

## Digital Assets

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

#### Summary

For the past several years, FINRA has encouraged firms to keep their risk monitoring analyst 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> FINRA appreciates members' cooperation with this request and is encouraging firms to continue to keep their risk monitoring analyst abreast of their activities related to digital assets on an ongoing basis.

Questions concerning this *Notice* may be directed to:

- ▶ Kosha Dalal, 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); or
- ▶ Robert McNamee, Assistant General Counsel, OGC, at (202) 728-8012 or [robert.mcnamee@finra.org](mailto:robert.mcnamee@finra.org).

#### Background & Discussion

Since 2018, FINRA has sought to engage in an ongoing dialogue with member firms regarding their current and planned activities relating to digital assets.<sup>2</sup> These efforts have included a survey of firms' current and planned activities related to digital assets, as well as through the publication of *Regulatory Notices* requesting that each firm keep its risk monitoring analyst informed of new or planned activities 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 firms over the past several years on this important topic.

As the area of digital assets continues to evolve and present unique regulatory challenges, FINRA believes it is important to keep the lines of communication with members open. 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 activities and planned activities relating to digital assets not previously disclosed. Therefore, as was the case under *Regulatory Notices* [18-20](#), [19-24](#) and [20-23](#), FINRA asks that each firm promptly notify its risk monitoring analyst if it, or its associated

July 8, 2021

#### Notice Type

- ▶ Reminder

#### 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
- ▶ Regulatory Notice 19-24
- ▶ Regulatory Notice 20-23
- ▶ Section 2(a)(1) of the Securities Act of 1933
- ▶ Section 3(a)(10) of the Securities Exchange Act of 1934

persons (including activities under Rules 3270 and 3280),<sup>4</sup> or affiliates, currently engages, or intends to engage, in any activities related to digital assets.<sup>5</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;
- ▶ 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>6</sup>

FINRA encourages firms to promptly notify their risk monitoring analyst in writing (including email) of these types of activities on an ongoing basis. If a firm already has submitted a continuing membership application (CMA)<sup>7</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 Notices 18-20* (July 2018), *19-24* (July 2019) and *20-23* (July 2020).
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, 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). 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. In addition, on July 8, 2019, the staffs of the SEC Division of Trading and Markets and the FINRA Office of General Counsel released a joint statement addressing some key regulatory concerns regarding a broker-dealer’s ability to comply with financial responsibility rules in the context of digital asset securities. See Public Statement, Division of Trading and Markets, U.S. Securities and Exchange Commission and Office of General Counsel, Financial Industry Regulatory Authority, [Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities](#), (July 8, 2019).
4. FINRA continues to be interested in learning from firms how they 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).
5. 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 70844, 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).

6. 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.
7. A material change in a firm’s business operations also requires the submission and approval of a CMA. For factors to consider in determining materiality, *see Notice to Members 00-73* (October 2000). *See also* FINRA Rule 1017 (Application for Approval of Change in Ownership, Control, or Business Operations).