CADWALADER

CABINET NEWS

Research and commentary on regulatory and other financial services topics

The Fine Print

June 26, 2025

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Cadwalader Webinar – Introducing the GENIUS Act and Payment Stablecoins

June 26, 2025

On July 1 at 12 pm ET, join Cadwalader's Blockchain and Digital Assets Working Group as they explain the impact of the recent passage of the GENIUS Act. This landmark legislation establishes the regulation of payment stablecoins, which will allow businesses, investors, issuers, and the broader financial system to use payment stablecoins confidently in a wide variety of financial transactions.

Mercedes Tunstall, Dan Meade, Doug Mintz, and Peter Malyshev, along with moderator Lary Stromfeld, will describe the implications of the GENIUS Act, providing critical insights and a clear understanding of what's next.

The webinar will cover:

- Definitions and Effective Dates
- The Structure of Payment Stablecoins and Rules for Issuing Them
- Regulation of Payment Stablecoins
- Insolvency Considerations for Payment Stablecoins
- Consumer Protections
- Regulation of Non-Payment Stablecoins

Register **here**.

Federal Banking Agencies Issue Proposed Rulemaking To Amend eSLR

June 26, 2025

By Daniel Meade
Partner | Financial Regulation

This week, the Federal Reserve Board ("FRB") and the Office of the Comptroller of the Currency ("OCC") issued a **notice of proposed rulemaking ("NPR")** to amend the Enhanced Supplementary Leverage Ratio ("eSLR"). At the time of this writing, the Federal Deposit Insurance Corporation ("FDIC") (together with the FRB and OCC, the "Agencies") was scheduled to meet on the issue on June 26 and is expected to also issue the NPR.

The eSLR applies to the eight U.S. global systemically important bank holding companies ("GSIBs"). As currently applicable, the eSLR requires the eight U.S. GSIBs to add an additional 200 basis points to the 3% supplementary leverage ratio, which is applicable to all banks and bank holding companies with $250 billion or more in assets. Thus, the current eSLR requirement is 5%. The NPR would adjust how the eSLR is calibrated for the GSIBs, tying the eSLR calibration to the GSIB surcharge. The GSIB surcharge requires the GSIBs to calculate the surcharge using two methods (Method 1 or Method 2), and use the higher number as the surcharge number. For most institutions, the Method 2 calculation is the higher score. Both GSIB surcharge methods look to an institutions size, interconnectedness, complexity, and cross-jurisdictional activity. The Method 1 approach (which is generally consistent with the **Basel Committee's** approach to SLR) looks at an institution's substitutability, while Method 2 replaces substitutability for average daily values of short-term wholesale funding.

The NPR proposes to use the generally lower Method 1 score and divide that score in half to produce the eSLR for each institutions. In the perambLe to the NPR, the Agencies noted that this change would result in a reduction of aggregate tier 1 capital requirements for GSIB holding companies by 1.4% or $13 billion, but a $210 billion aggregate reduction at the subsidiary depository institutions level. The Agencies, noted however, that the capital at the depository institution level would generally need to be retained within the holding company structure to meet holding company capital requirements.

As we noted in our **last issue**, FRB Vice Chair of Supervision Michelle Bowman cited changes to the eSLR as the likely first change to the capital framework because it was too often becoming the binding constraint on institutions rather than the intended backstop to risk-based capital measures. Vice Chair Bowman, and the NPR preamble noted that by having a leverage ratio act as the binding constraint, they believe it was leading to disruptions in the Treasuries markets. The preamble notes that the Agencies believe this proposed change will provide more liquidity to the Treasuries market and other low-risk asset classes.

The approach in the NPR is somewhat different then the temporary approach the Agencies took in 2020, when the pandemic disrupted markets. At that time, the Agencies removed Treasury securities and reserves held at Federal Reserve Banks from the denominator of the calculation. Although the Agencies ask for comment on that approach, they note in the preamble that they are approaching the change in the numerator so as not to pick winners and losers in terms of asset classes. The NPR also would make corresponding changes to the Total Loss-absorbing capacity and long-term debt requirements.

The FRB did have two dissenting votes on the proposal. Governors **Michael Barr** and **Adriana Kugler** both voted no on the NPR noting that the reductions in capital levels were more than they were comfortable with and that the changes should be part of a more holistic approach to changes to the capital framework that also included Basel III Endgame adjustments.

Comments on the proposal will be accepted for 60 days following publication in the Federal Register.

Europe Proposes Relaxations for Liquidity Buffers Including Securitisation Positions

June 26, 2025

By Alix Prentice
Partner | Financial Regulation

The European Commission has published a draft Regulation amending Delegated Regulation (EU) 2015/61 on the eligibility conditions for securitisations in the liquidity buffer of credit institutions (the "Draft").

The draft looks at requirements applied to banks to maintain a Liquidity Coverage Ratio ("LCR") made up of High Quality Liquid Assets ("HQLA") that form a buffer to meet a credit institution's short term liquidity needs. The LCR has always allowed that certain securitisations may be treated as eligible HQLA to form part of the composition of the LCR, being senior tranches of high-quality (i.e. simple, transparent and standardised or "STS" transactions). Such securitisations, along with other Level 2B HQLA (level 2B assets, which along with level 2A assets are 'level 2 assets', are assets of high liquidity and credit quality as described in the Capital Requirements Regulation, can amount to up 15% of a bank's liquidity buffer, but take up by banks on deploying qualifying securitisations in this way has been very low.

As part of the efforts to improve market share for EU-issued securitisations, the Draft is consulting on the following, among other measures:

- To mitigate cliff-edge risks triggered by credit rating downgrades the EU proposes to increase the eligibility of senior tranches of STS traditional securitisations with credit quality CQS5 to CQS7;
- While maintaining all other eligibility conditions for credit institutions' liquidity buffers, apply a haircut of 50% to securitisations with CQS5 to CQS7. As a result, senior tranches of STS traditional securitisations with CQS5 to CQS7 will be eligible as Level 2B HQLA, in addition to those with CQS1 to CQS4, but with a higher haircut;
- In order to encourage more long term financing, Europe is proposing the removal of the EU-specific requirement for securitisations eligible for the liquidity buffer to have a remaining weighted average life of five years or less.

Comments are due by 15 July 2025.

Operation and Structure of the GENIUS Act of 2025 on Payment Stablecoins

June 26, 2025

The Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025 (the "***GENIUS Act***" and the "***Act***")[1] establishes a regulatory infrastructure for defining, managing, custodying and issuing a specific kind of cryptocurrency – "*payment stablecoins.*"

Stablecoins generally are a type of digital asset based on the technology underpinning cryptocurrencies such as Bitcoin, Tether, and Ether, which are recorded on a cryptographically secured distributed ledger (often, a blockchain), and are intended to maintain a stable value against a defined reference asset (*e.g.*, $1 USD per stablecoin). Stablecoins can take a variety of forms and be used for a variety of purposes. As more fully described herein, the Act defines a specific subset of stablecoins that are designed to be used as a means of payment or settlement.

The Act lays out clear guidelines on how payment stablecoins can be issued, who can issue them, how reserves backing up these stablecoins should be maintained and what disclosures must be provided, as well as how payment stablecoins are to be treated in bankruptcy proceedings. Additionally, the Act contemplates both Federal and State rules for the approval and supervision of U.S. issuers of payment stablecoins to U.S. persons, and provides registration requirements for foreign issuers that offer payment stablecoins to U.S. persons.

Effectiveness of the Act and Important Milestones.

The Act becomes effective the *earliest* of: 1) 18 months after the President signs the Act or 120 days after the issuance of any final regulations implementing the Act by the primary Federal payment stablecoin regulators. Nevertheless, there is a three-year grace period ("***Grace Period***") after which it becomes illegal to offer, sell or issue payment stablecoins that were not issued by a PPSI.[2] That three-year period begins to run when the President signs the Act, not once the Act has become effective. Payment stablecoins that had been issued before the enactment of the Act, or during the Grace Period, but not in compliance with the provisions of the Act, will not be treated as payment stablecoins.[3] The Act provides several additional milestones when various obligations and prohibitions would become effective and when certain rulemakings would have be completed by applicable regulators to implement the Act.

This memorandum briefly summarizes the main provisions of the GENIUS Act as it was passed in the Senate on June 17, 2025.

Definitions.

Some definitions in the Act incorporate existing concepts (*e.g.*, depository institutions), while others overlap with definitions also used in the proposed market structure bill for digital assets (the Clarity Act of 2025 (the "***Clarity Act***"))[4], (*e.g.*, disseminated ledger) and yet other definitions are novel and introduce entirely new regulatory concepts, such as, "payment stablecoin" and "permitted payment stablecoin issuer" ("***PPSI***"). Outlined below are some of the key definitions useful to understanding the Act and this summary.

<u>Payment Stablecoin.</u> This is the most important definition in the Act. A payment stablecoin must be a "digital asset" (*i.e.*, "any digital representation of value that is recorded on a cryptographically secured distributed ledger") that is designed only to be used for payment or settlement purposes.[5]

Next, the definition requires that a payment stablecoin may only be issued by an issuer that: (1) is obligated to convert or redeem the payment stablecoin for a fixed amount of monetary value; and (2) will maintain the stable value of the payment stablecoin against a fixed amount of monetary value. Importantly, a payment stablecoin may be issued by both PPSIs and "foreign payment stablecoin issuers," but only PPSIs may issue them in the United States after the Grace Period.

An integral part of the definition of "payment stablecoin" is, of course, a list of assets that cannot qualify as payment stablecoins and are expressly carved out of the definition. Specifically, a payment stablecoin does not include national currency (*e.g.*, $USD), bank deposits (whether traditional deposits or deposits that are on-chain) or securities as defined in U.S. securities laws. [6] In addition, the Act amends the Commodity Exchange Act ("***CEA***")[7] to carve out "payment stablecoins" that are issued by a PPSI from the definition of "commodity" in §1a(9) of the CEA.[8] This carve-out means that neither U.S. registered commodity exchanges (*i.e.*, designated contracts markets) nor the non-U.S. exchanges, that may give a direct access to persons located in the U.S. to trade futures on payment stablecoins,[9] may list and offer for trading futures contracts on payment stablecoins.[10]

<u>Permitted Payment Stablecoin Issuer</u>. A PPSI is defined as a person formed in the U.S. that is any of:

- a subsidiary of an insured depository institution that has obtained the approvals required by the Act to issue payment stablecoins;
- a Federal-qualified stablecoin issuer, approved by a primary Federal payment stablecoin regulator; or
- a State-qualified payment stablecoin issuer, approved by a State payment stablecoin regulator.

Foreign Payment Stablecoin Issuer. When a digital asset meets the definition of a "payment stablecoin," but the stablecoin has been issued by an issuer organized under the laws of, or domiciled in, a foreign country or a territory of the U.S., Puerto Rico, Guam, American Samoa, or the Virgin Islands, AND the issuer is not a PPSI, then the issuer is a "foreign payment stablecoin issuer."

Digital Asset Service Provider. A "digital asset service provider" is broadly defined to encompass any for-profit business in the United States (or on behalf of U.S. customers) that exchanges, transfers, or keeps custody of digital assets, or participates in financial services relating to the issuance of digital assets (*i.e*., not just the issuance of payment stablecoins). However, this definition expressly excludes entities engaged only in certain technical activities related to distributed ledger protocols, including when the entity is *per se* a distributed ledger protocol; when the entity is developing, operating or validating transactions on a distributed ledger; or when it is participating in liquidity pools and similar mechanisms for peer-to-peer transactions.

Primary Federal Payment Stablecoin Regulator. The "primary Federal payment stablecoin regulator" is the existing appropriate Federal banking agency – meaning, for depository institutions and/or their subsidiaries – the Federal Reserve Board ("***FRB***"), the Office of the Comptroller of the Currency ("***OCC***"), the Federal Deposit Insurance Corporation ("***FDIC***"), or the National Credit Union Administration ("***NCUA***"), depending upon the type of issuer. And, for non-banks that apply to be a permitted payment stablecoin issuer at the Federal level, the OCC.

State Payment Stablecoin Regulator. A "State payment stablecoin regulator" is defined in the Act to mean a State agency that has primary regulatory and supervisory authority in such State over payment stablecoin issuers. To be clear, not all States must have a State Payment Stablecoin Regulator, and if they do not have one, then entities in those states would apply to the appropriate Federal Payment Stablecoin Regulator.

As the parameters embedded in these definitions suggest, the intent of the Act is to sanction the creation and regulation of an entirely new asset that is not a bank deposit, not a security, not a national currency and not a commodity.

Issuance of Payment Stablecoins.

General Rules on Issuance, Offer or Sale of Stablecoins. Section 3(a) of the Act lays down the basic rule of *issuance* of payment stablecoins: after the Grace Period expires, only those entities that have been approved as PPSIs may issue payment stablecoins in the United States.[11]

Section 3 also restricts who may *offer or sell* payment stablecoins. The Act similarly prescribes that after the Grace Period expires digital asset service providers may only offer or sell payment stablecoins to U.S. persons that have been issued by a PPSI, with a few exceptions.[12] For example, payment stablecoins issued by a "foreign payment stablecoin issuer" may only be offered or sold to U.S. persons when that foreign payment stablecoin issuer has applied for a determination by the Department of Treasury ("***Treasury***") that it has the technological capability to comply with lawful orders and reciprocal arrangements (i.e., U.S. anti-money laundering and sanctions laws and regulations) and has then proceeded to register with the OCC.[13] In addition, Treasury is directed under the Act to issue rules on "foreign payment stablecoin issuers" not later than one year of enactment of the Act and may issue other regulations that provide limited safe harbors that would apply to a "de minimis volume of transactions."[14]

Payment stablecoins that have not been issued by PPSIs, upon the expiration of the Grace Period, will lose treatment as cash equivalent assets for accounting purposes and as cash equivalent margin and collateral for futures commission merchants, derivative clearing organizations, broker-dealers, registered clearing agencies and swap dealers, as well as settlement assets for wholesale payments, exchange and settlement among banking organizations.[15]

Exceptions to General Rules on Issuance, Offer and Sale. Section 3 does provide certain exceptions and safe harbors:

Exempt Transactions. Section 3 of the Act exempts from both the general issuance rule and the offer and sale rule three types of transactions. Such transactions are wholly outside the scope of Section 3:

- *Non-intermediated Transfers Between Individuals*. Transfers of digital assets between two individuals, acting on their own behalf for lawful purposes, without the involvement of an intermediary;
- *Cross-Border Transfers Between an Individual's Accounts*. Transactions involving the receipt of digital assets, between an individual's account in the United States and that same individual's account abroad, which accounts are offered by the same parent company; and
- *Self-Custody Wallet Transactions*. Any transaction by means of a wallet (software or hardware) that "facilitates an individual's own custody of digital assets."[16]

De Minimis Issuance Safe Harbors. The Act empowers the Secretary of the Treasury to issue regulations providing for safe harbors from the issuance restrictions in Section 3(a) of the Act, as long as those safe harbors are consistent with the Act, limited in scope and apply to a de minimis volume of transactions.

Unusual and Exigent Circumstances Issuance Safe Harbors. The Act also empowers the Secretary of the Treasury to provide limited safe harbors from the issuance restrictions in Section 3(a) of the Act if the Secretary determines that unusual and exigent circumstances exist. The Secretary is required to submit a justification of such determination to leaders of Senate Banking, Housing and Urban Affairs Committee and House Financial Services Committee.

It is notable that the latter two safe harbor authorizations are limited only to the issuance rules in Section 3(a) that mandates that only PPSIs may issue payment stablecoins, and do not cover the offer and sale rules in Section 3(b).

Prohibition of Issuance by Non-Financial Public Company Issuers. The Act includes a specific prohibition against a public company (or its subsidiaries or affiliates) issuing a payment stablecoin if the public company is not "predominantly engaged" in one or more financial activities.[17] This prohibition reflects the general public policy inherent in the Bank Holding Company Act[18] and federal banking law of a general separation between banking commerce and applies to foreign public companies, as well.[19] However, such a public company (or subsidiary) may be permitted to issue a payment stablecoin if the Stablecoin Certification Review Committee unanimously makes the following three findings:

- Such permission will not pose a material risk to the safety and soundness of the banking system, the financial stability of the U.S. or the Deposit Insurance Fund;
- Such public company will comply with data use limitations restricting use of personal data obtained from stablecoin transactions from use in targeting advertising, from sale to third parties, or from being shared, unless consented to by the consumer; and
- Such public company will comply with the Act's anti-tying provisions (*see* Paragraph 10 of this memorandum).

Payment Stablecoin Reserves and Prohibitions.

In addition to establishing rules for who can issue, offer and sell payment stablecoins, the Act establishes detailed standards for the payment stablecoins themselves that are subject to such issuance. Perhaps the most central requirements are those surrounding the reserves required to be maintained by PPSIs.[20]

"Backing". Section 4(a)(1) of the Act states that a PPSI "shall" maintain reserves "backing" the outstanding payment stablecoins on at least a "1 to 1 basis" and composed of specified assets.

Although the Act makes several references to the reserves "backing" payment stablecoins, it does not mandate any particular legal structure for the payment stablecoin to achieve such backing. The Act thereby accords latitude to payment stablecoin issuers to derive appropriate structures to achieve the Act's policy of supporting payment stablecoins with their reserves, as well as allowing for continued technological development. Further, the Act specifically notes that it is prohibited to represent that the FDIC will provide deposit insurance for payment stablecoins or to otherwise create an impression that the payment stablecoins are "backed" or otherwise "guaranteed" by the U.S. Government.[21]

Composition. The reserves of payment stablecoins are restricted to highly liquid and creditworthy assets such as certain currency deposit accounts and Treasury bills, notes or bonds with tenors to maturity of 93 days or less and certain other liquid financial assets and instruments.[22] The primary Federal payment stablecoin regulator (in consultation with any relevant State payment stablecoin regulator) can add similar liquid, Federal Government-issued assets to the list.

Further, it is notable that the permitted composition of assets for payment stablecoin reserves includes tokenized forms of all of the types of reserve assets other than money under repurchase agreements and reverse repurchase agreements. Similar to the reference to reserves "backing" payment stablecoins, the term "tokenized" here is not defined, again leaving space for market participants to determine appropriate tokenization structures for reserve assets, and for future technological development. Note that with respect to the reserves, the PPSIs are expressly permitted to engage in non-payment stablecoin activities that are authorized by the primary Federal or State payment stablecoin regulator, provided that "the claims of payment stablecoin holders rank senior to any potential claims of non-stablecoin creditors with respect to the reserve assets."

Importantly, the Act does not include many other assets that are commonly used as collateral and reserves for stablecoins, such as, for example precious metals (*e.g.*, gold and platinum).

Prohibition on Yield. The Act forbids any PPSI or foreign payment stablecoin issuer from paying to a holder of any payment stablecoin

"any form of interest or yield, whether in cash, tokens or other [23]consideration, solely in connection with the holding, use, or retention of such payment stablecoin."[24]

A payment stablecoin that itself bears interest or pays yield (for example, from earnings on reserves) would not be able to qualify as a payment stablecoin under the Act, and would therefore not benefit from the exclusions accorded payment stablecoins from the definitions of "security" and "commodity" for certain Federal regimes in Section 17 of the Act .[25] Interestingly however, there is no prohibition for PPSIs' on collecting interest from holding U.S. government securities or the yield on the reserves that are used to back payment stablecoins, which may be a substantial source of revenue.

Prohibition on Rehypothecation. The Act includes a prohibition against using the reserves required to back such payment stablecoins being rehypothecated (*i.e.*, the required reserves may not be used as the basis for lending or other activities), pledged or otherwise "reused" directly or indirectly by the issuer.[26] The reserves may be used to satisfy margin obligations in connection with investments in permitted reserves, to satisfy obligations associated with the use, receipt or provision of custodial services, and to create liquidity reasonably necessary to redeem payment stablecoins.

Regardless of this prohibition, the Act does provide that the Federal and State regulators shall prescribe custom capital requirements for PPSIs.[27] Further, to the extent the PPSI is an insured depository institution or a depository institution holding company that is required to meet a leverage capital requirement or risk-based capital requirement on a consolidated basis, if the PPSI custom capital requirements result in an "excess of the capital" required to be held, that institution or company does not need to hold such additional capital amounts.[28]

Regulation of Payment Stablecoins.

The regulatory structure for approving, supervising and enforcing against PPSIs under the GENIUS Act strives to avoid additional regulators for depository institutions by assigning responsibility to the existing appropriate Federal banking agency while offering flexibility for non-banks and State regulated institutions. In addition, the Act provides comprehensive direction for the evaluation, approval and oversight of Foreign Payment Stablecoin Issuers.

Identifying the Correct Regulator – Insured Depository Institutions or Subsidiaries Thereof.[29] For an insured depository institution or subsidiary thereof, the appropriate stablecoin regulator is the same Federal banking agency that is primarily responsible for the institution. This means that national banks or subsidiaries thereof seeking to become a PPSI would have the OCC as their "primary Federal payment stablecoin regulator," and an insured credit union subsidiary would have the NCUA as theirs.

At the State level, the issuers are allowed to choose whether they will be subject to a State-level regime of stablecoin regulation (if such State-level regulatory regime is available) or the Federal regime.[30] The Secretary of the Treasury is instructed to engage in notice-and-comment rulemaking to establish that a State-level regime is substantially similar to the Federal regulatory framework. Then States that do wish to maintain a "State payment stablecoin regulator" must submit certification to the Stablecoin Certification Review Committee that their framework is substantially similar, and must annually re-certify. Note that if a State already has a regulatory agency that is responsible "for the supervision of digital assets or payment stablecoins", such as the New York Department of Financial Services, then the Secretary's review will automatically be conducted on an expedited basis and concluded within 180 days after the enactment of the Act.[31]

As a result, if a State-chartered depository institution that is not a member of the Federal Reserve System (i.e., a state non-member bank) wants to be a PPSI and their State does not have a State-level regime of stablecoin regulation, then that institution would apply to the FDIC. Likewise, a state-chartered bank that has opted to be a member of the Federal Reserve System (i.e., a state member bank) without an adequate state-level regime, would apply to the FRB. If the State does have a State-level regime of stablecoin regulation, then such an institution would have the option to choose the State-level regime or the applicable Federal regulator, unless their outstanding issuance of payment stablecoins is more than $10 Billion, in which case the institution must follow the Federal regime.

Identifying the Correct Regulator – Non-Banks and Existing U.S. Issuers of Stablecoins. If a non-bank[32] wants to become a PPSI, that non-bank may choose to apply to the certified State-level payment stablecoin regulator (if available) of the state in which they are resident or it can apply to the OCC to become a "Federal qualified payment stablecoin issuer." This would also be the method by which non-banks that have already issued payment stablecoins would go about becoming a PPSI, which would in turn mean that their stablecoins would be deemed payment stablecoins issued by a PPSI. Of course, such non-banks would have to ensure that the payment stablecoins had no yield, were backed 1-to-1 by reserves in the United States and that the reserves were not being reused in a manner inconsistent with the prohibition against rehypothecation.

Foreign Payment Stablecoin Issuers. The GENIUS Act recognizes that some foreign payment stablecoin issuers may want to become PPSIs, in which case those issuers would apply to the OCC and would be required to meet the same requirements regarding reserves and limited activities, etc., as a non-bank applying to become a PPSI.

However, the GENIUS Act also recognizes that foreign payment stablecoin issuers need to be regulated, as well. To this end, Section 18 of the Act provides that such entities must meet a series of requirements. First, the Secretary of the Treasury must determine that the foreign payment stablecoin regulator overseeing the foreign payment stablecoin issuer is "comparable" to the regulatory and supervisory regime established by the Act. The foreign payment stablecoin issuer must then register with the OCC, hold reserves in a United States financial institution "sufficient to meet liquidity demands" of U.S. customers and must be domiciled in a jurisdiction that is not subject to sanctions or be a "jurisdiction of primary money laundering concern."[33]

Anti-Money Laundering Provisions / Sanctions.

The GENIUS Act has several provisions addressing the applicability of anti-money laundering ("***AML***") and sanctions laws to stablecoin activities, whether the stablecoins are issued by PPSIs or not.

Applicability of Existing Law. Pursuant to Section 4(a)(5) of the Act, "Treatment Under the Bank Secrecy Act and Sanctions Laws", PPSIs are treated as financial institutions for purposes of the Bank Secrecy Act ("***BSA***"), which means that they must maintain an effective AML program, retain appropriate records, engage in ongoing monitoring and reporting of suspicious transactions, and have a KYC/CIP program. The bill would largely codify existing guidance from Treasury's Financial Crimes Enforcement Network ("***FinCEN***"), which treats stablecoin issuers as money services businesses subject to the BSA's AML program requirements. The bill mandates that FinCEN shall adopt rules "tailored to the size and complexity" of PPSIs. This mandate differs from existing AML rules, which require financial institutions to develop and implement an AML program responsive to risks each financial institution identifies; the mandate suggests that FinCEN will promulgate different rules for PPSIs on the basis of PPSI risk profiles that FinCEN itself identifies.

Lawful Orders. In seeking to broadly encompass this area of security concerns, the GENIUS Act uses phrasing such that foreign payment stablecoin issuers must have the "technological capability to comply" with "lawful orders."[34] Lawful orders are defined[35] to mean any final rule, command, process, order or other requirement under Federal law issued by a court of law or a Federal agency that: 1) requires a person to seize, freeze, burn or prevent the transfer of payment stablecoins issued by the person; 2) specifies the payment stablecoins or accounts subject to blocking; and 3) is subject to judicial or administrative review or appeal. A PPSI is only permitted to issue a payment stablecoin which has the technological capacity to comply with a lawful order – in effect, the Act mandates that the computer code for payment stablecoins includes certain security functions.[36] This requirement is immediately applicable to payment stablecoins upon the Act's enactment. In other words, it is required that all payment stablecoins issued by a PPSI must meet these standards, even if the Grace Period has not yet run. The Secretary of Treasury is expressly permitted to supersede a PPSI's procedures to "block and prohibit transactions in property and interest in property of a foreign person."

For example, if FinCEN ordered, this functionality would allow PPSIs to inactivate a payment stablecoin issued by a blocked PPSI that was acquired by an unrelated third-party purchaser in a secondary market transaction if FinCEN so ordered.

Related Studies by FinCEN and Treasury. The GENIUS Act provides that Treasury will quickly commence obtaining public comment "to identify innovative or novel methods, techniques, or strategies that regulated financial institutions use, or have the potential to use, to detect illicit activity, such as money laundering, involving digital assets, including comments with respect to – (1) application program interfaces; (2) artificial intelligence; (3) digital identify verification; and (4) use of blockchain technology and monitoring."[37] FinCEN will work with Treasury to conduct additional research and then, within two years after the Act is enacted, FinCEN is required to issue a rulemaking for notice and comment addressing best practices for identifying and reporting illicit activity, best practices for monitoring transactions that mix stablecoins in such a way as to make a transaction or its counterparties less identifiable, and risk management standards for financial institutions interacting with decentralized finance protocols.

Custody of Payment Stablecoin Reserve and Collateral.

The Act prescribes requirements for entities that provide custodial or safekeeping services not only for payment stablecoins, but also for: (i) payment stablecoin reserves, (ii) payment stablecoins used as collateral, and (iii) the private keys that are issued along with permitted payment stablecoins.[38] The only entities that may engage in those activities must be subject to supervision or regulation at either the Federal level by a primary Federal payment stablecoin regulator, the SEC or the CFTC; or at the State level by a State bank regulator or credit union supervisor.[39]

All entities engaged in these activities must "treat and deal with the payment stablecoins, private keys, cash, and other property" of the customer (*i.e.*, the PPSI or the holders of the payment stablecoins) as belonging to that customer, and not as being the property of such entity. In addition, these entities must take steps to protect the customer from the entity's own creditor claims. Finally, the reserves must be fully segregated; it is prohibited for these entities to commingle payment stablecoin reserves, payment stablecoins, cash, and other property of a PPSI or a customer with its own reserves, stablecoins, cash or other property.[40]

The Federal banking agencies, NCUA and the SEC may not require depository institutions, credit unions, national banks, trust companies or any affiliate thereof to include digital assets held in custody that are not owned by the entity as a liability on their financial statements, including payment stablecoin custody or safekeeping activities. Nor can these regulators require these entities to "hold in custody or safekeeping regulatory capital against digital assets and reserves backing such assets", except as necessary to mitigate operational risks in custody or safekeeping services.[41]

Insolvency Provisions

Section 11 of the Act ("Treatment of Payment Stablecoin Issuers in Insolvency Proceedings") is the primary section relating to insolvency matters.

Priority of Claims. Section 11(a)(1) works together with section 11(d) to elevate the claims of stablecoin holders above all other unsecured claims, including administrative expense claims. Administrative expenses – like post-petition vendor invoices and professional fees – are typically granted top priority under Section 507 of the Bankruptcy Code to encourage parties to continue doing business with a debtor and support a successful reorganization. The Act departs from this principle by giving stablecoin holders first priority to reserves and the PPSI's estate, if those reserves are insufficient to fully satisfy their claims.

The Act purports to apply this principle "in any insolvency proceeding of a [PPSI] under Federal or State law, including any proceeding under title 11, United States Code, and any insolvency proceeding administered by a State payment stablecoin regulator with respect to a [PPSI]." Section 11(d) expressly amends section 507 of the Bankruptcy Code to create this priority in bankruptcy – though Congress appears to be applying the priority to "any insolvency proceeding" at state or Federal law.

Claims of Transferees. Some stablecoins are structured so subsequent holders may not have a direct contractual redemption right from the issuer. In bankruptcy currently, those holders arguably may lack a claim in an issuer's future bankruptcy. The Act seeks to address this problem by including language aimed at ensuring subsequent holders are deemed to hold a claim against a debtor irrespective of the terms of the permitted payment stablecoin. Section 11(a)(2) provides that:

"[N]otwithstanding any other provision of law, including the definition of "claim" under section 101(5) of title 11, United States Code, any person holding a payment stablecoin issued by the permitted payment stablecoin issuer shall be deemed to hold a claim; . . ."

Bankruptcy Automatic Stay. Section 11(c), amends the automatic stay provisions of Section 362 of the Bankruptcy Code to create a pathway for redemption of permitted payment stablecoins from required reserves. The Bankruptcy Code's "automatic stay" imposes a freeze on any actions that would seek to collect or otherwise litigate with a debtor that has filed for bankruptcy. This is called the "automatic stay." Under section 11(c) of the Act, the automatic stay would apply to: "the redemption of payment stablecoins issued by the [PPSI], from payment stablecoin reserves required to be maintained under section 4 of the GENIUS Act."

However, section 11(c) seeks to create a path toward terminating the automatic stay at the outset of a PPSI's bankruptcy. It requires the PPSI debtor to file a motion to "lift" the stay "with respect to the redemption of payment stablecoins held by a person, if the court finds . . there are payment stablecoin reserves available for distribution on a ratable basis to similarly situated payment stablecoin holders . . ." Congress would require the Court "to enter a final order to begin distributions under this paragraph not later than 14 days after the date of the required hearing."

This provision, while creating a path toward redemption from the reserves, also creates a delay in redemption from the reserves of more than two weeks. We note there is some discrepancy between the application of the automatic stay – which applies to the debtor, and section 11(e)'s removal of the reserves from the debtor's estate. This inconsistency could create challenges for bankruptcy courts – and potentially customers seeking immediate redemption.

Priority in Bankruptcy. As noted above, Section 11(d) amends Section 507 of the Bankruptcy Code (regarding priority in Bankruptcy proceedings) by providing that, if a payment stablecoin holder is not able to redeem all outstanding payment stablecoin claims from the reserves, any remaining claim of a person holding a payment stablecoin shall have first priority claim over any other claim (including administrative expenses such as attorneys' fees) "to the extent compliance with Section 4 of the Genius Act would have required additional reserve to be maintained . . .".

Property of the Estate. Section 11(e) of the Act amends the Bankruptcy Code to expressly exclude "required payment stablecoin reserves" from a debtor's bankruptcy estate "provided that notwithstanding the exclusion of such reserves from the property of the estate" the automatic stay described above "shall apply to the reserves."

The Act apparently aims to prevent outcomes like the one in Celsius Networks LLC, where the court held, over the objection of customers, that digital assets in certain yield-bearing accounts were property of the bankruptcy estate.[42] Exclusion of these reserves ensures that such reserves are not subject to claims of other creditors (or general administrative costs of the bankruptcy estate) and affirms that the reserves are dedicated solely to redeeming stablecoin claims. However, the language ensuring the application of the automatic stay to those reserves, at best creates delay in freeing the reserves from the bankruptcy estate – and potentially creates uncertainty around the treatment of the reserves.

Other Insolvency Provisions. Section 11(g) provides that if a PPSI is a regulated depositary institution, an insolvency proceeding shall be resolved by the FDIC, NCUA or state payment stablecoin regulator, as applicable.

Finally, Section 11(h) requires the primary Federal payment stablecoin regulators to undertake a study regarding potential insolvency proceedings of PPSI, in particular as to potential gaps in the law. The report on such study would be due within 3 years after enactment of the Act.

Consumer Protection Provisions

PPSIs are subject to a number of disclosure requirements and other obligations with respect to its customers, including consumers. For example, all PPSIs must disclose their "redemption policy" meaning that they must establish clear and conspicuous procedures regarding how and how quickly a holder of a permitted payment stablecoin may redeem the stablecoin for cash. In addition, the PPSI must clearly and conspicuously disclose all fees associated with purchasing or redeeming the payment stablecoins and must also publish every month a disclosure on their website regarding the PPSI's reserves.

Also, the Act includes certain anti-tying provisions to protect consumers.[43] PPSIs may not provide services to a customer and condition that they must obtain "an additional paid product or service" from the PPSI or its subsidiaries. PPSIs may also not act in a manner that prohibits, nor may they design their payment stablecoins such that the design effectively prohibits customers from obtaining additional products or services from competitors. To this end, the FRB is permitted to issue regulations as may be necessary to further prescribe how PPSIs achieve compliance with these provisions.

Finally, PPSIs must not use "deceptive names" that involve any combination of terms relating to the U.S. Government, including "United States" in the name of a payment stablecoin.[44] PPSIs must also take care to not "market a payment stablecoin in such a way that a reasonable person would perceive the payment stablecoin to be [legal tender, issued by the United States, or guaranteed or approved" by the United States.[45]

Non-Payment Stablecoins.

The Secretary of the Treasury must provide a report to Congress within one year of enactment that studies non-payment stablecoins, including so-called endogenously collateralized stablecoins ("***ECS***"). An ESC is a digital asset 1) "the originator of which has represented will be converted, redeemed, or repurchased for a fixed amount of monetary value" and 2) that solely relies on the value of another digital asset by the same originator to maintain the fixed price.[46]

The report, which must have input from the Federal payment stablecoin regulators, the SEC and the CFTC must address at least the following: 1) the categories of non-payment stablecoins that exist; 2) the participants in those stablecoins; 3) the utilization of non-payment stablecoins; 4) the nature of reserves; 5) types of algorithms being employed; 6) governance structure, including any decentralized structure; 7) the nature of public promotion and advertising; and 8) the clarity and availability of consumer notices disclosures.

Implementation.

The "Act, and the amendments made by this Act, shall take effect on the ***earlier*** of – (1) the date that is 18 months after the date of enactment of this Act; or (2) the date that is 120 days after the date on which the primary Federal payment stablecoin regulators issue any final regulations implementing this Act."[47]

The timeline for when it becomes unlawful for digital asset service providers to offer or sell a payment stablecoin that was not issued by a PPSI is three years after the date of enactment, also known as the Grace Period. This likely means in the summer of 2028, assuming that the Act is enacted in the summer of 2025.

Interested in more information?

1 S.1582 - 119th Congress (2025-2026): GENIUS Act, S.1582, 119th Cong. (2025), **https://www.congress.gov/bill/119th-congress/senate-bill/1582**. The GENIUS Act was voted out by the Senate Banking Committee on March 13, 2025, and passed the Senate by a 68-30 vote on June 17, 2025. The bill will now move to the House of Representatives, where House leaders have voiced concerns about earlier versions of the Senate bill, but amendments made since March may allay some of those concerns. This summary is based on the version that passed the Senate on June 17.

2 Once the three-year period has run, if anyone other than a PPSI issues payment stablecoins in the U.S., they will be subject to a $1 million fine and/or a 5-year imprisonment for each violation. Act § 3(f)(1).

3 Act § 3(g) - Treatment.

4 H.R.3633 - 119th Congress (2025-2026): Digital Asset Market Clarity Act of 2025, H.R.3633, 119th Cong. (2025), **https://www.congress.gov/bill/119th-congress/house-bill/3633**.

5 Act § 2(22)(A)(i).

6 The Act amends several U.S. securities laws to clarify that "payment stablecoins" are not "securities" and that the PPSI would not qualify as an "investment company" even if payment stablecoins may otherwise qualify as "securities." *See,* Act § 2(22)(B)(iii) and Act §17(b). Also see Statement on Stablecoins, SEC Div. Corp. Fin, April 4, 2025, stating that generally payment stablecoins do not meet the conditions of the Reves test and the Howey test and therefore do not qualify as "securities."

7 7 U.S.C. § 1a *et seq*.

8 We note, however, that as of the date of this writing, existing stablecoins are widely recognized to qualify as "commodities" and subject to CFTC's jurisdiction. *See* Tether and Bitfinex CFTC enforcement matters , CFTC Release Number 8450-21, October 15, 2021, where the CFTC had unequivocally stated that "The [stablecoin] USDt is a commodity as defined in the Act". If a payment stablecoin is not a "commodity," the CFTC will not have enforcement jurisdiction over fraud and manipulation in transactions involving these instruments. After the effective date of the Act, the CFTC would not be able to bring similar enforcement matters.

9 Act § 3(c) gives the extraterritorial effect to §3 prohibition on issuances of payment stablecoins by persons other than PPSIs.

10 *See* § 17(f) of the Act. At the present time, it is less clear whether "swaps" (as defined in § 1a(47) of the CEA) can be offered on payment stablecoins given that swaps may reference many other assets in addition to referencing "commodities." Likewise, it is unlikely that swaps on payment stablecoins could qualify as "security-based swaps" as defined in § 1a(42) of the CEA and the § 3(a) of the Securities Exchange Act of 1934 given that payment stablecoins are not "securities."

11 Act §3(a).

12 Act §3(b)(1).

13 Act §3(b)(2) and §18(a)(2) and (c).

14 Act §3(c)(1).

15 Act §3(g).

16 Act §3(h)(1)(A)-(C).

17 Act §4(a)(12). "Financial activities" are defined by reference to Section 4(k) of the Bank Holding Company Act of 1956, as well as including activities involving issuance, redemption and managing the reserves of payment stablecoins, and exchanging, transferring and maintaining custody of digital assets.

18 12 U.S.C. § 1841, *et seq*.

19 Act §4(a)12(c).

20 Act §4(a)(1).

21 Act § 4(e).

22 Permitted reserves for payment stablecoins include:

(i) United States coins and currency (including Federal Reserve notes) or money standing to the credit of an account with a Federal Reserve Bank;

(ii) funds held as demand deposits (or other deposits that may be withdrawn upon request at any time) or insured shares at an insured depository institution (including any foreign branches or agents, including correspondent banks, of an insured depository institution), subject to limitations established by the Corporation and the National Credit Union Administration, as applicable, to address safety and soundness risks of such insured depository institution;

(iii) Treasury bills, notes, or bonds—

(I) with a remaining maturity of 93 days or less; or

(II) issued with a maturity of 93 days or less;

(iv) money received under repurchase agreements, with the permitted payment stablecoin issuer acting as a seller of securities and with an overnight maturity, that are backed by Treasury bills with a maturity of 93 days or less;

(v) reverse repurchase agreements, with the permitted payment stablecoin issuer acting as a purchaser of securities and with an overnight maturity, that are collateralized by Treasury notes, bills, or bonds on an overnight basis, subject to overcollateralization in line with standard market terms, that are—

(I) tri-party;

(II) centrally cleared through a clearing agency registered with the Securities and Exchange Commission; or

(III) bilateral with a counterparty that the issuer has determined to be adequately creditworthy even in the event of severe market stress;

(vi) securities issued by an investment company registered under section 8(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–8(a)), or other registered Government money market fund, and that are invested solely in underlying assets described in clauses (i) through (v);

(vii) any other similarly liquid Federal Government-issued asset approved by the primary Federal payment stablecoin regulator, in consultation with the State payment stablecoin regulator, if applicable, of the permitted payment stablecoin issuer; or

(viii) any reserve described in clause (i) through (iii) or clause (vi) through (vii) in tokenized form, provided that such reserves comply with all applicable laws and regulations; ...

Act §4(a)(1)(A).

23 Note that the most recent version of the bill struck this word.

24 Act §4(a)(11).

25 The precise scope of “any form” of “yield” may be an area for further rulemaking by regulators. For example, since the Act permits reserve assets to include tokenized forms of assets, if protocol staking rewards are considered a type of “yield” under the Act, then issuers would be unable to stake such reserve assets for permitted payment stablecoins. [*Cf.* “Statement on Certain Protocol Staking Activities,” Securities and Exchange Commission, Division of Corporate Finance (May 29, 2025) (expressing the Division’s view that protocol staking activities do not involve the offer and sale of securities). **https://www.sec.gov/newsroom/speeches-statements/statement-certain-protocol-staking-activities-052925**]

26 Act §4(a)(2).

27 Act §4(a)(4).

28 Act § 4(a)(4)(C).

29 Depository institutions that are not insured are treated as non-banks for purposes of the Act.

30 Act § 4(c).

31 *See,* 4(c)(7).

32 *See,* Footnote 21.

33 Act § 18(a).

34 *See, e.g.,* Act §3(b)(2) and §4(a)(6).

35 Act §2(16).

36 Such security patterns may include approaches such as emergency stops, circuit breakers, self-destruct functions, and timelocks. For example, the OpenZeppelin Pausable contract component is a common module to permit authorized accounts to temporarily disable certain smart contract functions. ***https://docs.openzeppelin.com/contracts-cairo/1.0.0/security*** *See generally* Emergency stops, Ethereum.org **https://ethereum.org/en/developers/docs/smart-contracts/security/#emergency-stops**

37 Act §9. Such public comment period is limited to 60 days beginning on the date 30 days after enactment of the Act.

38 § 10(a).

39 In this case, the applicable State regulator must provide information on the entity to the FRB describing “the person’s business operations and processes to protect customer assets, in such form and manner” as the FRB determines in a rulemaking.

40 Nevertheless, it would be possible for these entities to combine payment stablecoin reserves for more than one PPSI in an omnibus account, and if the entity is an insured depository institution and the reserves are held as cash in the form of a deposit liability, then such cash need not be separated from the property of the applicable depository institution.

41 § 16(c).

42*See In re Celsius Network LLC*, 647 B.R. 631, 637 (Bankr. S.D.N.Y. 2023) (concluding that “the cryptocurrency assets remaining in the Earn Accounts on the Petition Date became property of the Debtors’ bankruptcy estates.”)

43 Act § 4(a)(8).

44 Act § 4(a)(9).

45 It would be permissible for a PPSI to use abbreviations directly relating to the currency to which a payment stablecoin is pegged, such as “USD”.

46 Act § 14.

47 Act § 20.

Are Payment Stablecoins Like Onions?

June 26, 2025

It is becoming increasingly likely that the "Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025'' (the ''***GENIUS Act of 2025***'' or the "***Act***") will become enacted and signed into law by the President in the summer of 2025.[1]

As the contours of the regulatory regime for payment stablecoins ("***PSCs***") in the United States ("***U.S.***") take shape, a number of areas of uncertainty remain with how the Act will be implemented; what effect it will have on existing and future markets; and specifically what the future holds for "contracts for future delivery" on PSCs (*i.e.*, futures contracts).

The key to this analysis lies in examining the definition of a PSC, and determining whether it qualifies as a "commodity," or if it is not a commodity, if that means trading in futures on PSCs will be prohibited. Because PSCs are intended to be used as collateral for commodity derivatives and securities trading, to ensure the safety and soundness of U.S. financial markets, it would seem appropriate for Federal civil market regulators to have anti-fraud and anti-manipulation enforcement jurisdiction. And, this result could be achieved by a simple fix in the language of the Act.

If, as currently proposed in the Act, PSCs would be carved from the definition of "commodity" in § 1a(9) of the Commodity Exchange Act of 1936 (the "***CEA***"),[2] the following would likely occur:

(1) No U.S. or foreign exchange would be able to list, and make available for persons located in the U.S. futures contracts on PSCs. So, it would be impossible to hedge, or speculate on, price fluctuations in PSCs above or below their redemption value;

(2) There would be no market regulator to police for fraud and manipulation involving futures trading in PSC because under the Act, the PSCs are neither "commodities" nor "securities," and neither the U.S. Commodity Futures Trading Commission ("***CFTC***") nor the U.S. Securities and Exchange Commission ("***SEC***"), respectively, will have any jurisdictional reach over such trading;

(3) State and Federal PSC bank regulators would likely not have the tools to police these markets nor do they have the expertise in market regulation. As such, they would have to defer to the Department of Justice ("***DOJ***") for investigations into market abuse relating to digital assets, which they recently announced are a low priority.[3]

Defining PSC in the GENIUS Act

The definition of PSCs starts off with outlining a very broad category of digital assets generally and then progressively tightening the characteristics of a PSC to also clarify what a PSC is not.

First, the Act defines PSC as a "digital asset," *i.e.*, a "digital representation of value which is recorded on a cryptographically-secured distributed ledger." This category is broad and could include securities, currencies, bank deposits and of course "digital commodities." Second, the Act states that not all "digital assets" would become PSCs, but only those "designed to be used as a means of payment or settlement." This category would normally and primarily include all sorts of national currencies and money. Third, the Act says that PSCs must be issued by the issuer that: i) is obligated to convert PSCs into a "fixed amount of monetary value"; and ii) represents that the issuer will maintain (or reasonably endeavor to maintain) a stable value relative to the PSCs. Finally, to clear any doubt, the Act specifically states what a PSC is not – *i.e.*, it is not a "national currency," it is not a "deposit," and not a "security."[4]

Importantly, this list of definitional carveouts in § 2 of the Act does not say that a PSC is not a "commodity," as that term is defined in the CEA. The Act only provides at the very end in § 17 that PSCs issued under the Act are not "commodities." That section amends the CEA to state that "[t]he term 'commodity' does not include a [PSC] issued by a permitted [PSC] issuer, as such terms are defined in the [Act]."

There are several important implications arising from excluding PSCs from the definition of "commodity" in the CEA.

PSCs are like onions

It is not the first time an otherwise qualifying commodity was specifically carved out from being a "commodity" under the CEA. Indeed, if something was not a commodity in the first place, there would have been no need to carve it from the definition of "commodity."[5]

In response to a massive manipulation in onions in 1955, the U.S. Congress enacted the Onion Futures Act in 1958 (the "***Onion Futures Act***")[6] that amended the definition of "commodity" in § 1a(9) of the CEA[7] to exclude onions and made trading in onion futures on commodity exchanges unlawful. At that time there was a populist belief that futures trading in onion contracts had exacerbated price fluctuations and made the manipulative scheme possible.

Half a century later, in 2010, under the Dodd Frank Act of 2010,[8] Congress amended the Onion Futures Act and the CEA to further carve out from the definition of "commodity" – "motion picture box office receipts (or any index, measure, value, or data related to such receipts)" and to make the trading in futures on commodity exchanges in motion picture box office receipts also unlawful.[9] The motivation was to eliminate "popcorn futures" as a potential gaming contract and in response to the motion picture association's lobbying efforts.

Further, just last year, in 2024, U.S. Senator E. Warren reintroduced her proposed Future of Water Act of 2024 to also carve out from the definition of "commodity" – "water or water rights" as well as to prohibit trading of water futures on commodity exchanges by amending the Onion Futures Act.[10] Again, the motivation was to prevent manipulation and speculation of water as a public good.

Of note, the son of the farmer who had successfully lobbied Congress to carve onions out of the "commodity" definition now regrets that outcome because without a robust futures market in onions, prices are much more susceptible to fluctuation, and it is impossible to hedge one's exposure to onions in the open market;[11] likewise, arguments are being made that the ban on movie futures hurts the industry and makes it impossible to hedge new movie releases.[12]

But, again, onions and box office receivables (and potentially water in the future) are not commodities and the trading in these futures is unlawful because of the populist belief that active trading in listed futures on these assets would result in excessive speculation and eventually cause greater volatility in these assets, as well as manipulation and fraud.[13]

It is not clear why legislators believe that there should be no market in PSC futures and that the prices of PSCs would become negatively impacted by the trading of PSC futures on commodity exchanges, especially given that PSCs, by design, are intended to maintain their stated value – *i.e.*, remain "stable."

Future contracts on non-commodities are not allowed

Removing a commodity from the "commodity" definition in § 1a(9) of the CEA will result in several consequences. *First*, this section itself states in reference to what a "commodity" is, that it is something "in which contracts for future delivery are presently or in the future dealt in." *Second*, § 1a(27) of the CEA defines "future delivery" by exclusion stating "[t]he term "future delivery" does not include any sale of any cash commodity for deferred shipment or delivery…", meaning that deliverable forward transactions do not qualify as futures (*i.e.*, contracts for a "commodity for future delivery"). Obviously, if there is no "commodity," there would be no "commodity for future delivery" either. *Third*, it has been a foundational principle of U.S. regulation of commodity derivatives that all "contract[s] for purchase and sale of a commodity for future delivery" must be traded on a designated or registered "board of trade" – *i.e.*, a commodity exchange or a designated contract market ("DCM").[14] Accordingly, under the Act, no futures contracts on PSCs will be allowed and no U.S. registered DCM will be able to list futures contracts on PSCs. *Fourth*, because retail participants (*i.e.*, the public)[15] may only trade derivatives in the form of futures and swaps traded on a registered DCM, retail participants will not be able to mitigate their commercial risks, hedge or speculate in PSC derivatives in the U.S.[16]

It is less clear whether the same prohibition will apply to "swaps"[17] on PSCs because the definition of "swap" only lists "commodities" among a list of other assets and economic indicators; which arguably could mean that a swap on a PSC would be still technically possible, especially if swaps on PSCs are not traded on a DCM. However, this may be a distinction without a difference because "swaps" are included in the definition of "commodity interests"[18] and most provisions of the CEA apply to transactions in "commodity interests." Therefore, because "swaps" can only be entered into between Eligible Contract Participants, again, retail participation would be precluded (unless a swap is listed on a DCM while it is not clear whether a DCM can list swaps on non-commodities). Given these outcomes, a U.S. derivatives market (futures, options on futures, swaps and OTC options as well as security-based swaps[19]) on PSCs will be practically impossible, depriving retail and institutional users of PSCs of important protections.

Paradoxically, however, some customer-protection provisions in the CEA will not apply that otherwise would prohibit retail participation. Because leveraged and margined contracts on PSCs by definition will not be "contracts for future delivery of a commodity," arguably retail participants will not be prohibited from trading these contracts under § 2(c)(2)(D) of the CEA. If there was fraud or manipulation in trading PSCs on spot or forward markets, the CFTC will have no jurisdiction to police these markets under § 180.1 of CFTC Regulations because PSCs would no longer be commodities. Therefore, there is a possibility that an active retail market in leveraged and margined PSC contracts may develop – and entirely outside the purview of any U.S. financial regulators.[20]

Can PSC derivatives be issued overseas?

Non-U.S. markets, including U.S. registered "foreign boards of trade,"[21] are not restricted in the same way from trading futures on assets that are not "commodities" and, provided local law allows, may list derivatives on PSCs. This means that nothing will prevent non-U.S. markets from listing and trading futures and OTC derivatives on U.S.-issued PSCs (either deliverable or cash-settled).[22]

Regardless of the language in the Act, U.S. persons will likely be able to trade PSC derivatives directly on local overseas trading platforms, as well as on U.S.-registered foreign boards of trade, even though § 30.1 of CFTC Regulations will prohibit U.S. futures commission merchants ("***FCMs***") from facilitating trades on non-U.S. markets because "foreign futures" only include "commodity futures" on foreign boards of trade.

Who will prosecute fraud and manipulation in retail PSC derivatives?

The CFTC has enforcement jurisdiction over spot or derivative transactions in interstate commerce to the extent fraud and manipulation is involved,[23] and exclusive regulatory jurisdiction over transactions involving "commodity interests." Realizing that there is a jurisdictional gap over spot transactions for "digital assets," each of the proposed bills in Congress addressing the infrastructure of digital commodity and digital assets trading, grants the CFTC additional exclusive jurisdiction over spot markets in digital commodities.[24]

Because PSCs are neither bank deposits, nor "national currencies," nor "securities," nor "commodities," it will fall to the appropriate PSC State regulators as well as the Federal banking regulators to police the issuers of PSCs. Further, because neither the SEC nor the CFTC will have any jurisdictional reach over the markets in PSC derivative instruments, and State and Federal banking regulators have traditionally not acted as market regulators, the DOJ (primarily under the Wire Fraud Act)[25] would have to step up.

Will PSCs issued not in compliance with the Act be "commodities"?

Section 3(a) of the Act states: "It shall be unlawful for any person other than a permitted payment stablecoin issuer to issue a payment stablecoin in the United States" and provides that PSCs not issued by permitted [PSC] issuer shall be subject to heavy fines and a referral to the DOJ for criminal sanctions. Because the carve-out in § 1a(9) refers only to PSCs issued by a "permitted PSC issuer," arguably PSCs issued by a non-permitted issuer would still qualify as "commodities,"[26] however, these PSCs would nevertheless be illegal under § 3(a) of the Act at the expiration of three (3) years following enactment, so it is unlikely that at that time there will be a market in PSCs that would qualify as a "commodity" (or a "security," for that matter).

What likely effects will there be on the PSC markets?

The Act would require all U.S. PSC issuers to either stop issuing PSCs or to qualify as "permitted PSC issuers" within three (3) years of enactment of the Act.[27] Likewise, any futures contract on PSCs would have to cease trading and be delisted from a DCM within that timeframe.[28] It is less clear whether non-U.S. platforms will be required to delist these contacts, and it is possible that a derivatives market on U.S.-issued PSCs will develop overseas should there be demand in PSC futures.

It appears clear that the lawmakers do not wish to see a derivatives market in PSCs to develop in the U.S., but it is less clear whether Congress also intended that there should be no futures trading on PSCs (again, it could have amended the Onion Futures Act as was done with respect to onions and box office receivables). The carveout in § 17 of the Act does not have a companion amendment to the Onion Futures Act by adding the prohibition on trading PSC futures on a "board of trade" (*i.e.*, a commodity exchange), as these prohibitions apply with respect to the trading of futures on onions, box office receivables, and as proposed to water.[29]

An amendment to the Act would provide important protections

A simple fix to this potential gap would be simply to remove the provision in § 17 of the Act so that the Act will remain silent as to whether a given PSC will qualify as a "commodity," or to provide that PSCs would be qualified as an "excluded" commodity, akin to interest rates, exchange rates, currencies, etc.[30] Then, if U.S. market participants chose to develop a market in PSC futures, the CFTC and the DOJ will have the appropriate tools to regulate and police these markets in the future without further amendments to the Act.

If the language in the Act does not change as described, hopefully PSCs do not become the new onions. It is possible that the 1-to-1 redeemable requirement will ensure stability of PSC valuations and there will never be a need to hedge one's exposure to PSC issuers in the U.S.[31]

Interested in more information?

1 On June 17, 2025, the Act passed the Senate with a 68-30 vote and is now heading to the House for a reconciliation. **https://www.congress.gov/amendment/119th-congress/senate-amendment/2307/text**

2 *See* 7 U.S.C. § 1a, *et seq*.

3 *See* Memorandum from the Deputy Attorney General, Ending Regulation by Prosecution (Apr. 7, 2025).

4 Note that on April 4, 2025 SEC's Division of Cop. Fin. has already stated that PSCs would not meet the Reves and Howey tests and would not qualify as securities. *See* **https://www.sec.gov/newsroom/speeches-statements/statement-stablecoins-040425**

5 CFTC Chairman Rostin Behnam has repeatedly stated that fiat-backed stablecoins—like USDC, USDT, and BUSD—should be considered commodities under the Commodity Exchange Act. In a March 2023 appearance before the Senate Agriculture Committee, he emphasized that "notwithstanding a regulatory framework around stablecoins, they are going to be commodities, in [his] view". *Also see*, Tether and Bitfinex CFTC enforcement actions where the CFTC has asserted that PSC issued by these issuers were "commodities." **https://www.cftc.gov/PressRoom/PressReleases/8450-21** *Also see*, CFTC enforcement action involving Avraham Eisenberg and Mango Markets, CFTC Release No. 8647-23, Jan. 9, 2023, **https://www.cftc.gov/PressRoom/PressReleases/8647-23**

6 7 U.S.C § 13-1.

7 *See* § 1a(9) of the CEA and § 1.3 of 17 C.F.R ("***CFTC Regulations***").

8 124 STAT. 1376 Public Law 111–203 (July 21, 2010).

9 *See* The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 85-839 (7 U.S.C. 13-1).

10 *See* **https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-khanna-reintroduce-bill-to-stop-wall-street-from-profiting-off-water-and-water-rights**

11 **https://money.cnn.com/2008/06/27/news/economy/The_onion_conundrum_Birger.fortune/index.htm**

12 In fact, prior to the enactment of the Dodd Frank Act in 2010, the CFTC had approved two DCMs that were intending to list motion picture futures and was about to approve the specific movie contract before the ban on these contracts went into effect when the Onion Futures Act was amended in 2010.

13 **https://www.theringer.com/2018/11/15/movies/box-office-futures-dodd-frank-mpaa-recession**

14 *See* § 4(a) of the CEA.

15 The CEA does not define a "retail participant," however, any participant that is not qualified as an "eligible contract participant," as defined in § 1a(18) (*e.g.*, regulated financial institutions and wealthy individuals) ("***ECP***") and not an "eligible commercial entity," as defined in § 1a(17) of the CEA, would be considered retail. *Also see* § 2(c)(2)(D) of the CEA – Retail Commodity Transactions.

16 There have been instances when a stablecoin issuer was not able to redeem its PSCs **https://www.investopedia.com/sec-sues-terra-and-founder-for-fraud-7111256** or when the value of a PSC collapsed significantly below the stated redemption value. Holders of these PSCs would have been able to reduce the risks of the loss in value of their PSCs if they were able to hedge with PSC futures or swaps, similarly to hedging fluctuations in interest rates, currencies, gold or crude oil.

17 *See* § 1a(47) defining a "swap" generally as an agreement on various occurrences, events, outcomes as well as rates, currencies, commodities, etc.

18 *See* § 1.3 of CFTC Regulations defining "commodity interests" to also include "swaps."

19 Security-based swaps ("***SBS***") are defined in § 1a(42) of the CEA in reference to § 3(a) of the Securities Exchange Act of 1934. Because PSCs are also carved out from the definition of security, a SBS on a PSC will also be likely unlawful.

20 *See e.g.*, CFTC Release Number 8774-23, CFTC Issues Orders Against Operators of Three DeFi Protocols (Opyn, ZeroEx, Deridex), for Offering Illegal Digital Asset Derivatives Trading **https://www.cftc.gov/PressRoom/PressReleases/8774-23**. If none of the underlying digital assets were commodities, the CFTC would not have been able to bring these enforcement actions. Likewise, since PSCs are not securities either, the SEC also would not be able to police these markets.

21 Part 48 of CFTC Regulations.

22 § 3(e) of the Act provides that the Act has extraterritorial effect on offers and sales of PSCs to persons located in the U.S.; thus offering to U.S. persons deliverable futures on PSCs issued in violation of the Act will likely be prohibited.

23 *See* § 180.1

24 *See, e.g.*, the recently proposed The Digital Asset Market Clarity Act of 2025, introduced in the House as H.R. 3633 during the 119th Congress on May 29, 2025, by Representative J. French Hill (R-AR). **https://financialservices.house.gov/uploadedfiles/2025-05-29_-_sbs_-_clarity_act_of_2025_-_final.pdf**

25 18 U.S.C. § 1343.

26 *See* CFTC enforcement actions against Tether, Bitfinex, and Mango Markets.

27 § 3(b)(1) of the Act.

28 As of the date of this writing, there are no U.S. DCMs where futures on PSCs are listed; however, there are non-U.S. platforms where futures on U.S.-issued PSCs are currently listed.

29 To effectuate the prohibition on the trading of PSC futures, as discussed below, it would be necessary to also amend the Onion Futures Act because in the absence of the companion prohibition on trading of PSC futures, a secondary retail market in leveraged and margined PSC futures may develop completely outside of the regulatory reach.

30 § 1a(19) of the CEA.

31 Unfortunately, in 2022 several stablecoins had crashed and lost much of their value – demonstrating that hedging of stablecoins may be needed in the future as the history tends to repeat itself.

The EU Makes Significant Changes to the Securitisation Regulations and Associated Prudential Rules

June 26, 2025

The EU has now published its final proposal **here** (the "**SecReg Proposal**") for a regulation amending Regulation (EU) 2017/2402 ("**SecReg**"). This memo discusses the most notable changes from the 2017 version of SecReg, many of which reflect the 2025 report by the Joint Committee of the European Supervisory Authorities (for our note on that see **here**). However, key provisions relating to risk retention, the ban on re-securitisations and credit granting standards will remain unchanged under the SecReg Proposal.

To accompany the SecReg Proposal, a number of concomitant changes have been proposed to the Capital Requirements Regulation (the "**CRR Proposal**"). Notable changes are discussed below. The link to the CRR Proposal is **here**.

These proposals aim to "*recognise the risk mitigants implemented in the EU securitisation, regulatory and supervisory frameworks, which have significantly reduced the risks embedded in in securitisation transactions, as well as the good credit performance of EU securitisations*". This is in order to amend non-prudential and prudential requirements to encourage more engagement in securitisations by the removal of "*undue issuance and investment barriers in the EU securitisation market".*

As of today, the SecReg Proposal and the CRR Proposal remain proposals; they must still go through the trialogue process of a proposal by the Commission, and then a review by the Parliament and Council of the EU. Changes may be tabled and the process can involve amendments. Once the Parliament and Council agree joint texts, the legislation will be adopted, though this can be a lengthy process. Following adoption, we can expect draft Regulatory Technical Standards ("**RTS**") to be published for consultation.

Those RTS will deal with operational implementation of the proposals, presumably including details of the contents of revised reporting templates.

In addition to the SecReg Proposal and the CRR Proposal, draft amendments to the Liquidity Coverage Ratio Delegated Regulation have also been published on a "Have Your Say" basis for a four-week consultation. The Commission also plans to publish its proposed amendments to the Solvency II Delegated Regulation in the second half of July.

SECREG Proposals

Scope

Article 1(1) of the SecReg Proposal amends the scope of SecReg so as to apply to "*institutional investors and to originators, sponsors, original lenders,* servicers [emphasis added] *and securitisation special purpose entities.*" The previous draft of the SecReg Proposal's explanatory note asserts that the addition of "servicers" is simply a clarification and that SecReg already applies to servicers managing a pool of purchased receivables or the underlying credit exposures on a day-to-day basis. This, however, is not repeated in the final proposal.

Definitions of public and private securitisations

Article 1(2) of the SecReg Proposal amends the definition of a "public securitisation" to mean a securitisation that meets any of the following criteria:

- a prospectus is required[1];
- the notes are admitted to trading on a Union trading venue[2]; or
- marketing to investors takes place on a non-negotiable basis.

Though the quantum of "negotiation" is undefined, Recital (3) of the SecReg Proposal describes the absence of negotiation as the scenario when marketing "*to investors under non-changeable terms and conditions where the package is offered on a "take-it-or-leave-it" basis and investors have no direct contact with the originator or sponsor and can therefore not directly receive necessary information to conduct due diligence without the originator or sponsor disclosing any commercially sensitive information to the market."*

In contrast, the new definition of "private securitisation" is one that does not meet any of the criteria applicable to public securitisations (see Article 1(2) of the SecReg Proposal).

The result of this change, should it be adopted, is that many more securitisations will be classified as "public securitisations". In our view, the ability for certain "anchor" investors to review and comment on an advanced draft or "preliminary" offering memorandum may not, in and of itself, cause the transaction to be considered "negotiated" (and therefore private) for the purposes of the above.

The classification of whether a transaction is public or private will determine the type of transparency template reporting a transaction must use and whether such template reporting is available to investors and potential investors via a securitisation repository. *See Transparency below*.

Due diligence

The aim here is to streamline and simplify due diligence requirements by:

- removing verification requirements for risk retention in Article 5(1)(c) of SecReg for investors when the sell-side is established and supervised in the EU;
- making the risk assessment required currently by Article 5(3)(b) of SecReg principles-based and proportionate to the risk involved by removing the list of features that investors are required to verify. The principles are described (but not enumerated) in new Recital 4 as requiring investors to focus on risk characteristics and structural features that can materially affect performance and avoiding duplicative and overly burdensome or generic obligations. However, despite the above "principles based" approach, the rules for verifying investments in third county issuances set out in SecReg will continue to apply to investors in their current form (see below);
- providing that secondary market transactions will have an extra 15 days to document their due diligence;
- deleting Article 5(3) of SecReg, which required verification of compliance with certain Articles of SecReg in respect of STS transactions;
- deleting Article 5(4)(a) which required the establishment of written procedures to cover monitoring of exposures;
- disapplying due diligence requirements when securitisation positions are guaranteed by a multilateral development bank[3]; and
- providing for lighter due diligence in cases when the securitisation includes a first loss tranche that is guaranteed or held by a defined list of public entities and when that tranche represents at least 15% of the nominal value of the securitised exposures.

However, the SecReg Proposal's revised Article 5 does nothing to relieve the due diligence burden for third country securitisations including the requirement for EU institutional investors to confirm compliance with Article 6 (*Risk Retention*) and Article 7 (*Transparency*). In our view, the SecReg Proposal does not go nearly far enough to relieve the burdensome due diligence requirements imposed on EU institutional investors. The due diligence burden still remains high when compared with other types of investments.

Delegation of due diligence

Article 1(3)(e) of the SecReg Proposal aligns the requirements in respect of delegation in Article 5(5) of SecReg with those set out in AIFMD[4]. While an institutional investor may delegate due diligence obligations to another institutional investor, the delegation will not relieve the delegating investor of the regulatory responsibility for compliance with such obligations.

Risk retention

Risk retention is now waived when the securitisation includes a first loss tranche that is guaranteed or held by a narrowly defined list of public entities and when that tranche represents at least 15% of the nominal value of the securitised exposures.

Transparency

- The headline change here is the stated aim of reducing the number of mandatory reporting fields by at least 35%, and that consideration should be given to distinguishing between mandatory and voluntary fields. This work is tasked to the securitisation sub-committee of the ESAs Joint Committee, under the leadership of the EBA in cooperation with the other European Supervisory Authorities.
- Reporting templates for highly-granular and short-term portfolios should no longer require loan level information.

- Article 7(2) of SecReg is amended so as to allow private securitisations a distinct and simplified reporting framework that still contains the essential information relevant to competent authorities. This will be aligned to other well-established templates, in particular the ECB notification of securitisation template.
- The ESAs, through the Joint Committee of the ESAs under the leadership of the EBA, and in cooperation with ESMA and EIOPA, are charged with developing regulatory technical standards to specify disclosure information, taking into account the usefulness of the information for investors and whether the issue is public or private.
- Private securitisations are now required to report to securitisation repositories (in the new modified form), but the SecReg Proposal allows that while those reports need to be accessible to regulatory and other authorities, they will not be accessible by investors or potential investors (an acknowledgment of the confidential nature of many private transactions).

While we welcome the move to reduce the information in respect of public securitisations and the development of a short-form template for private securitisations, the requirement for all securitisations to report to EU securitisation repositories will create an additional burden for securitisation issuers, particularly in the case of third country securitisations. In addition, given the proposed expansion of the definition of "public securitisations", fewer securitisations will be able to use the less burdensome "private securitisation" template.

STS

- Currently, SecReg Article 20(8) requires total homogeneity of the underlying asset class. Article 24(5) requires the same of ABCP. When the asset class is SME loans, this homogeneity is now replaced by a 70% threshold.
- To encourage investment by insurance and reinsurance vehicles in SRT transactions, SecReg Article 26(e) now allows unfunded guarantees provided that: (i) exposures to the investor qualify for a 0% risk weighting; (ii) the undertaking uses an internal risk model; and (iii) the undertaking complies with designated capital requirements.

ABCP

- As noted above, the previous homogeneity requirement for the underlying asset class has been replaced by a 70% threshold when the asset class is SME loans.
- Disclosures for ABCP must now include whether the programme is fully supported by a sponsor.

Sanctions

- Article 32 of SecReg now includes failures by institutional investors to comply with Article 5 due diligence requirements as subject to administrative sanctions.
- Those administrative sanctions can include a pecuniary sanction of up to 10% of the total annual net turnover (on a consolidated basis where applicable).
- Such administrative sanctions could apply as an alternative or potentially in addition to the penalties that already apply under sectoral regimes (for example regulatory capital charges for banks under CRR).

These additional penalties are, in our view, unwarranted and have the potential to disincentivise investment in securitisations by EU institutional investors (both in absolute terms and relative to securitisation investment by non-EU investors).

Sponsor

We note that the SecReg Proposal does not include any clarification of the definition of "sponsor" so as to explicitly permit non-EU investment firms to act as sponsors, in particular for the purposes of holding the risk retention in accordance with Article 6 of SecReg. Accordingly, there remains uncertainty due to the reference to "whether located in the Union or not" in the present definition, as to whether only non-EU credit institutions (as opposed to investment firms) are permitted to act as sponsors. Consistent with the statements made in the 31 March report of the Joint Committee of the European Supervisory Authorities, non-EU investment firms should, in our view, be permitted to act as sponsors and hold the risk retention as such.

CRR Proposals

- A risk-sensitive risk weight floor has been introduced that will be applicable to the determination of risk weights for senior securitisation positions held by banks under all approaches (such formula to reference the effective risk weighting applied to the securitised portfolio, multiplied by a proportionality factor and subject to an overall minimum level).

- This approach should result in a lowering of the risk weight floor for securitisations of low-risk portfolios so as to better reflect the quality of those underlying portfolios and encourage their securitisation.
- At the same time, however, such risk-sensitive approach may increase the risk weight floor for securitisations of leveraged loan portfolios such as CLOs, for example (when underlying asset risk weights may equal or exceed 150%).
- The p-factor applicable to the calculation of risk weights for senior non-STS positions has also been reduced (from 1.0 to 0.6), but only for originators/sponsors; i.e., no relief has been given for banks acting solely as investors in non-STS securitisations.
- A concept of a “resilient” transaction has been introduced, provided certain criteria are met (some of which overlap with the STS criteria, such as the requirement for sequential amortisation of tranches and minimum granularity of the underlying assets).
- Some incremental relief (in terms of risk weight floor and/or p factor reduction) is then provided for resilient transactions (but for senior non-STS positions, only those held by originators/sponsors as opposed to bank investment generally).

Failing to reduce (or potentially even increase in the case of the new risk-sensitive formula for the risk weight floor as mentioned above) capital requirements, particularly for banks investing in senior non-STS positions including CLOs (as opposed to when acting as the originator/sponsor), will have the effect of increasing the regulatory capital burden and funding costs for banks investing in senior non-STS positions, despite the fact that many of these positions have historically suffered little or no defaults such as CLOs.

Interested in more information?

1 Pursuant to Article 3 of Regulation (EU) 2017/1129.

2 As defined in Directive 2014/65/EU.

3 As listed in Article 117(2) of Regulation (EU) 575/2013, with the guarantee subject to the conditions of Article 213 and 215 of Regulation (EU) No. 575/2013.

4 Directive 2011/61/EU on Alternative Investment Fund Managers.

Digital Assets-Focused UCC Amendments Pass New York Legislature

June 26, 2025

On June 11, 2025, the New York State Senate passed a bill adopting the 2022 Amendments to the Uniform Commercial Code (UCC).[1] The 2022 Amendments have now been passed by both houses of the New York legislature, and can be delivered to New York's governor. (The bill will only become law upon the governor's signature.) The 2022 Amendments would become effective in New York 180 days after enactment.[2]

The 2022 Amendments to the UCC, including new Article 12 for "controllable electronic records," make numerous changes to accommodate emerging technologies. In particular, the amendments modernize commercial law rules in respect of the rapidly-evolving areas of blockchain, tokenization, cryptocurrency, electronic money and other digital assets. The 2022 Amendments have been enacted in 30 states, including Delaware and the District of Columbia, and have been introduced in eight more (including New York).

Because of the importance of New York as a jurisdiction for corporate and financial transactions, New York's adoption of the 2022 Amendments (if it becomes effective) will have wide-ranging effects. Further, in a speech given during the American Bar Association's Banking Law Committee this January, New York Department of Financial Services ("NYDFS") Superintendent, Adrienne Harris, commented that as soon as Article 12 was passed by the New York legislature NYDFS would provide interpretive guidance, so New York's adoption of Article 12 may come with additional New York-specific interpretations.

Interested in more information?

1 https://www.nysenate.gov/legislation/bills/2025/A3307/amendment/A

2 Assembly Bill A3307A, §88.