

CLIENT ALERT

Recent Developments for Crypto Asset Exchange-Traded Products and Exchange-Traded Funds

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On July 1, 2025, the Division of Corporation Finance (the “Division”) of the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) issued a statement on crypto asset exchange-traded products (“Crypto ETPs”) in furtherance of the SEC’s ongoing effort to provide “greater clarity on the application of the federal securities laws to crypto assets.”¹ The statement sets forth the Division’s views on disclosure requirements for issuers of Crypto ETPs under Regulation S-K and Regulation S-X as they apply to registration forms under the Securities Act of 1933 (the “Securities Act”). Highlights of those views are summarized below.

The issuers of Crypto ETPs must register their offerings under the Securities Act and the Securities Exchange Act of 1934 (the “Exchange Act”), but Crypto ETPs are not registered as investment companies under the Investment Company Act of 1940 (the “1940 Act”).² There has been uncertainty regarding whether certain crypto-based

¹ See Division of Corporation Finance, Statement on Crypto Asset Exchange-Traded Products (July 1, 2025), [available here](#). For a definition of “crypto assets”, see *id.*

² Exchanged-traded investment vehicles registered under the 1940 Act are referred to as “exchange-traded funds” (“ETFs”) rather than ETPs. A 1940 Act ETF has many regulatory requirements that are different from the requirements for Crypto ETPs. In general, ETFs comply

exchange-traded vehicles are appropriately registered as investment companies under the 1940 Act. Additionally, there has been uncertainty about the extent to which registered investment companies are able to hold crypto and crypto-related assets and what steps the Division of Investment Management staff would take after withdrawing its 2021 guidance about registered investment companies investing in the bitcoin futures market.³ One notable development occurred at the beginning of July, when two ETFs that were the subject of SEC staff comments addressing their investment company status were listed and began trading.⁴ The ETFs are the first U.S.-registered investment companies to provide investors with exposure to crypto assets as well as staking activities.

SEC Chairman Paul S. Atkins has made establishing a regulatory framework for crypto assets central to his agenda.⁵ These developments in early July may signal a shift in the SEC's views in this area, including with respect to the regulatory approach for the registration and listing of Crypto ETPs. Such a shift may be a welcome alternative to the lengthy 19b-4 process exchanges currently undergo to list Crypto ETPs. We also could see the SEC further addressing the treatment of crypto assets under the federal securities laws, clarifying custody requirements for crypto assets, and addressing tokenization.

Disclosure Requirements under the Securities Act and the Exchange Act

The statement the Division released provides some practical guidance as to the disclosure requirements for Crypto ETPs under the Securities Act and Exchange Act. The statement reflects observations regarding disclosure practices in Division staff reviews of Crypto ETP filings and addresses staff views about certain specific questions that market participants have presented to the staff. Though the statement does not appear to add significant new expectations beyond those previously communicated to prospective Crypto ETPs, it is noteworthy in that it consolidates, standardizes, and publishes guidance previously provided to issuers bilaterally. The following notable observations and views the Division highlighted in the statement may be particularly helpful for issuers of Crypto ETPs.

- **Cover Page:** The staff observed cover page disclosure of the initial offering price of the securities and the initial authorized participant ("AP") or the initial purchaser (identified as a statutory underwriter).

with Rule 6c-4 under the 1940 Act, register with the SEC using Form N-1A like other registered investment companies, and rely on the exchange's generic ETF listing standards issued consistent with Rule 6c-11. A Crypto ETP launch currently involves Division review of an S-1 (or S-3) registration statement filed by the issuer and Commission approval of a proposed change to the rules of the listing exchange under Rule 19b-4 under the Exchange Act. Though the 19b-4 process is subject to statutory timelines, they are lengthy, and there is no deadline for Division review of a registration statement. Past Crypto ETP launches have involved multiple rounds of comment and revisions for both the registration statement and the exchange rule change.

³ As discussed in a prior Willkie Client Alert, the staff from the Division of Investment Management withdrew a staff statement on funds registered under the 1940 Act investing in the bitcoin futures market. See Willkie Farr and Gallagher LLP, *Where We Stand in June 2025: Highlights of Regulatory Changes Impacting Asset Managers from the First Half of 2025* (Jun. 16, 2025), [available here](#) (discussing Division of Investment Management Staff, WITHDRAWN: Staff Statement on Funds Registered Under the 1940 Act Investing in the Bitcoin Futures Market (issued Jay 11, 2021, withdrawn May 6, 2025), [available here](#)).

⁴ See *infra* notes 6-10.

⁵ Testimony Before the United States House Appropriations Subcommittee on Financial Services and General Government (Chairman Paul Atkins, May 20, 2025), [available here](#). See also Remarks at the Crypto Task Force Roundtable on Decentralized Finance (Chairman Paul Atkins, June 9, 2025), [available here](#).

- *Prospectus Summary*: Examples of disclosure staff observed in the prospectus summary included a description of the underlying crypto asset(s) and associated network(s) and policies regarding management of the underlying crypto asset(s), among other items.
- *Risk Factors*: Examples of risks that were disclosed included risks related to the underlying crypto asset(s) and crypto asset markets, risks of attacks on associated network(s) by malicious actors, risk of concentration of ownership in the underlying crypto asset(s), and risks from loss of incentives for miners and validators, among others.
- *Description of Business*: The staff observed disclosure about the material aspects of the issuer's business, including information regarding:
 - o Underlying crypto assets and associated networks, such as material information about the underlying crypto asset(s) and associated networks(s) (i.e., launch of the crypto asset(s), initial development team, process for staking and validation, etc.); total supply of the underlying crypto asset(s) covering the amount outstanding, issued and burned, and market capitalization of the crypto asset(s); and spot and/or future markets for the underlying crypto asset(s);
 - o Indices or benchmarks, such as how an index or benchmark price is calculated and selected (e.g., by identifying and providing tabular disclosure for each constituent trading platform used to calculate the index or benchmark price and describing how the constituent trading platforms are selected and how the index or benchmark price is calculated); and
 - o Calculation of net asset value ("NAV"), such as the methodology to calculate NAV, the policies and procedures if the index or benchmark is unavailable or the sponsor elects not to rely on it to calculate NAV, the difference between methodologies if the methodology used to calculate NAV differed from the methodology used to calculate the fair value of crypto asset holdings for GAAP purposes, and agreements with any third parties used for their valuation methodologies and whether the sponsor had a license to use a secondary index or benchmark.
- *Additional Disclosures*: The staff also observed issuers providing information about the following, to the extent applicable:
 - o Service providers, including disclosing the various fees and expenses payable to the sponsor; disclosing material terms of any agreements with third-party service providers, including crypto asset custodians, APs, and any counterparties contracted to assist or provide financing in the purchase and sale of the underlying crypto asset(s); and filing the agreements as exhibits to the registration statement, if material.
 - o Custody of the trust's assets, including disclosure of material terms of any agreement(s) with custodian(s), crypto asset storage policies, who will have access to private key information, and

whether the custodian carries insurance for any losses of the crypto asset(s) that it custodies for the issuer.

- Fees and expenses, including disclosure on how the sponsor fee is calculated, whether any fees and expenses are capped or assumed by the sponsor, if there are any fee arrangements with third parties, and whether there are any arrangements whereby the sponsor fee or other fees are paid using underlying crypto asset holdings.
- *Description of Securities*: Examples of disclosure the staff observed in descriptions of the issuer's securities included disclosure on any limitations on voting rights with respect to securities offered by the trust, whether those voting rights may be modified other than by a vote of a majority or more of the shares outstanding, and how shareholders will be notified of material amendments to or termination of the trust agreement.
- *Plan of Distribution*: Issuers provided information about the distribution of securities offered and sold in a registered offering, including the mechanics of the creation and redemption process between or among the trust, the AP(s), the custodian, and any other third-party service provider, the extent to which creation and redemption orders will be settled on or offchain, and whether and under what circumstances the sponsor may suspend creation and redemption orders.
- *Management*: The staff observed disclosure of fees paid to the sponsor or third party for the sponsor's directors and executive officers performing functions similar to a board of directors and executive officers of the trust as well as descriptions relating to any policy-making functions performed by the sponsor.
- *Conflicts of Interest*: Issuers have disclosed existing and potential conflicts of interest between the sponsor and its affiliates and the trust, including whether the sponsor or its affiliates have any exposure to the underlying crypto asset(s), whether the trust has a code of conduct or any requirements for preclearance of transactions in the underlying crypto asset(s), and the sponsor's experience sponsoring other exchange-traded products and in crypto asset markets.

Crypto-Focused Exchange-Traded Vehicles Registered Under the 1940 Act

On July 2, 2025, the launch of REX-Osprey™ ETH + Staking ETF and REX-Osprey™ SOL + Staking ETF (the "Funds"), 1940 Act ETFs listed on Cboe BZX Exchange, Inc., was announced. The Funds are the first U.S.-registered investment companies to invest in crypto assets in addition to other assets that provide exposure to crypto assets, and to generate income and capital appreciation through staking crypto assets.⁶ The Funds will, under normal market conditions, invest at least 80% of their net assets in crypto assets and other assets that provide exposure to the crypto assets. The Funds will also stake up to 15% of their crypto assets, agreeing to lock up such assets to be used for the crypto asset's proof-of-stake validation process and in return receive staking rewards in the form of the underlying crypto asset.

⁶ Rex Shares, Rex-Osprey™ Launches First U.S. ETF with Solana Exposure plus Staking Rewards (July 2, 2025), [available here](#).

The announcement followed a registration process that began on January 21, 2025, when the ETF Opportunities Trust (the “Trust”) filed a post-effective amendment pursuant to Rule 485(a) under the Securities Act, registering seven new crypto-based ETFs.⁷ In April and May 2025, the SEC staff provided comments and questions to the Trust, including whether two of the ETFs, the REX-Osprey™ ETH + Staking ETF and REX-Osprey™ SOL + Staking ETF, would be able to meet the definition of “investment company” under the 1940 Act.⁸ On May 30, 2025, the Trust’s registration statement went effective and the SEC staff issued a comment letter expressing concern that the ETFs “may have improperly filed their registration statement on Form N-1A and that disclosures in the registration statement regarding the Funds’ status as investment companies may be potentially misleading.”⁹ In response, the Trust revised the principal strategy for each fund to disclose that each ETF will invest at least 40% of its total assets in securities, including securities issued by ETFs and ETPs that invest in or have exposure to Ether or Solana.¹⁰ In addition, the SEC staff requested that additional disclosure regarding the ETFs’ staking practices be included, including prominent disclosure that the staked Ether will be considered illiquid and disclosure on the potential risks of longer unstaking periods.¹¹ Communications between the SEC staff and the Trust suggest that the SEC staff may have questioned the Trust’s assertion that the Funds’ staking arrangements could be investment contracts and liquid staking tokens held by the Funds could also be securities for purposes of investment company status.¹² This appears consistent with contemporaneously issued SEC staff guidance taking the view that certain protocol-staking activities generally do not involve the offer and sale of securities.¹³

Key Takeaways

Overall, the Division’s Crypto ETP statement provides useful disclosure guidance and is a step forward in the SEC’s recent efforts to clarify the application of the federal securities laws to crypto assets. The recent listings of the 1940 Act ETFs investing in crypto and crypto-related assets illustrate development in the ability of ETFs to offer crypto-based investment strategies. The SEC staff’s scrutiny also illustrates the continued focus on confirming whether particular investment products are properly registered as ETFs or other investment companies under the 1940 Act,

⁷ ETF Opportunities Trust, Post-Effective Amendment No. 213, File No. 333-23544 (SEC filed January 21, 2025), [available here](#).

⁸ Letter from the U.S. Securities and Exchange Commission to ETF Opportunities Trust (May 30, 2025), [available as Exhibit A here](#).

⁹ *Id.* Specifically, the SEC staff expressed concern that the new ETFs did not invest at least 40% of their assets in securities as required to qualify as an “investment company” under the 1940 Act.

¹⁰ *Id.*

¹¹ *Supra* note 8. See ETF Opportunities Trust, Post-Effective Amendment No. 303, File No. 333-234544 (SEC filed June 27, 2025 and immediately effective), [available here](#) for the updated disclosures.

¹² Letter from ETF Opportunities Trust to the U.S. Securities and Exchange Commission (June 10, 2025), [available here](#).

¹³ See, e.g., Division of Corporation Finance Statement on Certain Protocol Staking Activities (May 29, 2025) [available here](#). In contrast, under the previous SEC Chair, the SEC staff took the position that certain third-party staking services constituted the offer and sale of an investment contract, which led to widespread uncertainty as to whether the SEC would *require* an exchange-traded vehicle staking spot crypto assets through a third party to register under the 1940 Act (seemingly a reverse of the agency’s present posture questioning whether 1940 Act registration is *permitted* for such a vehicle). See Complaint, *SEC v. Payward Ventures Inc. (d/b/a/ Kraken) and Payward Trading Ltd. (d/b/a Kraken)*, 3:23-cv-00588 (N.D. Cal. Feb. 9, 2023); see also Press Release, *Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay \$30 Million to Settle SEC Charges*, [available here](#); Complaint, *SEC v. Coinbase, Inc. and Coinbase Global, Inc.*, 1:23-cv-04738 (S.D.N.Y. June 6, 2023); Complaint, *SEC v. Consensys Software Inc.*, No. 24-cv-04578 (E.D.N.Y. June 28, 2024).

or should instead be registered as ETPs under the Securities Act and Exchange Act (or not registered under SEC requirements at all).

Together, these developments demonstrate that the SEC is positioned to continue addressing additional outstanding questions regarding the application of the federal securities laws to investments involving crypto assets. These developments may also be a precursor of the SEC potentially offering a welcome alternative to the lengthy 19b-4 process through the implementation of generic listing standards, likely to be implemented across the exchanges. While these standards would still require SEC approval, the SEC staff's disclosure requirements and observations provide valuable insight as to what these standards might ultimately entail.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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