Digital Asset Regulation Moves to the Agencies After the CLARITY Act Fails in the Senate

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On September 15, 2026, the Senate fell four votes short of the 60 needed to advance the Digital Asset Market Clarity Act (the CLARITY Act). Within 48 hours, the U.S. Securities and Exchange Commission (SEC) and the U.S. Commodity Futures Trading Commission (CFTC) both took steps to regulate digital assets using the authority they already have. The message for companies in this space is simple: without new legislation from Congress, the agencies plan to build the rules for digital asset markets themselves.

Why the CLARITY Act Failed

The CLARITY Act was meant to end years of confusion over whether securities or commodities rules govern digital assets. Among other things, the bill would have created a registration process for digital asset trading platforms, clarified when a digital asset counts as a security versus a commodity, and replaced the current patchwork of state rules with one federal standard. The bill failed after Senate Democrats concluded that revised ethics provisions, meant to address conflicts of interest for government officials who hold digital assets, still did not go far enough. Four Republican senators joined Democrats in voting against moving the bill forward.

Senate Banking Committee Chairman Tim Scott responded by calling on the SEC and CFTC to set clear rules for digital assets while Congress keeps working on legislation. Industry leaders echoed that call. Coinbase CEO Brian Armstrong said publicly that the industry could not keep waiting on Congress and that the agencies already have enough authority to provide clarity. Summer Mersinger, CEO of the Blockchain Association and a former CFTC Commissioner, made a similar point, arguing that clarity from the agencies alone, even without new legislation, would be enough to attract institutional investment and bring digital asset markets closer to traditional finance.

On September 17, 2026, the SEC issued two five-year exemptions (together, the Innovation Exemption) that let certain crypto trading platforms facilitate trading of tokenized versions of eligible U.S.-listed stocks without registering as a stock exchange or broker-dealer.[1] (A tokenized stock is a digital version of a company's shares that trades on a blockchain instead of a traditional exchange.) The exemption is narrower than early news coverage suggested. It applies only to a specific type of trading platform that uses automated pricing pools rather than traditional buy-and-sell order books; it excludes new stock offerings and synthetic tokens; it caps how much trading volume and how many stocks a platform can handle; and it requires a platform to give the company behind a stock 30 days to object before anyone can create a tokenized version of that company's shares.

[1]Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues "Innovation Exemption" to Facilitate the Trading of Tokenized NMS Stock and Request for Comment, No. 2026-90 (Sept. 17, 2026), https://www.sec.gov/newsroom/press-releases/2026-90-sec-issues-innovation-exemption-facilitate-trading-tokenized-nms-stock-request-comment.

Two days later, the CFTC submitted its own crypto rulemaking package to the White House Office of Management and Budget for review.[2] The CFTC has not made the details public. But based on CFTC Chairman Michael Selig's public statements and the direction of the CFTC's "Crypto Sprint" initiative, the proposal likely covers registration rules for crypto derivatives platforms, margin and clearing standards for digital assets, and possibly "perpetual swaps" — futures-like contracts with no expiration date that are widely traded outside the U.S. but have no comparable U.S. regulatory framework yet.[3] The same day, CFTC staff issued a no-action letter (a staff statement saying the agency won't take enforcement action for certain conduct) that gives software developers more room to operate if they connect users to regulated derivatives markets through digital wallets and similar tools.[4] The relief draws a line between what is and is not allowed: a covered developer may show available markets, let users submit orders, and earn transaction-based fees, but may not hold user assets, generate trading signals, or make trading decisions for users. This relief is temporary and will end once the CFTC adopts a formal rule on the same topic.

The conditions attached to the Innovation Exemption deserve a closer look. A tokenized stock can only be traded if it is paired with another tokenized stock, a non-security crypto asset such as a stablecoin that complies with the GENIUS Act, or a tokenized money market fund. There are also volume caps: for stocks in the S&P 500 and Russell 1000 indices, a platform is limited to 75 stocks and 0.25 percent of that stock's average daily trading volume; for other eligible stocks, the limits are 250 stocks and 2.5 percent of average daily trading volume. If a platform exceeds those limits, it must pause trading for three months.

A tokenized stock must also carry the same dividend, voting, and liquidation rights as the underlying stock. In a statement accompanying the order, SEC Commissioner Hester Peirce noted that the Innovation Exemption does not cover decentralized finance (DeFi) protocols generally, explaining that truly decentralized, non-custodial protocols do not need this kind of exemption in the first place.

A Coordinated Response, Not an Improvised One

These recent agency actions didn't come out of nowhere. Since late 2025, the SEC and CFTC have been working together through a joint harmonization initiative that combines the SEC's "Project Crypto" and the CFTC's "Crypto Sprint." In January 2026, SEC Chairman Paul Atkins and CFTC Chairman Michael Selig announced four shared goals: creating common definitions for digital asset categories, simplifying registration for firms that operate in both securities and derivatives

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[2] Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, *Pending EO 12866 Regulatory Review: Regulation Crypto Asset Transactions and Regulation Crypto Asset Markets*, RIN 3038-AF80, https://www.reginfo.gov/public/do/eoDetails?rrid=1537870 (last visited Nov. 10, 2026).

[3] Jeff Le Riche & Kip Randall, *CFTC Chairman Selig Announces Plans to Develop Crypto Market-Structure Rules Under Existing Authority*, Gov't Enf't, Compliance & Invs. Rep. (Sept. 3, 2026), https://www.governmentenforcementreport.com/2026/09/cftc-chairman-selig-announces-plans-to-develop-crypto-market-structure-rules-under-existing-authority/; Sarah Razaq Sallis et al., *How SEC-CFTC Harmonization Is Changing Crypto Regulation: What It Means for Your Business*, Gov't Enf't, Compliance & Invs. Rep. (Feb. 19, 2026), https://www.governmentenforcementreport.com/2026/02/how-sec-cftc-harmonization-is-changing-crypto-regulation-what-it-means-for-your-business/.

[4] Commodity Futures Trading Comm'n, Mkt. Participants Div., *No-Action Position Regarding Introducing Broker Registration Requirement Under Section 4d(g) and Associated Person Registration Requirement Under Section 4k(1) of the Commodity Exchange Act*, CFTC Staff Letter No. 26-25 (Sept. 17, 2026).

markets, setting up ways to share enforcement and surveillance data, and signing a formal agreement to keep this cooperation going beyond the current leadership's time in office.

The agencies signed that agreement in March 2026. It does not give either agency any new enforcement powers. But it does signal a shift away from a world where both regulators might separately pursue the same conduct, sometimes under different legal theories, toward a more coordinated approach. In practice, companies operating in both securities and derivatives markets may want to build compliance programs that account for both agencies at once, since resolving a matter with one agency will not necessarily prevent action by the other.

Both chairmen have acknowledged the limits of what agency action alone can do. Rules adopted by current agency leadership can be revised or reversed by future leadership, while only Congress can create the kind of lasting legal framework needed to support long-term investment. Several legislative proposals are still being considered, including digital commodities legislation pending before the Senate Agriculture Committee. In the meantime, the agencies are moving ahead under their existing authority, and companies in this space may want to expect continued guidance, exemptions, and proposed rules in the coming months.

Where the Agencies Are Likely to Act Next

Jurisdictional Classification. The traditional line between securities regulation and commodities regulation doesn't fit digital assets neatly. A token may start out as an investment contract, and therefore a security under the legal test courts use to define that term (the Howey test), but later function more like a commodity as the network behind it becomes more decentralized. The SEC's March 2026 interpretive release addressed part of this problem by recognizing that a digital asset can "separate" from its securities-law status as decentralization increases, but open questions remain, including how much decentralization is enough and how this framework applies to decentralized organizations and liquidity pools (software-based trading pools that let users trade crypto without a traditional exchange). Companies in this space may want to watch for further guidance from both agencies on these issues, especially around registration and disclosure requirements.

Derivatives Market Infrastructure. The CFTC has not yet adopted full rules for perpetual swaps (futures-like contracts with no expiration date), event contracts (contracts that pay out based on whether a specific event happens), or decentralized finance platforms that let people trade without a traditional intermediary. These areas fall solely within the CFTC's jurisdiction and do not require coordination with the SEC, though they still require further rulemaking. The proposal currently under White House review likely addresses at least some of these gaps.

On October 13, 2026, the CFTC took a further step in this direction, publishing a notice seeking public comment (known as an ANPRM) on a comprehensive set of rules for retail crypto transactions (CTXs) under the Commodity Exchange Act.[5] The notice explains that even though a 2010 law extended certain exchange-trading requirements to these transactions, the Commission has never adopted rules spelling out how that requirement applies to crypto assets. As a result,

[5] Regulation Crypto Asset Transactions and Regulation Crypto Asset Markets, 91 Fed. Reg. 64,811 (Oct. 13, 2026) (advance notice of proposed rulemaking), https://www.govinfo.gov/content/pkg/FR-2026-10-13/pdf/2026-20888.pdf.

everyday retail investors have had to rely mainly on a patchwork of state-by-state money transmission and crypto licensing rules that the Commission views as duplicative and poorly suited to protecting customers.

To address that gap, the notice previews two pieces of a possible rulemaking: a proposed rule called "Regulation CTX," which would identify which retail crypto transactions the Commission believes are covered and define key terms like "offer" and "actual delivery" in the crypto context; and a proposed rule called "Regulation CAM" (discussed below), which would create a new registration framework for exchanges that deal in these crypto transactions. The notice asks for input on how to prevent abusive practices in crypto markets under one national standard, how to incorporate industry best practices, and how to create a new type of exchange registration built specifically for these transactions. Public comments are due by December 14, 2026. Companies in this space may also want to watch the CFTC's ongoing work on round-the-clock trading and clearing, since markets that never close raise different oversight, margin, and collateral issues than traditional futures markets.

The proposed CAM registration category is the more significant of the two pieces. Instead of requiring crypto exchanges to register the same way traditional futures exchanges do, the notice proposes a new type of exchange registration — a CAM — designed specifically for exchanges that deal only in these retail crypto transactions, with its own set of core requirements adapted from the rules that already apply to traditional exchanges. The notice also proposes that these transactions generally be handled through registered brokers (futures commission merchants), with adjusted anti-money-laundering, disclosure, and margin requirements tailored to crypto assets; a parallel framework for the entities that clear and settle these trades; and a system where retail customers could only get leverage or financing for these transactions through a registered broker or bank acting as an approved leverage provider. The notice further proposes that exchanges already registered the traditional way could choose to keep that registration instead of switching to CAM status, and that a CAM could be structured as, or affiliated with, a broker or clearing entity, subject to extra safeguards addressing conflicts of interest.

Custody and Clearing Standards. Both agencies have confirmed that registered exchanges and clearing organizations can handle digital assets, and that clearing organizations can use third-party custodians to hold them. Formal rules on custody standards, insurance requirements, and keeping customer assets separate from a firm's own assets, however, have not yet been finalized. A September 2025 joint staff statement offered interim guidance on these issues, but formal rulemaking is expected, especially as banks and other traditional financial institutions expand their digital asset custody services.

On October 1, 2026, the SEC took a step toward formal rulemaking, proposing new rules to create a tailored custody framework for registered investment advisers and regulated funds (mutual funds and business development companies, which are publicly traded funds that invest in smaller or growing companies). The proposal would update existing custody requirements, including rules on financial statement audits for investment advisers and how broker-dealers hold fund assets, and would allow crypto assets to be self-custodied in certain circumstances and held with state trust companies.

SEC Chairman Paul Atkins described the proposal as replacing outdated custody rules, built for a different era, with a clear path forward for advisers and funds. The public comment period will stay open for 60 days after the proposal is published in the Federal Register.

On September 24, 2026, CFTC staff issued FAQs answering questions raised after CFTC Staff Letters 25-39 and 26-05 on using crypto assets as margin collateral (the funds a trader sets aside to cover potential losses).[6] The FAQs confirm that a registered broker (an FCM) can count the value of a customer's non-security crypto assets, including payment stablecoins, toward covering that customer's account deficit, and that an FCM can deposit its own payment stablecoins, though not other crypto assets like bitcoin or ether, into segregated customer accounts, subject to a minimum capital charge of 2 percent of market value.

For a firm's own crypto holdings, the FAQs state that CFTC staff would not object to a 20% capital charge for bitcoin and ether and a 2 percent charge for payment stablecoins, matching the SEC's parallel guidance for broker-dealers. The FAQs also confirm that clearing organizations (DCOs) can accept crypto assets, including payment stablecoins, as collateral for cleared trades, under the same standards that apply to other collateral.

The September 2026 FAQs also cover two topics beyond the original staff letters. First, they confirm that a broker or clearing organization can invest customer funds in tokenized versions of investments that are already permitted, as long as the underlying asset is itself a permitted investment, the tokenized version carries the same legal and economic rights as the traditional version, and it is held with an approved custodian.

Second, the FAQs confirm that firms can use blockchain technology to meet existing recordkeeping requirements, since the Commission treats those rules as neutral on which technology is used, so long as the system is authentic, reliable, and lets the firm retrieve records when needed. Companies relying on a public blockchain for recordkeeping may want to maintain backup systems that let them produce records even if that network becomes unavailable.

Stablecoins Outside the GENIUS Act Framework. The GENIUS Act created a federal framework for payment stablecoins and excluded compliant stablecoins from the legal definitions of security and commodity. The SEC confirmed in its March 2026 interpretive release that such stablecoins fall outside its jurisdiction. Open questions remain, though, for algorithmic stablecoins, yield-bearing stablecoins, and stablecoins that don't meet the GENIUS Act's reserve requirements. Companies in this space may want to watch for further guidance from both agencies, along with federal banking regulators, as stablecoin use continues to grow.

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[6] Commodity Futures Trading Comm'n, Mkt. Participants Div., Div. of Mkt. Oversight & Div. of Clearing & Risk, *Tokenized Collateral Guidance*, CFTC Staff Letter No. 25-39 (Dec. 8, 2025), https://www.cftc.gov/csl/25-39/download; Commodity Futures Trading Comm'n, Mkt. Participants Div., *Staff No-Action Position Regarding Digital Assets Accepted as Margin Collateral*, CFTC Staff Letter No. 26-05 (Feb. 6, 2026), https://www.cftc.gov/csl/26-05/download; Commodity Futures Trading Comm'n, Mkt. Participants Div., Div. of Mkt. Oversight & Div. of Clearing & Risk, *CFTC Market Participants Division, Division of Market Oversight, and the Division of Clearing and Risk Respond to Frequently Asked Questions Concerning Registrant and Registered Entity Activities Relating to Crypto Assets and Blockchain Technologies* (updated Sept. 24, 2026).

The Agencies Are Building the Bridge, for Now

The CLARITY Act's failure doesn't mean digital asset markets won't get regulatory clarity. It just changes where that clarity comes from, shifting it from Congress to the agencies. The SEC and CFTC are moving faster, and working together more closely, than in past years, which is good news for companies that have been operating under years of uncertainty. But there's a real tradeoff: rules created through agency action are easier for future leadership to reverse, and they're likely to be narrower than what comprehensive legislation would have provided.

Companies operating in digital asset markets may want to keep a close eye on guidance from both agencies, consider participating in public comment processes where relevant, and think about how these regulatory developments could affect product plans, compliance programs, and capital decisions. Both agencies have set up dedicated points of contact for industry questions and are actively seeking input from stakeholders.

If Congress doesn't act, the agencies are likely to keep filling the gap, and companies may want to factor that into their compliance and business planning. If you have questions about these developments, contact Jeff Le Riche, Sarah Razaq Sallis, Kip Randall, or Alex Keledjian.