

Memo

To: Securities and Exchange Commission Crypto Task Force

From: Stephen Keen¹

Date: April 30, 2025

Re: Stablecoins—Potential Conflicts Between the Commission Staff’s Interpretation and State Financial Authority Requirements

These comments are in reference to the [Statement on Stablecoins](#) released by the Commission’s Staff on April 4, 2025. I would like to alert the Staff to a possible conflict between the requirements for Covered Stablecoins set forth in their Statement and certain requirements imposed by state financial authorities, particularly the New York State Department of Financial Services (the “NYDFS”). I would recommend that the Staff contact representatives of the NYDFS to prevent the NYDFS from requiring issuers of Covered Stablecoins from taking steps that may violate the Securities Exchange Act of 1934 (the “Exchange Act”) and the Investment Company Act of 1940 (the “Investment Company Act”).

Let me begin by summarizing my understanding of the Statement on Stablecoins. “Covered Stablecoin issuers create an obligation to honor redemption requests [to pay the holder the face value of the Covered Stablecoin].” *Note 9*. “Covered Stablecoin issuers maintain a Reserve designed to satisfy fully their redemption obligations, which consists of [U.S. Dollars “USD”] and/or other assets that are considered low-risk and readily liquid so as to allow a Covered Stablecoin issuer to honor all redemptions on demand.” *Legal Discussion—Reves Analysis—Risk-Reducing Features* [footnote omitted]. “Examples of such low-risk, readily-liquid assets include USD cash equivalents, demand deposits with banks or other financial institutions, U.S. Treasury securities, and/or money market funds registered under Section 8(a) of the Investment Company Act.” *Note 6*.

Regarding the Reserve:

At all times, the assets held in the Reserve back the amount of outstanding Covered Stablecoins on at least a one-for-one basis. The assets held in the Reserve are only used to pay redemptions, although the issuer may realize earnings on the assets held in the Reserve. While the assets held in the Reserve

¹ I am a retired securities law attorney with 40 years of experience. As I no longer represent clients, I have no financial interest in the results of the Statement on Stablecoins. However, the comments made in this memorandum are consistent with my advice to clients regarding Stablecoins when I was practicing.

may be sold to redeem Covered Stablecoins, they are segregated from and not commingled with the assets of the Covered Stablecoin issuer or any third party. Moreover, the assets held in the Reserve are: (1) not used by the Covered Stablecoin issuer for operational or general business purposes; (2) not otherwise lent, pledged, or rehypothecated for any reason; and (3) held in a manner designed not to subject them to claims of third parties. To this end, a Covered Stablecoin issuer does not use the assets held in the Reserve to engage in trading, speculation, or discretionary investment strategies.

The Reserve.

I interpret the segregation requirement to mean that assets held in the Reserve will not be commingled with *other* assets of the Covered Stablecoin issuer. In other words, the issuer will establish a separate account or even a special purpose entity (see *Note 21*) to hold the Reserve's assets. These assets nevertheless are owned by the issuer (or its special purpose entity). A Covered Stablecoin creates *only* an obligation to redeem it at face value—*not* ownership of a share of the assets held in the Reserve.²

If this were not the case—if the holder of a Covered Stablecoin acquires an ownership interest in the Treasury securities and money market fund shares held in the Reserve—then the issuance of a Covered Stablecoin would necessarily involve the sale of such securities. The *Reves* and *Howey* tests would be of limited relevance; even if a Covered Stablecoin is not a separate security, it would still be a means of offering and selling interests in Treasury securities and shares of money market funds to the public.

While shares of money market funds would already be registered, and Treasury securities would be exempt from registration, under the Securities Act of 1933, they would still be subject to the Exchange Act. A Covered Stablecoin issuer would be engaged in the regular business of buying and selling these securities from and to holders of Covered Stablecoins for its account, making it a “dealer” as defined by the Exchange Act, subject to the registration and other regulatory requirements thereof.

Such a Covered Stablecoin might also create an undivided interest in a managed pool of securities, which the Commission has historically treated as an investment company. See, Investment Company Act Release No. 21260 (July 27, 1995) and the Report of the Advisory Committee on Investment Management Services for Individual Investors, Small Account Investment Management Services cited at Note 17 thereof. This is because the Reserve would be engaged primarily in the business of investing, reinvesting, or trading in securities and issuing interests, the Covered Stablecoins, in its portfolio:³ The exemption for managed pools of income producing assets (Rule 3a-7) does not extend to issuers of redeemable securities such

² I believe this is consistent with the status of payment obligations issued by the money transmitters referred to in Note 17.

³ Although Treasury securities and shares of money market funds are not “investment securities” as defined by the Investment Company Act, this more circumscribed term applies only to Section 3(a)(i)(C) of the definition of an investment company. Section 3(a)(i)(A) applies to the business of investing and trading any type of security (including non-investment securities) as defined by the Investment Company Act.

as Covered Stablecoins. Management of the Reserve's portfolio would also require the issuer to register as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act").

Although I read the Staff's Statement on Stablecoins as avoiding these issues by limiting the terms of a Covered Stablecoin to an obligation to honor redemption requests without also conveying ownership of the assets held in the Reserve, this may not be the case for state agencies that regulate the issuance or operation of Covered Stablecoins. The NYDFS, for example, has issued [Guidance on the Issuance of U.S. Dollar-Backed Stablecoins](#) (June 8, 2022). Under this Guidance, "The Reserve assets shall be held at these depository institutions and custodians for the benefit of the holders of the stablecoin, with appropriate titling of accounts." I have reason to understand that the NYDFS intends for an issuer to take the steps necessary to convey beneficial ownership of the Reserve's assets to the holders of the Covered Stablecoins. As explained above, taking such steps would involve a sale of interests in the Treasury securities and money market fund shares held by the Reserve, which should require the issuer to register under the Exchange Act and/or Investment Company Act and Advisers Act. The Commission's Staff does not appear to anticipate such registrations as a result of compliance with its Statement on Stablecoins.

I therefore suggest that the Staff contact representatives of applicable state agencies and come to a consensus as to the Reserve requirements for Covered Stablecoins. If I have misunderstood the Staff's intent regarding ownership of the Reserves, I would ask you to amend the Statement on Stablecoins to alert issuers to the need to register under other federal securities laws or explain why such registration would not be required.

Refinements to the Statement on Stablecoins might clarify the Staff's intent regarding the Reserve. For example, in the *Marketing of Covered Stablecoins* section, you could modify the third bullet point to read "does not reflect any investment or other ownership interest in the Covered Stablecoin issuer, the Reserve or any other third party." It may also help to expand the third numbered-Reserve requirement to "held in a manner designed not to subject them to or to give them priority over claims of third parties." This would acknowledge that issuers could protect Covered Stablecoin holders by creating a first-priority security interest in the Reserve assets, even though third parties may have claims to any residual value of the assets. Finally, adding a requirement that the issuer of a Covered Stablecoin use earnings from Reserve assets to satisfy any other claims to such assets, and only retain earnings in excess of such claims, would buttress the risk element of the *Reves* test.

I hope that these comments are helpful. Please feel free to contact me if you have any questions.