The Crypto Exchange — Navigating the Future of Payment Stablecoins: Legislative Updates and Market Implications (Crossover Episode With _Payments Pros – The Payments Law Podcast_)
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Carlin McCrory:

This is a special crossover episode with *Payments Pros* and *The Crypto Exchange*. *Payments Pros* is a Troutman Pepper Locke podcast focusing on the highly regulated and ever-evolving payment processing industry. This podcast features insights from members of our fintech and payments practice, as well as guest commentary from business leaders and regulatory experts in the payment industry.

I'm Carlin McCrory, one of the hosts of the *Payments Pros* podcast. Before we jump into today's episode, let me remind you to visit and subscribe to our blog, TroutmanFinancialServices.com. And don't forget to check out our other podcasts on troutman.com/podcasts. We have episodes that focus on trends that drive enforcement activity, consumer financial services, and more. Make sure to subscribe to hear the latest episodes.

Today, I'm joined by my colleagues Alex Barrage and Ethan Ostroff to discuss some of the recent legislative updates surrounding payment stablecoins and clear up some common misconceptions. We'll also discuss how banks and non-banks can navigate the opportunities in the stablecoin space and consider where stablecoin applications might be headed in the next five years.

Thank you so much to both of you for joining me today.

Ethan Ostroff:

Thanks for having us, Carlin. Appreciate it, as always.

Alexandra Barrage:

Yes, thank you.

Carlin McCrory:

Now, Alex, can you just set the stage and define what we mean by a payment stablecoin for the purposes of this podcast?

Alexandra Barrage:

Sure. Payment stablecoins are a type of crypto asset, and it's really important that we define them up front because many people may not understand how payment stablecoins are different from other types of stablecoins, and then, of course, how they're different from Bitcoin. They're very different. They're not a Bitcoin. They're not a meme coin. Payment stablecoins are a digital financial instrument, which are the focus of two bills, we'll talk about in a few minutes, and their value is pegged to another asset and designed to maintain a stable price. They're a form of digital money that's recorded on a blockchain, which people hold typically in wallets, digital asset wallets. And they are actually not expected at all to fluctuate in value because they are pegged to a reference asset. And something like 80% or 90% of payments stablecoins today, that reference asset is US dollar.

So, some people may have heard of an example of this. Payment stablecoin USDC is an example, PYUSD, that's issued by Paxos. There are a number of payment stablecoins today that are in circulation. And to give folks who are listening in a sense of the scale, there are roughly between $225 billion to $230 billion of payment stablecoins in circulation globally today. And the significant increase in stablecoin circulation has happened largely just over the past year. So, other features of payment stablecoins that are important to know are that they're backed by reserves with what we call in the banking world, high-quality liquid assets or assets that are easy to liquidate. That could be cash, that could be US treasuries, that could be a host of other types of high-quality liquid assets that are defined specifically in the bills currently. And then there are some properties of payment stablecoins that remind us of money that we use today, such as payment stablecoins are thought of as a unit of account. That means they can be a benchmark for trading. And today, payment stablecoins are really used in the DeFi crypto trading context. They're not instruments that we use for retail purposes, really. But that may change.

Also, payment stablecoins are like a store of value, and they're designed to maintain a stable value over time. They are a medium of exchange, right? So, in the DeFi context, for example, they are readily accepted as a form of payment, both for purposes of primary and secondary market trading, and they are a digital bearer instrument, which means that if you hold a stablecoin, you are the owner of that stablecoin, and you have the ability, if you ever want to redeem your fiat backing the value at stablecoin, you have the ability to basically get that value back.

So, those are some characteristics of payment stablecoins. Thanks for asking the question because it's important to know what we're talking about.

Carlin McCrory:

Alex, you mentioned that there are several different payment stablecoins. For the purposes of, let's say, retail, do you think having all of these different stablecoins is a good idea for the market or perhaps having one stablecoin issued by the federal government may have a better use case, or what are your thoughts on that?

Alexandra Barrage:

So, I think, first of all, we don't have currently any expectation that the government will be issuing a payment stablecoin or CBDC, which is over the past several years, there's been some talk about studying that. That idea has basically been put to bed by recent executive order and statements by the current administration. So, if folks are thinking, "Oh, this might be like a CBDC. We should also dispel that." That's totally different and not anticipated.

However, people sometimes think about the advantages of payment stablecoins, such as the fact that they're always on money. They're 24/7. They are not dependent on an intermediary. So, if I want to send you value, let's say you're living in another country like, let's call it the UK and I don't want to pay for the charges that come along with that from a bank to bank transaction lens, I might say, "Oh, maybe I can send you that value using stablecoin." Well, people start saying, "Well, the immediacy of that, the 24/7 aspect of that kind of feels like real-time payments, FedNow, and these other things that the federal government has or has talked about. So, why are stablecoins any better than that?"

That's kind of how the federal banking agency piece sometimes comes into the discussion. But I think for purposes of the interesting question you asked around competition, my strong view and the view of many people that follow this stuff is that, no, we should not have a monolithic stablecoin issuer. That would be bad for holders, both institutional holders, and consumer holders. Instead, what we should have is legislation that really fosters robust competition for whether it's a private issuer, or a bank issuer, or a credit union issuer, or some kind of state-regulated issuer to all be able to do issuance, so long as they're abiding by the same ground rules. That's kind of the premise of a lot of these bills is to make sure that there's a level playing field, that there's regulation and clear rules of the road, but in fact that there hopefully will be a multiplicity of players.

That's why this topic is so interesting to me because really what stablecoins represents and what this legislation, I think, represents is the future of payments and an entirely new regime that will be welcoming of both private and public sector entrants. This is why these ideas and this legislation and the potential for retail payments using stablecoins is so interesting to me.

Ethan Ostroff:

I would just add, I think you're seeing right now the anti-CBDC Surveillance State Act have been introduced in both the House and the Senate and expected to progress there. At the same time, though, we have this interesting idea that states themselves may try to issue their own stablecoins. For example, Wyoming, they're, I think, the state that's on the fastest track towards launching its own stablecoin, and that's an interesting thing to watch as well to see if Wyoming really does get this off the ground and if other states follow suit.

Carlin McCrory:

That's really interesting. And I know, Ethan and Alex, there was a big statement from the SEC this week. Can you expand upon that a little bit?

Ethan Ostroff:

We've seen a lot of activity by the SEC in a lot of different ways that intersects with digital assets. One of the things that we saw on April 4th was the staff of the SEC's Division of Corporation Finance issue a statement concluding, and I think it's really important that people focus on the narrow sort of scope of this, right? Basically, there's a narrow class of USD-backed, fully reserved, non-yield-bearing stablecoins that the Division of Corporation Finance views as not involving the offer or sale of securities within the meaning of the Securities Act or the Exchange Act.

The view of the staff now, according to this statement, is that issuing or redeeming these particular types of stablecoins does not require Securities Act registration because the coins don't meet the definitions of a security under both the Reves family resemblance test and the Howey test. There are some strict conditions, one-to-one USD backing with low-risk reserves, on-demand redemption of par, no expectations of profit, in other words, not an investment. And I think the way I see it is that if these conditions are met, the staff use a stablecoin as resembling a cash equivalent payment instrument, not a security.

But I think it's also important that this is staff-level guidance, not a commission rule regulation or anything official. The statement itself does say it has no legal force or effect, including it's not a safe harbor. In addition, one of the interesting things Commissioner Crenshaw dissented basically saying that staff fundamentally misunderstands the law and the realities of stablecoin arrangements. So, I think one way of looking at her decision to make this statement is for industry participants and stakeholders to understand there is a real difference of opinion amongst the commissioners at the SEC about whether or not particular types of stablecoins can also qualify as securities. But I'm interested, Alex, also, to hear your thoughts about this and some of your takeaways.

Alexandra Barrage:

Yes. Well, that was a great summary. Thanks, Ethan. I'll start really basic, which is why are we hearing about this from the SEC now? And the reason I ask that is for a few reasons, mainly which is, if you study these bills, if you've looked at these stablecoin bills just over the past, I don't know, a couple years, they've each included language that specifically says payment stablecoins is defined in this bill are not securities. And they walk through not just the 40 act provisions, I think it's also under 32 and 33 act, they might also cite SIPA, I'd have to double check that.

So, it's sort of like, why are we getting this non-binding staff opinion now? I mean, we got one on mean points. Maybe you can do this as like the next thing that the corp finance team wants to clarify there. But the timing seemed a little weird to me because we're supposed to be on the precipice of trying to get these bills done. So, I don't have any insight into the timing of that. I will say on a very, very close read of the text and including the footnotes, there are a number of aspects of the analysis that I don't think are totally accurate, more so on probably a technical level than anything else. However, it was interesting to read how the staff walked through both the Howey analysis and the Reves test, analogizing could payments table to be thought of as a note? Why or why not? And just walking through the tests. And I think as someone who is not a securities lawyer, but has enough of an interest in the technical arguments, that was interesting to me.

I also think just as a matter of process, even though Commissioner Crenshaw took issue with the analysis and basically said, "You've understated the risks here." The fact that that was dated on the same date, which was April 4th, indicates she had full knowledge that this was coming and was prepared to dissent robustly, which she did. And I just think as a matter of good government and good process, that's good. So, it's clearly the staff is communicating up the chain.

I'm not going to comment on specific aspects of the dissent, except to say they reminded me a lot of a paper, and this was actually footnoted in Crenshaw's dissent, a paper on credit slips, which I read, which was authored by Georgetown professor Adam Levitin. A lot of the same arguments, I think, are picked up in the commissioners' dissent. Many of them touch on aspects that are perhaps less sexy than most people would think about, but they're nevertheless important arguments, especially around consumer protection and how stablecoins proliferate primarily on the secondary market, and I think in her statement, it was something like 90%. I don't know. I didn't see any footnoted data there, but I think she said 90% of stablecoins are held through centralized exchanges.

In her view, and I think she's citing Adam Levitin here, there's just not enough clarity on what rights holders have. Again, I'm not going to take a position on that, except to say, after I read Adam Levitin's article, a good friend and colleague of mine put together a piece to try and knock down some of the arguments that I think proliferate about stablecoins and Adam's piece was something we looked at.

So, I think it's interesting. I don't know to what extent the staff bulletin or the pushback from Commissioner Crenshaw is going to really impact the bills. And I still have a question about the timing of those issuances. But nevertheless, they are out there. They're important for people to read and have thoughts about.

Carlin McCrory:

And Alex, picking up on something you just said about myths associated with payment stablecoins, can you talk about some of those?

Alexandra Barrage:

Yes. Well, there are lots of myths. When we were writing this piece, we tried to focus on the most prevalent myths. So, we chose three. One myth is that stablecoins are going to compete with deposits and that stablecoins are volatile instruments. And to be fair, we survived or maybe barely survived the crypto winter and there were a lot of crypto companies in bankruptcy. None of them were payment stablecoin issuers, but I think there's a generalized concern about crypto generally that leads into paying stablecoins, and so we have to deal with those narratives and try to clear them up. That was the first one.

I think on a more technical level, the way the payment stablecoins are intended to be structured at least under these bills, they're not supposed to pay any interest or yield unlike deposits, right? And so, our premise there is to say, look from a purely economic perspective and just their structure, they're different. Also, there's quite a lot of disclosure that happens around the reserves of a payment stablecoin under existing state regulation, and that's a monthly attestation that these issuers today, these private issuers, have to abide by whereas with a bank deposit, banks have to do call reports every quarter. So, our conclusion on this myth was they are neither volatile instruments nor are they deposit-like. By the way, in some cases, you're getting disclosure from a stablecoin issuer today than you are from a bank. But nevertheless, in each case, a depositor and a holder are protected. They're just protected in different ways, right? And the other piece too. Of course, if you hold a deposit, you have insurance up to a statutory limit.

So, what we tried to do in the first myth is to say, let's really unpack this and what do we really mean by deposit volatility when we're talking about a payment stablecoin?

The second and related myth, I think, is that people think stablecoins are going to eat the world of money and deposits are going to disappear off of banks' balance sheets. Here again, if payment stablecoins aren't paying yield or interest, that makes it really expensive for holders to hold, right? Because they're not earning interest somewhere else. Likewise, it makes it expensive for banks to issue because they're not getting any upside. So, we just wanted to unpack some of those pieces too, and our conclusion is we really need to think about that myth a lot more. We don't think they're going to eat the world of money, but we do think that there are some unique use cases where people will hold stablecoins for a particular purpose for what they need to do, whether it's cross-border remittances or some other use case. And that's how we ought to think about it.

Ethan Ostroff:

Yes, I will say, I mean, to me, one of the most interesting use cases is cross-border remittance and 24/7/365 settlement. That seemingly could improve the lives of a lot of people around the world in some ways. But I do think it's interesting to note when we talk about whether or not interest-bearing stablecoins make sense, I think that's something that is the subject of ongoing debate, and there are certainly folks out there in this ecosystem who want to be able to pay interest on stablecoins to consumers, and want banks and crypto companies to be able to do that.

Compare, in that vein, they compare the earnings you get in a savings account to what you might, as a consumer, might be able to get in treasuries. There's a push for the legislation that's advancing on the hill to permit that, and to permit stablecoins to pay interest like an ordinary savings account. But importantly, I think, without the disclosure requirements and tax implications imposed by securities laws.

Carlin McCrory:

Ethan, you brought up the legislation. Can we discuss that a little bit? How is it structured? What's the current state of play? What are the open issues and areas of concerns raised by the industry stakeholders?

Alexandra Barrage:

The current state of play on both the House bill, which is called the Stable Act, and the draft Senate bill, which is called the Genius Act, is that, as of today, both of those drafts contain provisions saying that payment stablecoins cannot pay yield or interest. That change started in the in the genius bill somewhere around mid-March and has now been picked up in the most recent markup of the stable bill that I reviewed.

I think reading the tea leaves that was probably an ask that was heavily supported by the banking industry, given the concerns in the myth we talked about before, I think it also helps support the concerns that many have about liabilities running off the balance sheet and then banks not being able to lend to the same extent. So, that's where that particular issue currently stands.

More broadly, I would say the sections of the bills are converging more and more and they touch on a few different big concepts. One is what is a payment stablecoin? The definition in those bills are much more technical than the one that I talked about at the top of the podcast, but they are virtually similar or identical. Then, who can issue a stablecoin, payment stablecoin? So, here again, the bills are largely similar, and those issuers fall into one of several groups. The first group is, if you're a private issuer, you could be regulated as a state permissioned payment stablecoin issuer, or you can be regulated at the federal level, or a federal payments stablecoin issuer. And in that case, your primary federal regulator will be the OCC. And if you're a bank or a credit union, in particular, if you're a subsidiary of an IDI or a subsidiary of a credit union entity, I forgot the exact name, you can be an issuer.

So, it includes banks and non-banks. It would include state banks and federal banks. Depending on kind of where you slot in, you could have your primary federal regulator be your primary regulator for stablecoin issuance purposes. So, the bills kind of walk through the parameters of that. Right away, we just have like, as I said before, a much broader universe of issuers than we have today. Banks are not issuing stablecoins today. They are holding reserves. They have been holding stablecoin reserves for several years now. Interestingly, I know this is not your direct question, but two banking agencies have recently spoke out about crypto activities. That's the FDIC and the OCC. A lot of what the bills say will eventually banks are super interested in that. Now, they have more flexibility to engage in crypto activities than they did before because those federal banking agencies have basically said, “You don't have to get written permission from us to do crypto activities. You should just do it as part of your ordinary supervision.”

Banks are like, “Oh, maybe I should issue,” or we've talked to several banks who are interested in facilitating payments using stablecoins, even if they don't want to be issuers themselves, or perhaps they want to hold the reserves of a stablecoin and insure deposits, for example, insure deposits were a form of HQLA. So, there are lots of interesting use cases. It's still pretty new. The bills also talk about how to get a license to issue stablecoins, like who you have to apply to, and also really importantly, what the reserves need to be comprised of, what the attestation requirements are, et cetera, et cetera.

What's super interesting to me about these bills is the fact that the United States, it really is kind of laggard across the world in terms of having stablecoin legislation, other parts of the world, whether it's Europe and MiCA or Japan or Singapore, other parts of the world have stablecoin frameworks in place. One of the interesting features of the bills, both House and Senate side, is they include a provision in there that says Treasury is empowered to work with other similarly situated or other frameworks across the world that have similar requirements as the US to make sure that we basically have a global level playing field so that issuers in the United States are not unduly prejudiced by the requirements in some of the regime, we really globally want to have a fair system. So, that's super interesting, and I think a feature of sort of where the US is timing-wise on stablecoin regulation.

Carlin McCrory:

Alex, you briefly mentioned banks having interest in getting involved. How should both banks and non-banks be thinking about stablecoin opportunities? And where do they even start on all of this?

Alexandra Barrage:

Let's take banks. Banks are a wide bunch, right? Size, risk, appetite, et cetera. Many banks have been very interested in crypto for several years. Some banks like JP Morgan Bank has its own internal stablecoin, JPM coin, which it uses on its own permissioned rail. So, that's one extreme where those kinds of banks are already doing something in crypto within the purview of their supervisor, like low-hanging fruit, maybe they are the different categories, let's say a mid-sized bank or community bank that hasn't touched crypto in part because the regulators have said you can't in so many words.

So, we need to think about where a bank is starting from. If we then kind of frame our question around, okay, who are the banks that want to custody crypto because they're already like global custodians, right? It just makes sense for them. Maybe they wanted to do it, but then, SAB 121, a different SEC staff accounting bulletin, prevented them from doing that effectively. And so, a lot of those banks are like, “Oh, well, SAB 121 is gone. Finally, is that policy?” And now we're going to pick up our pencils again. So, how do we think about the opportunities?

Well, we want to start with stablecoins, right? Because it looks like that's going to be the next piece of enacted legislation. Then you can kind of narrow down over the thousands of banks that are out there, which are the ones that I already have invested something in crypto or even custody or stablecoins? And then you say, “Okay, well, why are we even having this stablecoin strategy question? Is it just because it's the next shiny object or is it because we think there are real use cases here?” So, we walk clients through what the potential use cases are. We try and simplify that for them. We say, “Hey, look at the OCC interpretive letter 1183. This will tell you what the regulator thinks you should be thinking about.” When you do that, you can pluck two or three pretty clear use cases. You can be an issuer, you can facilitate payments, you can provide crypto custody services, which could mean a lot of different things. You can custody, you can hold the dollar deposits as a reserves, et cetera.

What does that really mean for a bank? A bank might say, “Well, I want to do some market research on what my customers want.” If a lot of my customers already hold crypto wallets, maybe this is something I should think about. Maybe they too in the future will want to use stablecoins for payments, just like we use Venmo or PayPal. I mean, maybe this is just like another substitute for that. Maybe I have a lot of customers at my bank that do a ton of cross-border remittances, either from the institutional side or the retail side. Maybe this presents an interesting opportunity for my bank to keep those customers because we can find ways to do what they want to do a lot more cheaply, right?

So, there are lots of questions, but you have to sort of walk banks through what is the use case. Then, once you kind of identify that, you have to talk about, well, do you have the tech and the infrastructure to support what you think might be interesting for your bank? The answer is always that they're missing one or several pieces, even the most highly sophisticated banks, right? So, then you connect them with people who do ledgering for stablecoins, basically. A lot of the same things we think about for deposits, but for this different type of instrument. So, you've got what's the use case and the legal and compliance around that. You've got, do I have the tech infrastructure to execute on that? And then, of course, the third important, maybe most important piece is the risk management around that. Whether you're a bank or a credit union or whoever, really, how do you think about the use cases and kind of funneling them through your risk appetite, your tolerance? How do you think about everything from liquidity risk to op risk to cyber risk to strategic risk, credit risk?

So, how do you even begin to kind of measure that? I'm working with that too, I've thought a lot about those questions. So, if you're a bank or credit union or a private issue or would be private issuer listening to this podcast, kind of dividing up the strategy questions in that way, in those three parts might be a helpful way of kind of thinking through this at the very first pass.

Carlin McCrory:

I'd like to hear from both of you. Where do you think we could be in five years regarding stablecoin uses and what does this depend on?

Ethan Ostroff:

Well, I think the number one thing it depends on is a legislative framework, an actual bill that's in place that sets up clear guardrails and sets out key parameters for how to do this in a way that complies with all federal laws. Because I think one of the things that we have to consider when we're talking about stablecoins is also KYC, AML, right? And how banks and non-banks, you might be issuing stablecoins can think about and do the appropriate things they've got to do to know their customer and assess the risks of money laundering and the risks that are associated with countering the financing of terrorism.

Alexandra Barrage:

I'm really glad that you mentioned that for a number of reasons, Ethan. One of the things we should think about when we talk about legislation, and I agree with you, we need those guardrails before we even start imagining the next five years in a constructive way, is that there are kind of two phases here. One is we have enacted legislation, right? The bills come together, President Trump signs the bill, it becomes law. And then what people seem to under-appreciate but is super important is there are a bunch of implementing rules that will follow from that enactment that are super important in thinking not just about the next five years, but like literally the next two years.

One of those, to Ethan's earlier point, is BSA/AML. Treasury will need to work with FinCEN to put together that package, that proposal, which will be presumably subject to notice and comment consistent with the APA, et cetera. But that is just one example of what needs to happen. There are at least three or four other pieces of implementing regulation that need to happen around things like capital, liquidity, and risk management requirements, both for banks and non-banks. Again, with this idea of having a level playing field. So, I think as a procedural matter, to answer your question, I would first say we should think about the next phase beyond enactment as being a really critical step in shaping what stablecoins can do and how they might proliferate.

If we get the legislation wrong and then we get the implementing rules not quite where they ought to be, I think that'll pose some issues. But the fact that they're noticed in common periods gives me some hope that there will be vigorous engagement with industry and other important players in the ecosystem.

In the best case, we have this world of multiple issuers, and we have a world where everyone knows what the level playing field is. Hopefully, they've had an opportunity to comment on those rules as they're promulgated by the agencies. I believe that if the stars align on all of those things, you and I in five years. So, that's April 9th, 2030. Okay, my oldest will be hopefully out of college at that point. We will have a world where we are using stablecoins just like any other kind of digital cash, including for retail purposes. The key to all of this will be whether there is trust in the instrument, and there are different ways we build trust. We build trust through regulations that are smart. We build trust through bills that are well-designed and thoughtful, and thinking about the pitfalls and addressing the anti, and all of that. And we build a structure where not just within the United States, but globally, payments are greatly enhanced by use of these payment stablecoins, and there's going to be a lot of time that needs to kind of take place in order for that trust to work.

I don't think that's five years. I don't think there's quite a marker for that. But the more that these bills and these rules can center around building trust, whether that's from an institutional perspective or a consumer perspective, that's going to be the key determinant in how these payments stablecoins may proliferate or not.

Carlin McCrory:

Well, Alex and Ethan, thank you for joining me today, and thank you to our audience for listening to today's episode. Don't forget to visit our blog, TroutmanFinancialServices.com, and subscribe so you can get the latest updates. Please also make sure to subscribe to this podcast via Apple Podcasts, Google Play, Stitcher, or whatever platform you use. We look forward to next time.