

PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF
TITLE 5, UNITED STATES CODE, OF THE RULE SUBMITTED BY THE SE-
CURITIES AND EXCHANGE COMMISSION RELATING TO “STAFF AC-
COUNTING BULLETIN NO. 121”

MAY 1, 2024.—Committed to the Committee of the Whole House on the State of the
Union and ordered to be printed

Mr. MCHENRY, from the Committee on Financial Services,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.J. Res. 109]

The Committee on Financial Services, to whom was referred the
joint resolution (H.J. Res. 109) providing for congressional dis-
approval under chapter 8 of title 5, United States Code, of the rule
submitted by the Securities and Exchange Commission relating to
“Staff Accounting Bulletin No. 121”, having considered the same,
reports favorably thereon without amendment and recommends
that the joint resolution do pass.

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PURPOSE AND SUMMARY

Introduced on February 1, 2024, by Representative Mike Flood, H.J. Res 109, *Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Securities and Exchange Commission relating to “Staff Accounting Bulletin No. 121*, would rescind the Securities and Exchange Commission’s (SEC) Staff Accounting Bulletin (SAB) 121, which expresses the view of SEC staff regarding how certain entities should account for and disclose their custodial obligations when safeguarding digital assets held for their platform users. H.J. Res 109 is cosponsored by Reps. Nickel, Emmer, Soto, and Hill. Senator Cynthia Lummis (R-WY) introduced a companion Resolution in the Senate.

On August 2, 2022, Senator Cynthia Lummis (R-WY) sent a congressional request to the Government Accountability Office (GAO) for a decision regarding whether the Bulletin is subject to the Congressional Review Act (CRA). On October 31, 2023, the GAO issued its decision concluding that the Bulletin is a rule for purposes of CRA because it meets the APA definition of a rule, and no exceptions apply.

BACKGROUND AND NEED FOR LEGISLATION

Effective on April 11, 2022, SAB 121 requires entities that are safeguarding digital assets for users to record on their balance sheets a liability and a corresponding asset at the fair value of the digital assets. SAB 121 also specifies certain disclosure requirements. This is a sea change from the existing accounting treatment for custodial assets, as these are traditionally recorded off-balance sheet. Indeed, numerous commenters have highlighted that SAB 121 “deviates from existing accounting treatment of safeguarded assets held in a custodial capacity, which does not result in assets or liabilities reported on the custodian’s balance sheet.” Even Federal Reserve Board Chair Powell remarked in testimony before the Senate Committee on Banking, Housing, and Urban Affairs that SAB 121 marks a shift away from traditional custodial practices.

While SAB 121 was intended to clarify the accounting treatment of digital assets safeguarded by custodians, digital asset trading platforms, and other digital asset firms, SAB 121 creates confusion and injects new risks and costs for digital asset custodians. By placing custodial assets onto the balance sheet, it puts customer assets at greater risk of loss if the custodian becomes insolvent or enters receivership. Likewise, SAB 121 will increase capital, liquidity, and other burdens on digital asset custodians under the existing prudential regulatory framework by requiring on-balance sheet treatment of digital assets. As a result, it will be far more expensive for a firm to custody digital assets compared to traditional assets. This in turn is likely to discourage banking organizations from providing custodial services for digital assets. As emphasized in comment letters, “U.S. banking organizations” experience over the past two years has confirmed that SAB 121 has curbed the ability of [financial institutions] to develop and bring to market at scale certain digital asset products and services.”

The impact of SAB 121 was especially apparent when the SEC recently approved spot bitcoin exchange-traded products (ETPs).

These ETPs allow investors to gain exposure to Bitcoin through a regulated product. As part of the ETP structure, an entity must provide custody services to each ETP issuer. Typically, this role would be filled by banking organizations, such as Coinbase and Fidelity Digital Asset Services, that have ample experience providing such services. Because of the regulatory burdens created by SAB 121, the banking organizations that specialize in custodial services are unable to custody digital assets.

In contrast to the SEC's approach, the Federal banking agencies have concluded that digital asset custody is a permissible activity for banks. Indeed, financial institutions have already engaged with their regulators who have set out guidelines for the safe and secure custody of digital assets. As Jones Day Partner, Jonathan Gould, explained on March 9, 2023, "OCC Interpretive Letter 1179 required banks to address [safety and soundness concerns] to the OCC's satisfaction before the bank could engage in digital asset activities . . . Following in the footsteps of the OCC, the FDIC and Federal Reserve each issued similar guidance documents in 2022."

It is therefore not surprising that the SEC issued SAB 121 without consulting the Federal banking agencies, in contravention of Commission norms. According to a former Chief Accountant of the SEC, "[g]enerally, before a SAB is issued, the general content and staff views to be expressed in the SAB are discussed with registrants, accounting firms, standard setting bodies, trade groups, and other agencies." On March 2, 2023, House Financial Services Committee Chairman Patrick McHenry and Senator Cynthia Lummis sent a letter to the Federal banking agencies asking if they had been consulted on SAB 121. Each agency confirmed there had been no coordination between them and the SEC regarding SAB 121, prior to its issuance. SEC Chair Gary Gensler also confirmed this during the Committee's SEC oversight hearing on April 18, 2023.

SEC Commissioner Hester Peirce emphasized her concerns that "the staff accounting bulletin may not be the appropriate vehicle through which to make this accounting change." Importantly, Commissioner Peirce also highlighted that the Bulletin "provides definitive interpretive guidance" for public companies and contains a "detailed description of disclosure the staff expects to see, including a full paragraph describing relevant disclosures that may also be required outside the financial statements under existing Commission rules."

RELATED HEARINGS

118th Congress

Pursuant to clause 3(c)(6) of rule XIII, the following hearings were used to develop H.J. Res 109: The Committee on Financial Services held a hearing on February 6, 2024, titled "The Annual Report of the Financial Stability Oversight Council."

The Committee on Financial Services held a hearing on November 15, 2023, titled "Oversight of the Prudential Regulators."

The Committee on Financial Services held a hearing on September 27, 2023, titled "Oversight of the Securities and Exchange Commission."

The Committee on Financial Services held a hearing on June 21, 2023, titled “The Federal Reserve’s Semi-Annual Monetary Policy Report.”

The Committee on Financial Services held a hearing on June 13, 2023, titled “The Future of Digital Assets: Providing Clarity for the Digital Asset Ecosystem.”

The Subcommittee on Digital Assets, Financial Technology and Inclusion held a hearing on April 27, 2023, titled “The Future of Digital Assets: Identifying the Regulatory Gaps in Digital Asset Market Structure.”

The Committee on Financial Services held a hearing on April 18, 2023, titled “Oversight of the Securities and Exchange Commission.”

The Subcommittee on Digital Assets, Financial Technology and Inclusion held a hearing on March 9, 2023, titled “Coincidence or Coordinated? The Administration’s Attack on the Digital Asset Ecosystem.”

The Committee on Financial Services held a hearing on March 8, 2023, titled “The Federal Reserve’s Semi-Annual Monetary Policy Report.”

117th Congress

Pursuant to clause 3(c)(6) of rule XIII, the following hearings were used to develop H.J. Res 109:

The Committee on Financial Services held a hearing on November 16, 2022, titled “Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity, and Accountability of Depository Institutions.”

The Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets held a hearing on July 19, 2022, titled “Oversight of the SEC’s Division of Enforcement.”

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on February 29, 2024, and ordered H.J. Res 109 to be reported favorably to the House as amended by a recorded vote of 31 ayes to 19 nays (Record vote no. FC–119), a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the order to report legislation and amendments thereto. H.J. Res 109 was ordered reported favorably to the House as amended by a recorded vote of 31 ayes to 19 nays (Record vote no. FC–119), a quorum being present.

Record vote no. FC- 119

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. McHenry	X	—	—	Ms. Waters	—	X	—
Mr. Hill	X	—	—	Mrs. Velázquez	—	X	—
Mr. Lucas	X	—	—	Mr. Sherman	—	X	—
Mr. Sessions	X	—	—	Mr. Meeks	—	X	—
Mr. Posey	X	—	—	Mr. Scott	—	X	—
Mr. Luetkemeyer	X	—	—	Mr. Lynch	—	X	—
Mr. Huizenga	X	—	—	Mr. Green	—	X	—
Mrs. Wagner	X	—	—	Mr. Cleaver	—	X	—
Mr. Barr	X	—	—	Mr. Himes	—	X	—
Mr. Williams (TX)	X	—	—	Mr. Foster	—	X	—
Mr. Emmer	—	—	—	Mrs. Beatty	—	X	—
Mr. Loudermilk	X	—	—	Mr. Vargas	—	X	—
Mr. Mooney	X	—	—	Mr. Gottheimer	X	—	—
Mr. Davidson	X	—	—	Mr. Gonzalez	—	—	—
Mr. Rose	X	—	—	Mr. Casten	—	X	—
Mr. Steil	X	—	—	Ms. Pressley	—	X	—
Mr. Timmons	X	—	—	Mr. Horsford	—	X	—
Mr. Norman	X	—	—	Ms. Tlaib	—	X	—
Mr. Meuser	X	—	—	Mr. Torres	X	—	—
Mr. Fitzgerald	X	—	—	Ms. Garcia	—	X	—
Mr. Garbarino	X	—	—	Ms. Williams (GA)	—	X	—
Mrs. Kim	X	—	—	Mr. Nickel	X	—	—
Mr. Donalds	X	—	—	Ms. Pettersen	—	X	—
Mr. Flood	X	—	—				
Mr. Lawler	X	—	—				
Mr. Nunn	X	—	—				
Ms. De La Cruz	X	—	—				
Mrs. Houchin	X	—	—				
Mr. Ogles	X	—	—				

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the goal of H.J. Res 109 is to rescind the SEC's SAB 121, which expresses the view of the SEC staff regarding how certain entities should account for and disclose their custodial obligations when safeguarding digital assets held for their platform users.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

The Committee has requested but not received a cost estimate from the Director of the Congressional Budget Office. However, pursuant to clause 3(d)(1) of House rule XIII, the Committee will adopt as its own the cost estimate by the Director of the Congressional Budget Office once it has been prepared.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

The Committee has requested but not received an estimate from the Director of the Congressional Budget Office. However, pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, once an estimate has been prepared by the Director of the Congressional Budget Office, as required by section 402 of the Congressional Budget Act of 1973, the Committee will adopt as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues.

FEDERAL MANDATES STATEMENT

The Committee has requested but not received from the Director of the Congressional Budget Office an estimate of the Federal mandates pursuant to section 423 of the Unfunded Mandates Reform Act. The Committee will adopt the estimate once it has been prepared by the Director.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the pro-

visions of the bill and states that the provisions of the bill do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, including any program that was included in a report to Congress pursuant to section 21 of the Public Law 111–139 or the most recent Catalog of Federal Domestic Assistance.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

This Joint Resolution disapproves the rule submitted by the Securities and Exchange Commission relating to “Staff Accounting Bulletin No. 121” and asserts that such rule shall have no force or effect.

MINORITY VIEWS

H.J. Res.109 is a Congressional Review Act (“CRA”) resolution that would nullify U.S. Securities and Exchange Commission’s (“SEC”) Staff Accounting Bulletin (“SAB”) No. 121, which provides non-binding, staff-level accounting guidance for companies registered with the SEC that custody crypto assets on behalf of customers. This resolution is a knee-jerk reaction in response to some banks, who are concerned that SAB 121 will indirectly requires them to hold more capital if they want to provide custodial services to a crypto firm. Nullifying this non-binding guidance using a CRA resolution, as H.J. Res.109 would do, would not only make it difficult for the SEC to revise their guidance on this matter, it would likely result in a chilling effect on the SEC’s willingness to provide any further guidance via SABs, which could ultimately have broad, negative consequences for all investors, particularly retail investors, and U.S. businesses.

SAB 121 provides guidance in two regards. *First*, it advises custodians to record on their balance sheets a liability for each corresponding crypto asset they custody on behalf of customers. For some banks, this may indirectly require them to hold more capital. *Second*, SAB 121 advises custodians to clearly disclose the nature and amount of crypto assets that the entity is responsible for holding for its platform users, with separate disclosure for the vulnerabilities the entity may face due to such holdings. The SEC explained that the guidance in SAB 121 was prudent because of the “unique risks and uncertainties” associated with the custody of crypto assets, including technological, legal, and regulatory risks and uncertainties.¹ SAB 121 is designed to provide transparency to investors and the public regarding custody of crypto assets in light of the unique risks and uncertainties associated with crypto assets as compared to non-crypto assets, that could have significant impact on the entity’s operations and financial condition.² Such transparency can also help protect consumers by preventing mishandling of crypto assets that can ultimately result in substantial losses for consumers.

By nullifying SAB 121, H.J. Res.109 would not only eliminate the aforementioned benefits for investors and consumers, it would also lead to a chilling effect on the SEC’s ability to issue staff-level accounting and legal guidance across the board. The SEC has a long history of providing its registrants, often at their request, with input on how complex legal and accounting principles should be applied to the myriad of unique and fact-specific situations that they face. One way this is accomplished is through SABs, which the SEC started issuing nearly five decades ago to provide uniform

¹See SEC, SAB 121, effective April 11, 2022.

²*Id.*

guidance in response to the numerous accounting inquiries it receives from both registrants and federal regulators. Due to the CRA's prohibition on an agency adopting "substantially similar" rules to the one nullified, passing H.J. Res. 109 would impair the SEC staff's efforts to provide guidance on this particular issue in the future and it could also significantly disincentivize the SEC from providing any other staff level guidance in this manner. The crypto industry has long complained about the lack of clarity from the SEC when it comes to crypto matters and accused the SEC of regulating by enforcement. The irony is that this resolution could impair the SEC's ability to provide clarifying guidance, leaving the SEC to lean more heavily on its enforcement arm.

The following individuals and groups oppose H.J. Res. 109: Americans for Financial Reform (AFR); Better Markets; Public Citizen; Consumer Federation of America (CFA), United States Public Interest Research Group (US PIRG); NJ Citizen Action; Demand Progress; Institute for Agriculture and Trade Policy; Texas Appleseed; 20/20 Vision; Hilary J. Allen, Professor of Law at American University; Lee Reiners, Lecturing Fellow at Duke University.

For these reasons, we oppose H.J. Res. 109.

Sincerely,

MAXINE WATERS,
Ranking Member, Committee
on Financial Services.
 NYDIA M. VELÁZQUEZ,
 BRAD SHERMAN,
 STEPHEN F. LYNCH,
 AL GREEN,
 EMANUAL CLEAVER, II,
 JOYCE BEATTY,
 SEAN CASTEN,
 RASHIDA TLAIB,
 NIKEMA WILLIAMS,
 BILL FOSTER,
 JUAN VARGAS,
 AYANNA PRESSLEY,
 SYLVIA R. GARCIA,
Members of Congress.