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In the Wake of CLARITY Act's Failure, Agencies Move Forward Without Congressional Action or Certainty

WRITTEN BY

Genna Garver | David Madrazo

KEY POINTS

- The Senate rejected cloture on the Digital Asset Market Clarity Act of 2025 (H.R. 3633) by a vote of 49-50 on September 15, 2026, effectively ending the bill's prospects for the remainder of this Congress.
- Without congressional action, the CFTC cannot create a registration and licensing regime for spot digital commodity exchanges, brokers, and dealers using its existing authority alone, as the Commodity Exchange Act limits the agency's spot-market authority to anti-fraud and anti-manipulation enforcement.
- The SEC's proposed Regulation Crypto Assets, released August 18, 2026, includes a two-tier fundraising exemption of up to $75 million for Tier 2 in a 12-month period, approximating CLARITY's capital formation objectives but on a less durable legal foundation than a statutory exemption.
- CLARITY's bankruptcy and Bank Secrecy Act provisions — including customer-property priority for digital commodities in Chapter 7 proceedings and comprehensive classification of crypto platforms as financial institutions — cannot be replicated through agency action and require an act of Congress.
- Agency action remains vulnerable to reversal under future administrations and legal challenge, as demonstrated by the Fifth Circuit's vacatur of several of the SEC's Biden-era rulemakings on the grounds that the Commission exceeded its statutory authority.

For years, the crypto industry has pushed for clarity on U.S. law and a regulatory framework to legitimize the U.S. market and encourage institutional adoption. Industry hopes for clarity were high last summer. On July 17, 2025, Congress passed the GENIUS Act and the House passed the Digital Asset Market Clarity Act of 2025 (H.R. 3633)[1] (CLARITY) by a 294-134 vote. On September 15, 2026, after more than a year of bipartisan Senate committee work and a last-minute release of revised substitute text,[2] the Senate rejected cloture on the motion to proceed on the bill by a vote of 49-50 (with one senator not voting), 11 votes short of the 60 needed to open floor debate. With the Senate approaching its recess ahead of the November 2026 midterms, the bill is effectively dead for the remainder of this Congress. But who needs CLARITY anyway?

THE REGULATORY FRAMEWORK CLARITY WOULD HAVE CREATED

CLARITY would have established a statutory market-structure framework for digital assets by allocating principal regulatory responsibility between the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). Its classification framework would have distinguished a "digital commodity" from an "investment contract asset," providing a defined basis for determining whether a digital asset and its related transactions fall principally within the CFTC's commodities-market jurisdiction or the SEC's securities-law jurisdiction. That allocation was intended to replace much of the present uncertainty surrounding the treatment of assets that may evolve over time and the respective roles of the two agencies.

The bill also would have created new CFTC registration categories for digital commodity exchanges, brokers, and dealers. Those categories would have addressed the frequently described spot-market gap: today, the CFTC has anti-fraud and anti-manipulation enforcement authority over spot digital asset commodity markets, but it does not have a general statutory program to register or supervise the intermediaries that operate those markets. CLARITY would have supplied an affirmative licensing and supervisory structure for those businesses.

For capital formation, CLARITY would have directed the SEC to adopt rules under the Securities Act and the Exchange Act, to be referred to collectively as "Regulation Crypto," to implement statutory exemptions from the registration requirements for transactions in "ancillary assets."[3] Regulation Crypto in part would have required the SEC to exempt offers, sales, or distributions of an investment contract involving an ancillary asset from the Securities Act's registration requirements, provided the offering does not exceed the greater of: $50 million, for up to four years; or 10% of the total dollar value of the ancillary assets outstanding, subject to tailored disclosure obligations. The bill also would have amended the Bankruptcy Code to classify digital commodities and ancillary assets as "customer property" in Chapter 7 proceedings, an important change to the treatment of customers in a platform insolvency.

Additional provisions would have brought crypto platforms within Bank Secrecy Act (BSA) coverage by treating them as financial institutions. The legislation also would have produced downstream tax consequences by tying treatment under Internal Revenue Code Sections 864(b)(2)(B) and 475 to a statutory digital commodity classification and CFTC-regulated-market status. In combination, these provisions would have created a more integrated legal framework spanning market oversight, capital raising, insolvency, anti-money-laundering obligations, and tax treatment.

AGENCIES MOVE FORWARD WITHOUT LEGISLATION

Federal agencies are not waiting for Congress. On August 18, 2026, weeks before the Senate's failed cloture vote, the SEC proposed Regulation Crypto Assets,[4] which includes a two-tier fundraising exemption of up to $20 million for Tier 1 and up to $75 million for Tier 2 in a 12-month period, plus a separate $5 million/four-year startup exemption, along with a conditional safe harbor for crypto assets that meet its conditions. The proposal reflects the SEC's view that it can use existing exemptive and interpretive authority to create a tailored pathway for qualifying offerings.[5] An agency-created exemption, however, rests on a different legal foundation than a statutory exemption or statutory directive to prescribe such rules, such as the congressional directive for the SEC to adopt Regulation Crypto included in the failed CLARITY bill. The failed cloture vote does not change the SEC's existing statutory authority to proceed with proposed Regulation Crypto Assets.

The CFTC is also moving quickly in the wake of the failed cloture vote. On August 20, 2026, CFTC Chairman Michael Selig announced that he had directed staff to explore rules to "codify a CFTC market structure for crypto assets using the agency's existing authorities," including designating current registrants and non-registrant crypto exchanges as a new type of designated contract market, a "crypto asset market," on which crypto assets could trade on a leveraged or margined basis.[6] The day after the vote, Selig said the agency was "locked in and ready to ship its rules for the new frontier of finance."[7] On September 17, 2026, two days after the vote, the CFTC submitted a pre-rule action titled "Regulation Crypto Asset Transactions and Regulation Crypto Asset Markets" (RIN 3038-AF80)[8] to the Office of Information and Regulatory Affairs (OIRA) within Office of Management and Budget. The rulemaking is expected to involve two comment periods and two OIRA reviews, and a binding rule is not expected to take effect before late 2027. The text of the CFTC draft proposed regulation is not yet publicly available. Whatever emerges can only go as far as the CFTC's existing authority, which reaches leveraged or margined retail transactions in crypto commodities but, for ordinary fully paid spot trading, extends only to anti-fraud and anti-manipulation enforcement.

Other post-vote actions likewise illustrate how the agencies are using existing authority while Congress remains at an impasse. On September 17, 2026, the SEC issued a separate, temporary and conditional exemptive relief under the Exchange Act (Release No. 34-106402).[9] For five years, venues that trade tokenized NMS stock through permissioned automated market makers are exempt from the definition of "exchange," and their liquidity providers from the definition of "dealer." The exempt relief is subject to conditions on symbols, volume, holder rights, and trading halts. The SEC's release for the relief also requests comments on whether modifications to the exemptions may be necessary and whether the exemptions should be permanent.

Also on September 17, 2026, the CFTC's Market Participants Division issued Staff Letter 26-25, extending staff no-action relief first granted to a single self-custodial wallet provider to all "passive software providers" whose software lets users transmit their own orders to registered intermediaries and designated contract markets.[10] Subject to specified conditions, including that the provider exercises no routing or execution discretion, the Division will not recommend enforcement against qualifying providers for failing to register as introducing brokers when their software provides access to CFTC-regulated derivatives, including event contracts and perpetual contracts.

On September 24, 2026, the CFTC's Market Participants Division, Division of Market Oversight, and Division of Clearing and Risk released updates to FAQs Concerning Registrant and Registered Entity Activities Relating to Crypto Assets and Blockchain Technologies.[11] The FAQs,[12] which were originally released on March 20, 2026, were updated to address investments of customer funds in tokenized forms of permitted investments under CFTC Regulation 1.25 and the use of blockchain (or distributed ledger) technologies to satisfy a registrant's recordkeeping requirements. The post-CLARITY failure regulatory activity is consistent with the direction from House Financial Services Chair French Hill and House Agriculture Chair Glenn Thompson: "Until statutory certainty is achieved, we look forward to partnering with the federal financial regulators as they utilize existing authorities to develop rules and issue guidance governing digital assets."[13] These measures can advance discrete aspects of the market-structure agenda, but they do not eliminate the need for Congress to address the core statutory gaps left in the wake of CLARITY's failure.

Without congressional action, the CFTC cannot create a registration and licensing regime for spot digital commodity exchanges, brokers, and dealers using its existing authority alone. Under the Commodity Exchange Act, the agency's authority in spot commodity markets is limited to anti-fraud and anti-manipulation enforcement. It has no existing statutory basis to require those spot intermediaries to register or to impose the ongoing supervisory, capital, conduct, and compliance obligations that would accompany a comprehensive federal regime.

Other CLARITY features cannot be replicated administratively. A customer-property priority for digital commodities and ancillary assets in a Chapter 7 case requires an amendment to the Bankruptcy Code, which only Congress can enact. No administrative process can supply that priority, and the uncertain claims priority confronting customers of failed platforms therefore remains. Similarly, a comprehensive designation of crypto platforms as financial institutions under the BSA turns on statutory definitions that FinCEN and Treasury cannot unilaterally rewrite. Existing FinCEN guidance and enforcement already reach many crypto businesses through current money-transmitter concepts, but that authority is not the comprehensive statutory classification CLARITY contemplated.

The proposed tax consequences also lack an equivalent administrative solution. Eligibility under Internal Revenue Code Sections 864(b)(2)(B) and 475 tied to a digital commodity classification or a CFTC-regulated market would require statutory language or, at a minimum, Treasury and IRS guidance adopting an interpretation of existing law that has not yet occurred. Participants therefore cannot assume that non-legislative action will produce CLARITY's intended tax outcomes.

Agencies can approximate some of what CLARITY would have done, particularly on capital formation and product innovation, but core structural pieces, most importantly a durable spot-market intermediary licensing regime, bankruptcy protection for customers, and BSA classification, require an act of Congress.

WHAT'S THE DIFFERENCE FOR INDUSTRY PARTICIPANTS?

The most immediate practical industry consequence of CLARITY's failure is the continued absence of a federal licensing regime for spot digital asset exchanges, brokers, and dealers. These intermediaries remain without a clear federal registration pathway tailored to their activities, a gap that can continue to affect banking relationships and institutional counterparty comfort. Businesses must continue to evaluate the existing patchwork of federal enforcement authority, state requirements, and contractual risk allocation rather than a unified CFTC-administered program.

CLARITY's failure also leaves customers of digital asset platforms as potentially unsecured creditors facing the same uncertainty concerning claims priority in bankruptcy that has been a feature of prior exchange failures. Without a statutory customer-property provision, required custody arrangements, account documentation, asset segregation practices, and the applicable insolvency framework remain central to assessing recovery risk.

Relief for capital formation is likely to continue to advance without congressional action. As discussed above, the SEC's proposed Regulation Crypto Assets tracks much of the practical fundraising objective that CLARITY would have codified, but with a higher $75 million offering ceiling. Issuers may therefore see a similar practical outcome if the SEC adopts the rule, but on a less durable legal foundation than a statutory exemption.

While the agencies move forward to give the industry clarity, their actions, unlike congressional action, cannot give certainty. Agency action is subject to direction under future administrations, which could revise or withdraw rules and interpretations and change agency enforcement priorities. Recent SEC history illustrates these risks. On June 17, 2025, the SEC rescinded 14 proposed rules relating to investment adviser disclosure obligations and broker-dealer regulation that remained on the SEC's regulatory agenda following the change in administration. Even long-settled rules are not permanent. On September 3, 2026, the SEC proposed to rescind the investment adviser pay-to-play rule[14] in place since 2010, in its entirety, along with its related recordkeeping requirements, reflecting a change in policy philosophy, not a change in the underlying facts or statute. On enforcement, following years of an enforcement-first posture, the SEC under the Trump administration dismissed several enforcement actions against crypto firms and created a crypto task force to develop a comprehensive regulatory framework through public and industry engagement.

Agency action without legislation is also more exposed to legal challenge: the U.S. Court of Appeals for the Fifth

Circuit has vacated several of the SEC's signature Biden-era rulemakings on the grounds that the Commission exceeded its statutory authority.[15] Each vacatur leaves market participants who had already begun complying, or structuring around, those rules to unwind that work.

Overall, most channels for advancing innovation and capital formation remain open through agency action, but industry participants should not expect structural protections achieved through licensing that only a statute can deliver. Structuring decisions should continue to account for legal and political uncertainty until Congress revisits the issue.

PUBLIC ENGAGEMENT

Industry participants continue to play a vital role in the creation of a legitimate U.S. regulatory framework. Troutman Pepper Locke is preparing responses to the agencies' requests for comments. Industry participants interested in sharing their views relating to matters for which the agencies have requested comment should reach out before the applicable deadline. Comments for the SEC's proposed Regulation Crypto Assets are due October 20, 2026.

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[1] For more information, *see* https://www.congress.gov/bill/119th-congress/house-bill/3633.

[2] Except as otherwise indicated, this article discusses the revised text released by the U.S. Senate Banking Digital Assets Subcommittee Chair Cynthia Lummis (R-WY) alongside Chairmen John Boozman (R-AR) and Tim Scott (R-SC) on September 14, 2026, which would have been offered as an Amendment in the Nature of a Substitute if cloture was invoked on the motion to proceed. The revised text is available at https://www.lummis.senate.gov/wp-content/uploads/EHF26724.pdf.

[3] Under the September 14, 2026 revised text of the draft bill, the term 'ancillary asset' means a network token, the value of which is dependent upon the entrepreneurial or managerial efforts of an ancillary asset originator or a related person, as those concepts are further specified by the SEC by regulation.

[4] Proposed Regulation Crypto Assets, SEC Release Nos. 33-11434; 34-106150; File No. S7-2026-27, Aug. 18, 2026, available at https://www.sec.gov/files/rules/proposed/2026/33-11434.pdf.

[5] According to the proposing release, the SEC is relying on the authority set forth in the Securities Act, particularly sections 3(b) (small issues exemptive authority for when registration is not necessary in the public interest and for the protection of investors), 18 ("blue sky" authority for the SEC to add categories and set parameters for the definition of "covered securities"), 19(a) (general rulemaking authority, including rules and regulations governing registration statements), and 28 (general exemptive authority to provide any exemption necessary or appropriate in the public interest, and consistent with the protection of investors), and the Exchange Act, particularly sections 3(b) (authority to define certain terms), 12 (authority to prescribe registration forms, set thresholds for registration/deregistration, and exempt securities or issuers from registration requirements), 13 (authority to prescribe rules and grant exemptions for periodic reporting obligations), 15 (authority to prescribe rules and grant exemptions for broker-dealer registration and regulation), 23(a) (authority to prescribe necessary or appropriate implementing rules, and may classify persons, securities, transactions, etc., and impose different requirements on different classes, but in each case must consider the impact on competition and not impose an unnecessary competitive burden), and 36 (general exemptive authority to provide any exemption necessary or

appropriate in the public interest, and consistent with the protection of investors).

[6] https://www.cftc.gov/PressRoom/SpeechesTestimony/opaselig10.

[7] Michael S. Selig, Chairman of the CFTC [Mike Selig, @ChairmanSelig], X (Twitter), September 16, 2026, 10:35AM ET, available at https://x.com/chairmanselig/status/2100232064259735589?s=46.

[8] As of the date of this article, Regulation Crypto Asset Transactions and Regulation Crypto Asset Markets is pending EO 12866 regulatory review, meaning it is sitting with the OIRA, waiting for final clearance before it can be officially issued. For more information, *see* https://www.reginfo.gov/public/do/eoDetails?rrid=1537870.

[9] *See* Order Granting Temporary Conditional Exemptive Relief, Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934, from the Definition of "Exchange" in Section 3(a)(1) of the Exchange Act for the Use of Certain Distributed Ledger Trading Venues for Tokenized NMS Stocks and from the Definition of "Dealer" in Section 3(a)(5) of the Exchange Act for Certain Liquidity Providers for Tokenized NMS Stocks, and Request for Comment, SEC Release No. 34-106402; File No. 4-927, September 17, 2026, available at https://www.sec.gov/files/rules/exorders/2026/34-106402.pdf.

[10] *See* CFTC Staff Issues No-Action Position to Providers of Passive Software, CFTC Release Number 9300-26, September 17, 2026, available at https://www.cftc.gov/PressRoom/PressReleases/9300-26.

[11] *See* CFTC Staff Releases Updates to FAQs Concerning Registrants and Registered Entity Activities Relating to Crypto Assets and Blockchain Technologies, CFTC Release Number 9303-26, September 24, 2026, available at https://www.cftc.gov/PressRoom/PressReleases/9303-26.

[12] Available at https://www.cftc.gov/media/14671/FAQ_CryptoAsset092426/download.

[13] Chairman Hill & Chairman Thompson Joint Statement on Senate CLARITY Vote, U.S. House Committee on Financial Services, September 15, 2026, available at https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=411233.

[14] Political Contributions by Certain Investment Advisers, SEC Release No. IA-6994; File No. S7-2026-31, September 3, 2026, available at https://www.sec.gov/files/rules/proposed/2026/ia-6994.pdf.

[15] *See* Nat'l Assoc. of Private Fund Mgrs. v. SEC, No. 23-60471, 2024 WL 2836655 (5th Cir. June 5, 2024). *See also* Nat'l Ass'n of Priv. Fund Managers v. SEC, No. 4:24-cv-00250 (N.D. Tex. Nov. 21, 2024).

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