoin) from customers;
- ▶ mining of cryptocurrencies;
- ▶ recommend, solicit or accept orders in cryptocurrencies and other virtual coins and tokens;
- ▶ display indications of interest or quotations in cryptocurrencies and other virtual coins and tokens;
- ▶ provide or facilitate clearance and settlement services for cryptocurrencies and other virtual coins and tokens; or
- ▶ recording cryptocurrencies and other virtual coins and tokens using distributed ledger technology or any other use of blockchain technology.<sup>8</sup>

Until **July 31, 2020**, FINRA encourages firms to promptly notify their Regulatory Coordinator in writing (including email) of these activities. If a firm already has submitted a continuing membership application (CMA)<sup>9</sup> regarding its involvement in activities related to digital assets, or has otherwise provided this information to FINRA, additional notice is not requested unless a change has occurred.

## Endnotes

1. See *Regulatory Notice 18-20* (FINRA Encourages Firms to Notify FINRA if They Engage in Activities Related to Digital Assets) (July 6, 2018).
2. For purposes of this *Notice*, the term “digital asset” refers to cryptocurrencies and other virtual coins and tokens (including virtual coins and tokens offered in an initial coin offering (ICO) or pre-ICO), and any other asset that consists of, or is represented by, records in a blockchain or distributed ledger (including any securities, commodities, software, contracts, accounts, rights, intangible property, personal property, real estate or other assets that are “tokenized,” “virtualized” or otherwise represented by records in a blockchain or distributed ledger).
3. Firms that engage in activities related to digital assets, whether or not they are securities, are reminded to consider all applicable FINRA rules and federal and state laws, rules and regulations. In addition, digital assets that meet the definition of an “investment contract” under Section 2(a)(1) of the Securities Act of 1933 or under Section 3(a)(10) of the Securities Exchange Act of 1934 are “securities” governed by the federal securities laws and FINRA rules, irrespective of whether or not they are labeled as “securities.” On April 3, 2019, the Strategic Hub for Innovation and Financial Technology of the Commission published a framework for analyzing whether a digital asset has the characteristics of an “investment contract” and whether offers and sales of a digital asset are securities transactions. See Strategic Hub for Innovation and Financial Technology of the Securities and Exchange Commission, [Framework for “Investment Contract” Analysis of Digital Assets](#) (April 3, 2019) (Framework). See also Securities Exchange Act Release No. 81207 (July 25, 2017), Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO.
4. See, e.g., [Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities](#), Division of Trading and Markets, U.S. Securities and Exchange Commission and Office of General Counsel, Financial Industry Regulatory Authority, (July 8, 2019) (Joint Statement).
5. FINRA continues to be interested in learning how firms handle notifications regarding participation in activities related to digital assets, such as cryptocurrencies and other virtual coins and tokens. See FINRA Rule 3270 (Outside Business Activities of Registered Persons) and Rule 3280 (Private Securities Transactions of an Associated Person). FINRA is not requesting notification or information regarding passive investments and activities of associated persons that are subject to the requirements of Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions).
6. This notification is separate from any existing regulatory obligations under FINRA rules that may apply to a firm regarding its involvement in activities relating to digital assets (e.g., trade reporting transactions in digital assets that meet the definition of a “security” or filing a new member application or continuing member application). This notification also is separate from any other regulatory obligations that may apply to a firm regarding its involvement in activities relating to digital assets, such as submitting Form ATS filings as required, including notifications of “material changes” under Regulation ATS, such as changes to the types of securities traded on a platform. See Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70845, 70922 (December 22, 1998) (Regulation ATS adopting release) (including changes to “the operating platform, the types of securities traded, or the types of subscribers” as examples of “material changes” that must be filed under Rule 301(b)

- (2) of Regulation ATS); *see also Regulatory Notice 09-46* (August 2009) (reminding alternative trading systems of the need to submit to FINRA duplicate copies of any filing required by Rule 301(b)(2) of Regulation ATS).
7. *See* Joint Statement (stating that “[t]he specific circumstances where a broker-dealer could custody digital asset securities in a manner that the Staffs believe would comply with the Customer Protection Rule remain under discussion, and the Staffs stand ready to continue to engage with entities pursuing this line of business.”).
  8. Cryptocurrencies and other virtual coins and tokens use distributed ledger technology, most commonly known as “blockchain,” as the primary protocol for exchanging, storing and verifying information.
  9. A material change in a firm’s business operations also requires the submission and approval of a CMA. *See, e.g.,* Joint Statement, note 7 and accompanying text. For factors to consider in determining materiality, *see Notice to Members 00-73* (SEC Approves Amendments to NASD Membership Rules). *See also* FINRA Rule 1017 (Application for Approval of Change in Ownership, Control, or Business Operations).