

September 27, 2021

Submitted Electronically to submissions@banking.senate.gov

The Honorable Pat Toomey
Ranking Member
U.S. Senate Committee on Banking,
Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

Re: **Feedback on Clarifying Laws Around Cryptocurrency and Blockchain Technologies**

Dear Ranking Member Toomey:

Introduction

Fidelity Digital Asset Services, LLC (“Fidelity Digital Assets”) appreciates the opportunity to provide [feedback](#) to the U.S. Senate Committee on Banking, Housing, and Urban Affairs as you seek to clarify the laws and regulations around the rapidly developing cryptocurrency and blockchain technology ecosystem.

Business Overview

Fidelity Digital Assets is a New York state limited liability trust company that provides digital asset custody and trade execution services to financial institutions. Fidelity Digital Assets is an affiliate of Fidelity Investments (“Fidelity”), one of the world’s leading providers of financial services to both individual and institutional clients and customers.¹ Fidelity has long believed that blockchain technology has the transformative power to improve financial inclusion, broaden the range of products available to investors, and lower transaction costs worldwide.

As background, the Fidelity Center for Applied Technology (“FCAT”) began exploring the application of blockchain technology to financial services in 2014. Four

¹ Fidelity is one of the world’s largest providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 38 million individuals and institutions, as well as through 13,500 financial intermediary firms.

years later in 2018, Fidelity launched Fidelity Digital Assets, a full-service enterprise-grade platform for securely storing, trading, and supporting certain digital assets. In 2020, Fidelity announced the formation of Fidelity Digital Funds to develop digital asset investment products. Simply put, we believe that blockchain technology is a new operating system for financial services. The initial expression of this capability is through bitcoin, Ethereum and other native digital assets but we expect that other traditional forms of value — notably certain types of securities and possibly fiat currencies — will be issued on blockchains in the future.

In addition to strong growing demand² from institutional investors for exposure to digital assets such as bitcoin, in March 2021 Fidelity filed an application with the U.S. Securities and Exchange Commission for the Wise Origin Bitcoin Trust, a bitcoin exchange traded product (“ETP”). This application is still pending review by the Commission.

Finally, in April 2021, FCAT announced the launch of [SherlockSM](#), a digital assets data and analytics solution that helps institutional investors navigate digital assets by bringing together comprehensive data coverage and easy to use, intuitive analytics tools in a single location. *Sherlock* offers streamlined access to fundamental and technical data about development, network activity, trading, social media activity, news and other research on digital assets from some of the leading institutional data providers, as well as unique Fidelity-driven analytics to help investors evaluate the market.

Below, Fidelity Digital Assets is pleased to provide an overview of five key principles we think should underpin any statutory or regulatory actions for cryptocurrencies, digital assets, decentralized finance, and blockchain technologies: 1) bitcoin and other mature cryptocurrencies are part of a growing and viable asset class; 2) regulations should reflect the unique attributes of blockchains and blockchain-based assets; 3) until regulations are updated, policymakers should provide clear and timely regulatory guidance; 4) regulatory frameworks should evolve beyond simply thinking of all digital assets firms as “money transmitters”; and 5) regulators should take swift action against bad actors in the digital assets space.

² See *Fidelity Investments Press Release, July 20, 2021; [71% of Institutional Investors Plan to Buy or Invest in Digital Assets in the Future, According to New Research From Fidelity Digital AssetsSM | Fidelity Investments](#)*

Additionally, we are happy to share our views on the December 2020 proposal by the Financial Crimes Enforcement Network (“FinCEN”) that, as proposed, risks harming wider adoption of digital assets by imposing sweeping new regulatory requirements without addressing critical ambiguities and barriers to implementation. Fidelity Digital Assets would also like to express strong support for a Senate companion to H.R. 1602, the *“Eliminate Barriers to Innovation Act of 2021,”* introduced by Rep. Patrick McHenry (R-NC) and co-sponsored by Rep. Stephen Lynch (D-MA), which passed the U.S. House of Representatives in April 2021.

Key Principles

While there has been meaningful progress in addressing some of the regulatory ambiguity in the digital assets space, any new laws, regulations or rules must be governed by principles that ensure a level playing field and that the United States remains a competitive market for new technologies to flourish. Fidelity’s five digital assets principles are:

1. **Bitcoin and other mature cryptocurrencies are part of a growing and viable asset class with strong customer demand.** These technologies have moved beyond a payment mechanism and are part of a diverse ecosystem of digital assets that take many forms. Regulations should therefore envision the mainstream adoption of digital assets by retail and institutional investors.
2. **The regulatory structure for bitcoin and other blockchain-based assets should account for their uniqueness and innovative nature.** For several years, regulators have grappled with how to appropriately adapt existing regulatory structures—many of them written decades ago—to digital assets to allow for their continued development and a wide variety of use cases. However, the time has come where regulators must recognize that digital assets are a unique asset class not completely captured by existing definitions and categories and adjust accordingly. For example, electronic records maintained on distributed ledgers challenge conventional notions about “ownership” and “location” that have existed for decades or more in statute and regulation.
3. **Until regulations are updated, policymakers must provide clear, consistent, and timely guidance that allows new participants and incumbent firms to participate on equal footing, including clarity and consistency across**

regulators and jurisdictions. Regulators may need to alter or expedite existing guidance procedures to provide feedback on a timelier basis and mitigate the risk of “regulation by enforcement.” No other clarity is needed more than unambiguous guidance on what products are securities versus those that are not. A safe harbor for many innovative products may be the best solution to avoid destroying critically valuable innovation. The July 2020 interpretive letter from the Office of the Comptroller of the Currency (“OCC”)—confirming the authority of national banks and federal savings associations to provide custody services for cryptocurrencies—is one example of how prior precedents can be drawn upon to provide practical guidance without requiring new rulemaking. Expedited guidance will allow for: more innovation, the market for digital assets to thrive, market participants to understand and comply with rules and regulations, and the United States to be a leader in this space.

4. **Firms that want to engage in the growing digital assets ecosystem should not all be thought of or regulated as money transmitters.** When they first emerged, cryptocurrencies may have appeared to fit within structures that were designed to address another type of money movement; however, digital assets have evolved, and the value proposition now goes far beyond a payment or money transmission mechanism. Regulatory frameworks for the future should account for the diverse nature of digital assets, as payment systems are too narrow a concept to capture the diverse applications of blockchain technology. For example, asset managers are adding digital assets to diversified client portfolios and Non-Fungible Tokens (“NFTs”) are adding a new medium to the art world.
5. **Fidelity supports strong and swift regulatory action against bad actors in this space, which will instill confidence in the digital assets market and protect investors.** For example, we support past efforts by the SEC to weed out harmful and potentially fraudulent initial coin offerings (“ICOs”) intended to sidestep securities laws and defraud investors. Policing the digital assets space for fraud will instill greater confidence in mature and legitimate assets like bitcoin. Importantly, both Fidelity and Fidelity Digital Assets considers themselves partners to FinCEN and the broader regulatory and law enforcement community in the fight against money laundering and terrorist financing. We are committed to facilitating the adoption of and compliance with meaningful digital assets anti-money laundering regulations.

The December 2020 FinCEN Proposed Rule

As discussed immediately above, Fidelity Digital Assets considers itself a partner to FinCEN and other law enforcement agencies and has a strong tradition of robust Bank Secrecy Act (“BSA”) and anti-money laundering (“AML”) compliance. Indeed, Fidelity participated in a March 2020 meeting with the Director of FinCEN and the Treasury Secretary alongside other digital assets industry leaders to address concerns about terrorist financing and was subsequently part of a working group to facilitate compliance with the Travel Rule. As such, we approached our comments³ to FinCEN’s December 2020 proposed rule, *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, with an eye towards appropriate FinCEN oversight of digital assets transactions across all risk profiles, including self-hosted wallets. However, the proposed rule raised serious practical and technical concerns that we believe the Committee should evaluate to ensure clarity as it considers future legislation.

Specifically, the recordkeeping and reporting requirements in the proposed rule mandate that Virtual Asset Service Providers (“VASPs”) differentiate between hosted and unhosted wallets without defining these terms and acknowledging the challenges faced in differentiating transactions that involve unhosted wallets. Further, a mandate that VASPs obtain name, address, and other unique counterparty info for unhosted wallet transactions would be the first BSA rule commanding an institution to obtain specific information about customers’ counterparties with whom the institution has no relationship.

The scope of exemptions under the proposal does not match those that exist for other institutions as per the BSA, omitting exemptions to publicly listed corporations or their subsidiaries, established customers, or reports filed with state regulatory agencies. The proposed rule likely needs to add additional exemptions based on state regulations in accordance with the BSA. The proposed rule also redefines digital assets, with no basis, as “monetary instruments.” For the past five and a half years, FinCEN has interpreted transfers of digital assets between wallets as “transmittals of funds,” rather than transfers of “monetary instruments.” Not only would this change impose all new transaction reporting requirements, by law FinCEN

³ See Fidelity Digital Assets comment letter in response to *FinCEN Docket Number FINCEN-2020-0020; RIN 1506-AB47; Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, Jan. 4, 2021; available online: [FidelityDigitalAssets-FinCEN-Comment-Letter.pdf](#)

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must take multiple steps before enacting such a change or issuing new regulations governing the transmittal of funds, including a feasibility certification to Congress.⁴ If the rule is finalized as proposed, the resulting regulatory confusion would be a major challenge to the day-to-day exchange of digital assets.

Support for the “Eliminate Barriers to Innovation Act”

Fidelity Digital Assets strongly supports H.R. 1602, the *Eliminate Barriers to Innovation Act* and appreciates the bipartisan nature of its introduction and April 2021 passage in the U.S. House of Representatives. Likewise, we would support introduction and Senate passage of companion legislation. The bill would require that U.S. regulators take important first steps to develop a comprehensive and coordinated regulatory regime for digital assets. As the bill’s name expressly states, an effort to solicit input from market and technology leaders in this burgeoning ecosystem is needed on critical items such as market operations, reducing fraud and manipulation, improving investor protections, meeting strong BSA-AML obligations, and standardizing approaches for custody, private key management, and cybersecurity.

If we do not undertake this effort in a coordinated fashion, the U.S. risks losing the competitive advantage its capital markets afford developers of new technologies, who will themselves move to overseas jurisdictions that encourage innovation and growth. An appropriate analogy⁵ about how we must approach the regulation of digital assets is how the Clinton Administration and 104th Congress approached the rise and growth of another transformative invention: the Internet. The creation of the “Framework for Global Electronic Commerce” and passage of the Telecommunications Act of 1996 ushered in an unprecedented era of private sector development and investment that helped to transform the American economy.⁶ Indeed, today most of the world’s most prominent and successful Internet companies are American—digital assets companies need be no different.

⁴ See *Id.*, pg. 8, fn. 20.

⁵ See Special Address of CFTC Commissioner J. Christopher Giancarlo, Mar. 29, 2016, available online: [Special Address of CFTC Commissioner J. Christopher Giancarlo Before the Depository Trust & Clearing Corporation 2016 Blockchain Symposium | CFTC](#)

⁶ See *Id.*; see also, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), and *The Framework for Global Electronic Commerce*, The White House, available online: [The Framework for Global Electronic Commerce \(archives.gov\)](#)

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The enactment of the *Eliminate Barriers to Innovation Act* will help the regulatory community coordinate with and better understand the myriad technologies that are evolving in the digital assets space and how to regulate them in a manner that is fair, transparent, protects investors, and encourages further innovation.

Conclusion

As with any start to a new era of commerce or transformative technology, we recognize that alignment of all market participants on every issue is almost impossible and we appreciate the Ranking Member’s request for comment and input on how the Committee may approach thoughtful legislation. As Fidelity Digital Assets continues to be a leader in digital assets custody and product solutions, we welcome continued dialogue with the Committee to provide additional information, perspectives, or resources as you work through these critically important issues.

Sincerely,



Tom Jessop
President