

Chairman McHenry's Clarity for Payment Stablecoins Act approved by the House Financial Services Committee

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The House Financial Services Committee approved the Clarity for Payment Stablecoins Act of 2023. If enacted, the legislation would create a regulatory framework for the issuance and oversight of payment stablecoins.

While policymakers continue to hash out how various cryptoasset activities should be regulated, on July 27 the House Financial Services Committee (HFSC) pushed a regulatory framework for payment stablecoins one step closer to enactment by approving an updated version of Chairman Patrick McHenry's legislation, called the [Clarity for Payment Stablecoins Act](#).

Payment stablecoins are key components of the crypto ecosystem, and influential members of the HFSC had expressed optimism that more than a year of effort to foster consensus on stablecoin legislation would yield broad [bipartisan support](#) and eventually be [signed into law](#). But the McHenry bill ultimately passed out of committee by a vote of 34 to 16—mostly along party lines, with the exception of five Democratic members who supported the legislation—and against the stark [opposition](#) of Ranking Member Maxine Waters. According to Rep. Waters, the McHenry bill was not supported by the White House, the U.S. Treasury or the Federal Reserve.

Although Democratic opposition threatens chances of successful enactment of the McHenry bill in its current form, this legislation nevertheless represents the most progress to date on congressional authorization of a stablecoin regulatory framework.

In a recent [client update](#), we compared a prior version of the McHenry bill to Rep. Waters' draft proposal for a payment stablecoin bill. We highlighted the key areas of negotiation between the Republican and Democratic proposals, including the extent to which federal and state regulators should share oversight of the stablecoin industry, the array of bank-like regulations to impose on payment stablecoin issuers and whether to apply new regulations on participants in the broader stablecoin ecosystem, such as payment stablecoin service companies. Below we focus in detail on the key provisions of the McHenry bill, with observations on how this legislation has evolved over time compared to prior versions of proposed stablecoin legislation.

Key issues

- **Permitted payment stablecoin issuer.** The McHenry bill establishes requirements and privileges for entities that may legally issue payment stablecoins. If enacted, it would be unlawful for any entity other than a permitted payment stablecoin issuer to issue a payment stablecoin. The section imposing this prohibition has no effective date, which could imply that immediately upon enactment of this legislation any current issuer of payment stablecoins would be in violation of the law. This result appears to be an unintended drafting error.
- **Bank-like regulation for federal nonbank issuers.** The McHenry bill would establish bank-like regulation and supervision for federal qualified nonbank payment stablecoin issuers. Bank-like requirements include capital, liquidity

and risk management requirements; application of the Bank Secrecy Act and the Gramm-Leach-Bliley Act's customer privacy requirements; certain activities limits; and broad supervision and enforcement authority.

- **Role of state regulators.** The McHenry bill grants state regulators primary supervision, examination and enforcement authority over state stablecoin issuers, leaving the Federal Reserve Board (FRB) with secondary, backup enforcement authority for “exigent” circumstances.
- **Payment stablecoins are not securities.** The McHenry bill would amend the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934 and the Securities Investor Protection Act of 1970 to specify that payment stablecoins are not securities for purposes of those Acts. In contrast to other proposed stablecoin legislation, such as former Senator Patrick Toomey’s [Stablecoin TRUST Act](#), the McHenry bill does not prohibit stablecoins that offer interest from being payment stablecoins, meaning it may be possible for payment stablecoin issuers to offer interest to stablecoin holders without risking a violation of the federal securities laws.
- **Can payment stablecoins be issued on private blockchains?** An interesting implication of the McHenry bill’s defined terms is that a stablecoin issued on a private, permissioned blockchain may not be within the definition of “payment stablecoin,” and thus not subject to the bill’s requirements or benefits. Payment stablecoins are defined in the McHenry bill as a type of “digital asset,” which in turn is defined as an instrument recorded on “a cryptographically secured distributed ledger.” But the definition of “distributed ledger” refers only to “public” ledgers.
- **Issuance on public blockchains?** Even if enacted, it is unclear whether the federal banking agencies would support the issuance of payment stablecoins over a public blockchain such as Ethereum, as is today the standard for stablecoins. Although the McHenry bill appears designed to constrain the federal banking agencies’ discretion in rejecting applications, it is unclear whether a federal banking agency would deny an application to issue payment stablecoins based on a general finding that payment stablecoin activities are unsafe or unsound. The federal banking agencies have been growing increasingly critical of public blockchains and have [stated](#), for example, that “issuing ... crypto-assets that are issued, stored or transferred on an open, public and/or decentralized network ... is highly likely to be inconsistent with safe and sound banking practices.”
- **Collins Amendment.** The McHenry bill does not explicitly address the Collins Amendment, which established minimum (non-risk sensitive) leverage capital ratios. It is not clear that the McHenry bill provides regulators with sufficient authority to reduce the potential negative capital implications on the IDI and its holding company of having a subsidiary that issues payment stablecoins.
- **Tokenized deposits and other activities.** The McHenry bill provides that nothing in the bill should be construed to prevent a depository institution, credit union or trust company from: (1) accepting or receiving deposits and issuing digital assets that represent deposits (e.g., “deposit coins”); (2) utilizing a distributed ledger for books and records and intrabank transfers; and (3) providing custodial services for payment stablecoins (including their private keys) or reserves backing payment stablecoins.
- **No payment system or discount window access for nonbanks.** In contrast to prior versions, the McHenry bill does not include a provision granting access to the Federal Reserve’s payment systems and discount window for nonbank payment stablecoin issuers.
- **SAB 121.** The McHenry bill would overturn the SEC’s [Staff Accounting Bulletin No. 121](#) for depository institutions, credit unions, trust companies and their affiliates (regardless of whether they issue payment stablecoins), but—in contrast to prior versions—not for other custodians. SAB 121 directs any public reporting company that safeguards cryptoassets to record a liability on its balance sheet in the amount of the fair value of such cryptoasset, as well as a corresponding asset. The McHenry bill would also prohibit federal agencies from requiring depository institutions, credit unions, trust companies or their affiliates to hold additional regulatory capital against assets in custody, unless the appropriate federal banking agency (AFBA), National Credit Union Administration (NCUA), a state bank supervisor or a state credit union supervisor, as applicable, determines that such capital is necessary to mitigate operational risks inherent in the custody or safekeeping services.
- **Preemption.** The McHenry bill does not preempt state money transmitter licensing laws for state qualified payment stablecoin issuers.

Brief summary of McHenry bill

Three registration options

- A permitted payment stablecoin issuer must be one of:

- **Subsidiary of an IDI.** A subsidiary of an IDI that the IDI's AFBA has approved to issue payment stablecoins. The McHenry bill would also permit a credit union or a subsidiary of a credit union to issue payment stablecoins (subject to approval by the NCUA).
- **Federal qualified nonbank payment stablecoin issuer.** A person other than an IDI or a subsidiary of an IDI approved by the appropriate federal regulator to issue payment stablecoins.
 - The appropriate federal regulator for a national trust bank—because they are not insured, and are treated as nonbanks for purposes of the bill—would be the Office of the Comptroller of the Currency (OCC).
 - The appropriate federal regulator for all other federal qualified nonbank payment stablecoin issuers would be the FRB (except for noninsured credit unions, whose primary federal regulator would be the NCUA).
- **State qualified payment stablecoin issuer.** An entity legally established and approved to issue payment stablecoins by a state payment stablecoin regulator, and that complies with certain substantive requirements for issuing payment stablecoins set forth in the McHenry bill.

Approval requirements

- IDI subsidiaries and federal qualified nonbank payment stablecoin issuers
 - Must apply and receive prior approval from the primary federal payment stablecoin regulator (PFPSR) to issue payment stablecoins.
 - The PFPSR for each type of federal payment stablecoin issuer is as follows: (1) for an IDI subsidiary, the AFBA of such IDI; (2) for an insured credit union or subsidiary thereof, the NCUA; (3) for a federal qualified nonbank payment stablecoin issuer that is not a national bank, the FRB; and (4) for an entity chartered by the OCC (such as an uninsured national trust bank), the OCC.
 - The PFPSR shall inform the applicant whether the application is complete within 45 days of receiving an application, and the application shall be deemed to remain complete unless the PFPSR determines that a significant change in circumstances requires otherwise.
 - The PFPSR shall render a decision on an application no later than 120 days after informing the applicant that the application is complete; otherwise, the application shall be deemed approved. The PFPSR must submit annual reports to Congress on pending applications.
 - When determining whether to approve the application, the PFPSR is required to consider the following factors: (1) ability to meet the reserve, disclosure, capital, liquidity, risk management and activity limit requirements (described below); (2) general character and fitness of management; (3) risks presented by the applicant; and (4) benefits provided to consumers.
 - The regulator may only deny a complete application if it determines that the activities of the applicant would be unsafe or unsound based on these factors.
 - If an application is denied, the PFPSR must identify material shortcomings and provide recommendations on how they could be addressed. An applicant may also appeal a denial.
 - Although these provisions appear designed to constrain the PFPSR's discretion, as noted above it is unclear if the PFPSR could nonetheless deny an application based on a general finding that payment stablecoin activities are unsafe or unsound.
 - **Effective date and safe harbor for pending applications.** These approval requirements take effect on the earlier of (1) 18 months after enactment of the McHenry bill or (2) 120 days after finalization of the PFPSRs' implementing regulations. Beginning on the date such requirements become effective and continuing for a period not to exceed 12 months, the PFPSRs may waive the application of these approval requirements for IDI subsidiaries and nonbank entities with pending applications. The safe harbor does not apply prior to the effective date.
- State qualified payment stablecoin issuers are only required to obtain approval from a state payment stablecoin regulator, and not from the FRB.

Substantive requirements and provisions

- **Requirements and provisions applicable as a matter of law**

- **Reserve requirements.** All payment stablecoin issuers must comply with reserve requirements as well as related disclosure and certification requirements.
 - Stablecoins must be backed on at least a 1:1 basis (i.e., issuer must maintain at least 100% reserve).
 - Eligible assets include legal tender, U.S. currency (including Federal Reserve notes), insured deposits, Treasuries with maturities of 90 days or less (short-term treasuries), repurchase agreements backed by short-term treasuries or central bank reserve deposits.
 - Issuers must publish on their websites monthly: (1) the total number of their outstanding payment stablecoins and (2) the amount and composition of their reserves.
 - Each month, the previous monthly report must be examined by a registered public accounting firm.
 - The CEO and CFO must certify to the accuracy of each monthly report and are subject to criminal penalties for knowingly false certifications.
 - **Redemption.** All payment stablecoin issuers must establish procedures for “timely” redemption of outstanding payment stablecoins and publicly disclose their redemption policy.
 - **Rehypothecation.** Reserves may not be pledged, rehypothecated or reused by payment stablecoin issuers, except that short-term treasuries may be pledged for repurchase agreements with a maturity of 90 days or less for the purpose of creating liquidity to meet reasonable expectations of requests to redeem payment stablecoins. In such a case, the repurchase agreements must be cleared by a central clearing counterparty approved by the PFPSR or the issuer must receive prior approval from the PFPSR.
 - **Stablecoin holders not given priority in insolvency.** In contrast to prior versions of the bill, claims of stablecoin holders against payment stablecoin issuers are not given priority over all other claims in the issuer’s insolvency.
 - **Bank Secrecy Act.** All permitted payment stablecoin issuers treated as financial institutions under the Bank Secrecy Act.
 - **Privacy.** The Gramm-Leach-Bliley privacy requirements apply to all permitted payment stablecoin issuers.
 - **Activities limits.** Permitted payment stablecoin issuers must limit their activities to issuing and redeeming payment stablecoins, managing related reserves, providing custodial and safekeeping functions and other limited functions that directly support issuing and redeeming payment stablecoins.
- **Requirements to be implemented by rulemaking**
- **Capital, liquidity and risk management requirements.** PFPSRs are given broad authority to set reserve, disclosure, capital, liquidity, risk management and activity limit requirements; rules must be jointly issued. These requirements would also apply to state qualified payment stablecoin issuers.
 - The FRB is granted authority to issue orders and rules applicable to state qualified payment stablecoin issuers to the same extent as those issued jointly by the PFPSRs.
 - It is unclear as drafted whether the FRB would have sufficient authority to administer any such orders and rules if it does not enter into a supervisory agreement with the relevant state regulator.
 - **Application process.** PFPSRs may issue regulations to carry out the application process requirements of the legislation and then, pursuant to those regulations, accept and process applications.
 - **Implementation of substantive requirements.** The PFPSRs are required to jointly issue rules to implement the supervisory and regulatory requirements of the McHenry bill described below within 180 days of enactment. The FRB must issue rules to implement these requirements for state qualified payment stablecoin issuers.

Supervisory authority

- **IDI subsidiaries.** The AFBA that approved an IDI subsidiary’s application to issue payment stablecoins has the same supervisory authorities with respect to the subsidiary as the AFBA has with respect to the parent IDI.
- **Federal qualified nonbank payment stablecoin issuers.** The FRB and OCC’s supervisory authorities for registered nonbank entities *and their subsidiaries* are very similar to, and appear modeled after, the authorities the FRB has to supervise bank holding companies and their subsidiaries. The FRB and OCC are required to avoid duplicative oversight and must use existing reports and other supervisory information to the fullest extent possible.

- **State qualified payment stablecoin issuers.** State regulators are tasked with primary examination authority of state qualified payment stablecoin issuers. State regulators may enter into a supervisory agreement with the FRB, by mutual agreement, under which the FRB may carry out the supervision, examination and enforcement authority with respect to state issuers of such state. State regulators and the FRB must share information on an ongoing basis with respect to state payment stablecoin issuers, including copies of applications and accompanying materials.

Enforcement authority

– IDI subsidiaries and federal qualified nonbank stablecoin issuers

- The PFPSR for these two categories of payment stablecoin issuers may prohibit a payment stablecoin issuer from issuing additional stablecoins if the PFPSR determines that the issuer or any institution-affiliated party (IAP) is violating the McHenry bill or a regulatory commitment.
- PFPSRs also are given enforcement authority over these two categories of payment stablecoin issuers and their IAPs that is similar to the general enforcement authority federal banking agencies are given for IDIs and their IAPs in section 8 of the Federal Deposit Insurance Act (12 U.S.C. § 1818). This authority is the main tool used by the federal banking agencies to bring enforcement actions against IDIs and their holding companies.
 - These authorities include cease and desist orders, civil monetary penalties, termination of stablecoin issuance and removal and prohibition orders.
 - IAPs of payment stablecoin issuers include a broad range of persons, such as directors, officers, employees, control persons and agents.

– State qualified payment stablecoin issuers

- State regulators are tasked with primary supervisory, examination and enforcement authority over state qualified payment stablecoin issuers, but the state regulator and FRB may agree to enter into a supervisory agreement for the FRB to carry out supervisory, examination and enforcement authority.
- The FRB is also provided back-up enforcement authority in exigent circumstances, regardless of whether it enters into a supervisory agreement with the state regulator. The FRB must provide 48 hours' written notice to the relevant state regulator before commencing such an enforcement action against a state qualified payment stablecoin issuer or IAP of such issuer. The FRB must issue rules that identify qualifying exigent circumstances under which the FRB may bring such an enforcement action.¹ The FRB's enforcement authorities do not preempt state law or supersede any state licensing requirement.

Regulation of stablecoin ecosystem

– Custodians and wallet providers

- Grants the FRB regulatory and supervisory authority over persons who engage in the business of providing custodial or safekeeping services for payment stablecoins or their private keys, if not otherwise subject to (i) regulation by the SEC or CFTC or (ii) a state bank supervisor, as long as the state bank supervisor shares information on an ongoing basis with the FRB.
- Such persons are subject to customer protection requirements related to asset segregation and a prohibition on commingling customer property, subject to an exception that payment stablecoins, cash and other property of multiple customers—but not of the payment stablecoin issuer—can be commingled and deposited in an omnibus account at an IDI or trust company. They are also required to take appropriate steps to protect customer property from creditor claims.

– Self-custody

- The McHenry bill explicitly does not apply to a person or business engaged in the business of providing hardware or software to facilitate a customer's self-custody of payment stablecoins.

– Compatibility and interoperability standards

- The federal payment stablecoin regulators, in consultation with the National Institute for Standards and Technology, are provided authority to prescribe standards to promote compatibility and interoperability for payment stablecoin issuers.

– **Moratorium on algorithmic stablecoins**

- Imposes a two-year moratorium on the issuance, creation or origination of “endogenously collateralized” (i.e., algorithmic) stablecoins not in existence on the date of enactment of the bill. Directs the U.S. Treasury, in consultation with other agencies, to produce a report to Congress on algorithmic stablecoins and other nonpayment stablecoins within one year of enactment.

Resources

Crypto Regulation Hub

Visit our Crypto Regulation Hub for links to congressional proposals related to the regulation of crypto assets and other helpful materials.

[Explore our crypto resources](#)

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¹ A prior version of the bill would have granted the FRB a similar authority, but would have required the FRB to first recommend the state regulator take the requested action, and then only grant the FRB authority to act if the state regulator declined to do so.