

New Season, New You: Priorities for Asset Managers Planning Digital Asset Exposure in 2026

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Asset managers interested in incorporating digital assets into their clients' investment portfolios have additional possibilities to choose from in 2026 following a series of important regulatory developments in 2025 and the first quarter of 2026.¹ For example, sponsors of private funds and exchange-traded products have begun to offer indirect exposure to digital assets through funds that invest in the spot market and direct exposure through investments in

¹ For other Willkie Farr & Gallagher LLP alerts covering developments in digital assets, see Matthew Comstock et al., *Inside the Emerging U.S. Crypto Regulatory Framework: Recent Key Developments and Takeaways*, Willkie Farr & Gallagher LLP (Oct. 20, 2025), available [here](#). For IRS safe harbor guidance for investment trusts engaging in staking, see Roger Wise, *IRS Revenue Procedure 2025-31 Attempts to Put Stake Through Heart of Concerns about Staking by Digital Asset Exchange-Traded Products*, Willkie Farr & Gallagher LLP (Nov. 14, 2025), available [here](#). For more information on the recent CFTC developments, including the Digital Assets Pilot Program and tokenized collateral guidance, see Acri et al., *CFTC Launches Digital Asset Collateral Pilot Program*, Willkie Farr & Gallagher LLP (December 30, 2025), available [here](#). For more information on stablecoins, see J. Christopher Giancarlo et al., *The GENIUS Act: A New Pathway for Stablecoin Issuance*, Willkie Farr & Gallagher LLP (July 24, 2025), available [here](#).

digital assets themselves. In addition, asset managers are now sponsoring registered investment companies that invest in digital assets and offering separately managed accounts that include digital asset exposure. Other fund sponsors are offering tokenized fund shares. These developments provide registered investment advisers with new investment opportunities for their clients and investors, but they also raise new regulatory considerations for asset managers interested in participating in this growing part of the industry.

As discussed in other Willkie client alerts, these developments have been facilitated by various regulatory actions taken by the U.S. Securities and Exchange Commission (“SEC” or “Commission”) and the Commodity Futures Trading Commission (“CFTC”). Such actions have clarified the regulatory treatment of certain types of digital assets,² provided a pathway for certain state trust companies that custody digital assets to serve as qualified custodians,³ opened new avenues for spot crypto to list and trade on regulated venues, and provided for tokenized assets and certain natively digital assets to be used as collateral and margin in derivatives transactions.⁴ The SEC staff also approved generic listing standards for commodity-based exchange-traded products (“ETPs”), including certain crypto ETPs (see paragraph 3.d. below), which have shortened time to market for eligible products.⁵

This Alert highlights several potential regulatory considerations for asset managers interested in pursuing digital asset opportunities for their clients and investors in 2026, including to: classify the asset, make a custody plan, and evaluate the investment options.

1. **Classify the Asset**

Classification is the threshold determination that drives registration status, disclosure frameworks, custody options, and reporting across SEC and CFTC regimes. For many years the question of whether crypto assets are securities, commodities or neither has lingered, but those ambiguities are increasingly being clarified.

On March 17, 2026, the SEC and CFTC issued interpretive guidance (the “Interpretation”) clarifying how the federal securities laws apply to certain crypto assets and transactions involving crypto assets.⁶ The Interpretation classifies crypto assets into five categories: digital commodities, digital collectibles, digital tools, stablecoins and digital securities, and addresses how a non-security crypto asset may become subject to, and how it may cease to be subject to, an investment contract. In the Interpretation, the SEC provides that digital commodities, digital collectibles and digital tools, as described and defined therein, are not securities. The Interpretation further re-affirms the reasoning in the SEC staff’s statement in April 2025 that covered payment stablecoins are not securities and notes that this view is consistent with the forthcoming statutory exception in Section 17 of the Guiding and

² See, e.g., *infra* note 6.

³ Div. of Inv. Mgm’t., U.S. Sec. & Exch. Comm’n, No-Action Letter (Sept. 30, 2025), available [here](#) (“2025 Custody No-Action Letter”).

⁴ Press Release No. 9145 25, U.S. Commodity Futures Trading Comm’n, Acting Chairman Pham Announces First Ever Listed Spot Crypto Trading on U.S. Regulated Exchanges (Dec. 4, 2025), available [here](#); CFTC Staff Letters No. 25 39, 25 40, 25 41 (Dec. 8, 2025), available [here](#).

⁵ Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n, Statement on Crypto Asset Exchange Traded Products (July 1, 2025), available [here](#); Press Release No. 2025 121, U.S. Sec. & Exch. Comm’n, SEC Approves Generic Listing Standards for Commodity Based Trust Shares (Sept. 17, 2025), available [here](#).

⁶ U.S. Sec. & Exch. Comm’n, Commodity Futures Trading Comm’n. Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets (File No. S7-2026-09) (Mar. 17, 2026), available [here](#).

Establishing National Innovation for U.S. Stablecoins Act (“GENIUS Act”), signed into law on July 18, 2025, which excludes payment stablecoins issued by “permitted payment stablecoin issuers”⁷ from the definitions of “security” under the Investment Advisers Act of 1940 (the “Advisers Act”), the Investment Company Act of 1940 (the “1940 Act”), the Securities Act of 1933 (the “Securities Act”), the Securities Exchange Act of 1934 (the “Exchange Act”), the Securities Investor Protection Act of 1970 and the Commodity Exchange Act.⁸ The Interpretation does not address other types of stablecoins. The Interpretation also provides that certain crypto network validation activities, such as proof-of-work and proof-of-stake activities, do not involve the offer and sale of a security under the Securities Act or the Exchange Act, providing much awaited clarity for the crypto industry.⁹ By contrast, tokenized equity, debt, fund shares, and other instruments that meet existing statutory definitions remain securities and are subject to the Securities Act, the Exchange Act, and (where applicable) the 1940 Act.¹⁰ The Interpretation provides critical insight for assessing when an asset or activity involves the offer and sale of a security.

Where the asset or the activity involves securities, Securities Act registration or an exemption will apply to offers and sales of the asset, and Exchange Act and 1940 Act requirements will apply for secondary market trading and pooled investment vehicles. In addition, the Advisers Act will apply to persons who are in the business of providing investment advice about the asset.¹¹

Where the asset or activity is not, or does not involve, a security, it may be a commodity for purposes of the Commodity Exchange Act, and subject to regulation where it underlies a derivative contract or is the subject of a leveraged transaction involving a retail market participant.¹² The CFTC took multiple actions in this area in December 2025, announcing the first listed, spot crypto asset trading on any CFTC-registered exchange, and through contemporaneous CFTC staff letters, updating guidance on the use of tokenized assets as collateral and permitting futures commission merchants to accept certain non-securities digital assets as margin collateral.¹³

Asset managers and/or product sponsors engaging in digital asset strategies in 2026 may wish to document a written classification methodology to identify which assets are securities and commodities pursuant to the legal and regulatory standards discussed above. Such classifications, and any related guidance that CFTC and SEC staff

⁷ Under the GENIUS Act, a “permitted payment stablecoin issuer” is “a person formed in the United States that is—(A) a subsidiary of an insured depository institution that has been approved to issue payment stablecoins under section 5; (B) a Federal qualified payment stablecoin issuer; or (C) a State qualified payment stablecoin issuer.” (12 U.S.C. § 5901(23)).

⁸ Interpretation, 22.

⁹ Interpretation, 47.

¹⁰ Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n, Offerings and Registrations of Securities in the Crypto Asset Markets, available [here](#); Commissioner Hester M. Peirce, Enchanting but not Magical: A Statement on the Tokenization of Securities (July 9, 2025), available [here](#) (“Peirce Tokenization Statement”).

¹¹ 15 U.S.C. § 77e.

¹² 7 U.S.C. § 2(c)(2)(D).

¹³ U.S. Commodity Futures Trading Comm’n, Staff Letter No. 25-40, No-Action Position for FCMs Accepting Certain Non-Securities Digital Assets as Margin Collateral and Depositing Payment Stablecoins as Residual Interest (Dec. 8, 2025), available [here](#); U.S. Commodity Futures Trading Comm’n, Staff Letter No. 25-41, Withdrawal of Staff Advisory 20-34 on Accepting Virtual Currencies from Customers into Segregation (Dec. 8, 2025), available [here](#).

may provide regarding such classifications, likely are relevant to several regulatory requirements, including the following:

- Form ADV Part 1A Item 5 reporting, particularly the “securities portfolio” determination for regulatory assets under management, which treats an account as a securities portfolio if at least 50% of its value consists of securities (cash and cash equivalents may be treated as securities for this test), and requires inclusion of the entire portfolio if the threshold is met;¹⁴
- Form ADV Part 1A Item 9 reporting related to custody requiring a U.S. dollar calculation of the client funds and securities over which the adviser has custody, where “funds and securities” may include certain digital assets;
- Form ADV Part 2A brochure disclosures to confirm alignment with digital-asset custody and risk practices;¹⁵ and
- Fund reporting (e.g., Form N-PORT, Form PF), which must be consistent with the adviser’s classification methodology.

Going forward, asset managers may benefit from monitoring further regulatory developments and updating any relevant classification, compliance policies and procedures, SEC reporting, and investor disclosures appropriately as CFTC, SEC and/or staff positions evolve. Such developments could also result in advisers amending Form ADV to the extent disclosures become materially inaccurate.¹⁶

2. Make a Custody Plan: Evaluate State-Chartered Trust Company, Broker-Dealer and Other Custody Options

Advisers Act Rule 206(4)-2 (“Custody Rule”) was adopted by the SEC to provide safeguards when a registered investment adviser has custody of client funds or securities by requiring such an adviser, among other things: to undergo an annual surprise examination by an independent public accountant to verify client assets; to have a qualified custodian (such as a bank) maintain client assets and send account statements directly to advisory clients; and unless client assets are maintained by an independent custodian (i.e., a custodian that is not the adviser itself or a related person), to obtain, or receive from a related person, a report of the internal controls relating to the custody of those assets from an independent public accountant that is registered with and subject to regular inspection by the Public Company Accounting Oversight Board.¹⁷ Custody is defined in the Custody Rule as “holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them,” and the determination of whether an adviser may have custody, even inadvertently, requires a detailed analysis of the Custody Rule, related SEC staff guidance and the facts and circumstances of that particular adviser. Advisers historically struggled to apply the Custody Rule to digital assets, particularly with respect to determining whether

¹⁴ U.S. Sec. & Exch. Comm’n, Form ADV Instructions, Part 1A Item 5.b. (1)–(2), <https://www.sec.gov/files/formadv-instructions.pdf>.

¹⁵ Please see [Section 3.a](#) herein for additional discussion of Form ADV considerations for advisers.

¹⁶ 17 C.F.R. § 275.204-1.

¹⁷ Release No. IA-2968, U.S. Sec. & Exch. Comm’n, Custody of Funds or Securities of Clients by Investment Advisers (Dec. 30, 2009), available [here](#).

the holder of client digital assets was a permissible “qualified custodian” under the Custody Rule. This issue has also been relevant for registered funds under the 1940 Act, which are generally required to maintain custody of securities with “a bank or other company whose functions and physical facilities are supervised by Federal or State authority.”¹⁸

a. State-Chartered Trust Companies as Custodians

In September 2025, SEC staff issued a no-action letter stating it would not recommend enforcement if registered advisers and registered funds treat certain state-chartered trust companies as “banks” for purposes of the custody provisions of the Advisers Act and the 1940 Act with respect to the placement and maintenance of certain crypto assets and cash and/or cash equivalents reasonably necessary to effect transactions in such crypto assets.¹⁹ This no-action letter was notable for managers of digital assets seeking to use state trust companies for crypto custody services. The no-action relief is subject to specific authorization, supervision, safeguards, and disclosure conditions.²⁰

The letter does not answer all outstanding questions related to custody. For example, the letter does not apply when digital assets are moved “wallet-to-wallet” to a trading account away from the state trust company, leaving unanswered questions about whether an asset manager will be deemed to have custody when moving digital assets to such a trading account, and if so, how the adviser or fund should comply with the applicable custody rules.

b. Broker-Dealers as Custodians

With respect to broker-dealers, SEC staff provided guidance in 2025 that for the first time allows broker-dealers to maintain custody of crypto assets, including crypto asset securities. In its May 15, 2025 FAQs, the staff confirmed that (1) Rule 15c3-3 under the Exchange Act, which governs a broker-dealer’s custody of its customers’ and other broker-dealers’ securities, does not apply to crypto assets that are not securities and (2) a broker-dealer may establish control of crypto asset securities, i.e., effectively custody crypto asset securities with a third party, by maintaining those securities at a qualifying control location, such as a bank, under paragraph (c) of Rule 15c3-3.²¹ In December 2025, the SEC’s Division of Trading and Markets issued a staff statement setting out the conditions under which a broker-dealer may be deemed to have “physical possession” of a crypto asset security under the Customer Protection Rule, which allows a broker-dealer to directly custody customers’ or other broker-dealers’ securities, rather than custody those securities with a third party, subject to meeting certain requirements regarding

¹⁸ 17 CFR § 270.17f-2.

¹⁹ 2025 Custody No-Action Letter. Asset managers relying on the no-action relief must take measures to (among other things) conduct diligence on the state trust company’s crypto authorization and supervisory status, key management and cybersecurity controls, segregation procedures, audited financials and internal control reports (e.g., SOC-1 or SOC-2 reports), and make certain disclosures and enter into agreements that address rehypothecation prohibitions and segregation.

²⁰ *Id.*; Comstock et al., Inside the Emerging U.S. Crypto Regulatory Framework: Recent Key Developments and Takeaways Willkie Farr & Gallagher LLP (Oct. 20, 2025), available [here](#).

²¹ Div. of Trading and Markets: Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technology (May 15, 2025), FAQ2, available [here](#).

access and capability of transfer, policies and procedures, risk management and the maintenance of other protective mechanisms and controls.²²

While the no-action relief and other guidance have provided welcome clarity, there remain unanswered questions regarding the custody of digital assets, including whether investment advisers are able to maintain the private key on behalf of their clients, including investment companies, or otherwise self-custody crypto assets and whether broker-dealers can treat a state trust company as a bank for purposes of Rule 15c3-3 under the Exchange Act.

3. Evaluate Clients' Options

Advisers may be considering a variety of investment options for their clients, including funds and other investors, seeking digital asset exposure. In undertaking these considerations, advisers are reminded that each investment exposure may be subject to a different regulatory treatment, risk profile and disclosure obligation. Each may also have operational characteristics and a different time to market that makes it more (or less) appealing for the adviser's clients.²³

a. SMAs

Investment advisers may consider providing digital asset investment advice to clients through a separately managed account. Investment advisers owe a fiduciary duty to their clients in providing such advice, comprising of a duty of care and a duty of loyalty.²⁴

An adviser's fiduciary duty obligations are not reduced or waived for novel investment products, such as digital assets. However, the application of the duty of care regulatory framework to digital assets may result in new, practical considerations. For example, the Commission has provided that the duty of care includes, among other things, the duty to seek best execution,²⁵ and related guidance has taken into account the application of the duty to directed brokerage and soft dollars.²⁶ In the context of digital assets, an adviser may benefit from addressing in best execution analysis new sources of information to determine total cost inclusive of network fees, withdrawal and transfer fees, venue quality, and market impact in fragmented, 24/7 trading environments, with documented venue selection rationales and periodic execution quality reviews.²⁷

Investment advisers may also benefit from considering questions of valuation, suitability, diversification, and robust disclosure of the digital asset investment strategy and related risk. Specifically, advisers considering digital asset

²² Div. of Trading and Markets, Statement on the Custody of Crypto Asset Securities by Broker-Dealers (Dec. 17, 2025), available [here](#).

²³ 17 C.F.R. § 275.204-1.

²⁴ Release No. IA-5278, U.S. Sec. & Exch. Comm'n, Commission Interpretation Regarding Standard of Conduct for Investment Advisers (June 5, 2019), at 1, available [here](#) ("2019 Interpretation").

²⁵ 2019 Interpretation, at 12.

²⁶ See Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165 (July 18, 2006) (stating that investment advisers have "best execution obligations"); Investment Advisers Act Release 3060, *supra* footnote 15 (discussing an adviser's best execution obligations in the context of directed brokerage arrangements and disclosure of soft dollar practices); see also Advisers Act rule 206(3)-2(c) (referring to adviser's duty of best execution of client transactions).

²⁷ *Id.*

investment strategies are encouraged to be prepared for the disclosure of all material risks on Form ADV, including “in detail” if the adviser determines the risk is significant or unusual.²⁸ Potential conflicts of interest arising from validator operations, governance participation, affiliate service providers, and personnel holdings can be considered, mitigated, and appropriately disclosed in Form ADV and offering documents, and appropriate restrictions or supervisory controls can be considered. Advisers affiliated with broker-dealers may also consider potential conflicts of interest related to staking activities. Books and records for digital assets may require recordkeeping of different types of information regarding investment rationales, transaction hashes and wallet identifiers with appropriate safeguards, and reconciliations between on-chain records and custodian statements.²⁹

b. Private Funds

Private funds provide the ability for investors to pool their assets and diversify their exposure among additional investments. Private funds may provide additional flexibility for complex strategies, including those that utilize derivatives, leverage, decentralized finance, and staking.

Advisers to private funds should consider SEC and CFTC registration and reporting requirements, depending on whether the private fund's investments include securities, commodity derivatives, or both (as discussed more fully in Section 1 above). For example, advisers to private funds investing in derivatives referencing crypto assets that are deemed to be commodities, such as Bitcoin and Ethereum, may need to consider commodity pool operator and commodity trading adviser registration. Advisers to private funds investing in crypto assets that are deemed to be securities may benefit from considering the same regulatory standards and best practices as a private fund investing in traditional securities.³⁰

c. Registered Funds

Registered fund asset managers may be considering investments by the fund in digital assets or digital asset derivatives, evaluating tokenization of their shares, or considering the formation of funds that invest substantially all of their assets in digital assets or digital asset derivatives. Such investments present considerations under the securities and tax laws.

i. Registered Fund Investments in Digital Assets: Securities Laws

With respect to investments in digital assets, registered funds apply the existing 1940 Act regulatory framework. Boards, chief compliance officers and registered funds are encouraged to consider obligations regarding valuation programs under Rule 2a-5 of the 1940 Act, pricing times for continuous markets, how to handle trading errors, and triggers for fair value determinations and fair value methodologies. Derivatives risk management programs under Rule 18f-4 of the 1940 Act may be tailored to reflect crypto volatility and liquidity dynamics, and liquidity risk management programs under Rule 22e-4 may incorporate exchange outages, network congestion, and unstaking

²⁸ SEC, Form ADV Part 2 Instructions, available [here](#).

²⁹ 17 C.F.R. § 275.204-2.

³⁰ 17 C.F.R. § 275.203(m)-1.

windows. Funds are also encouraged to tailor public disclosures to better present risks in retail-appropriate terms and observe privacy safeguards.

ii. Registered Fund Investments in Digital Assets: Tax Considerations

Under Subchapter M of the Internal Revenue Code (the “Code”), to maintain its status as a regulated investment company (“RIC”), a registered fund must pass an annual “income test” and quarterly “asset diversification tests.”³¹ Under the income test, at least 90 percent of the fund’s gross income each year must be “good” income, such as income and gain from “securities” as defined in the 1940 Act. A fund will not satisfy the income test if more than 10% of its income is “bad” income, such as gain from investments in commodities. Commodities include digital assets, until and unless the SEC issues guidance to the contrary (i.e., that they are securities). Income derived from a partnership (other than certain publicly traded partnerships) or a trust is treated as qualifying income only to the extent the income would be so treated if realized directly by the RIC. This look-through rule can result in “bad” income for RIC even if the interest in the partnership or trust is treated as a security under the 1940 Act. For this reason, direct investments in digital assets or in flow-through entities holding digital assets, e.g., crypto ETPs taxed as grantor trusts (see paragraph d. below), may pose risks for a fund intending to retain its qualification as a RIC.

Nonetheless, RICs may be able to obtain exposure to digital assets in a variety of ways. Dividends or subpart F inclusions (which are deemed dividends for tax purposes) from a Cayman subsidiary produce “good” income for purposes of the income test, even if the Cayman subsidiary holds assets, such as digital assets, that would produce “bad” income if held directly by the RIC. Note, however, that such investments through the Cayman subsidiary cannot make up more than 25 percent of the fund’s total assets, in order for the fund to continue meeting the requirements of the asset diversification test.³² In addition, certain derivative instruments tied to the value of digital assets, or tied to the value of entities holding such assets, may be treated as securities and thus may produce “good” income for purposes of the income test.

Further under the asset diversification tests, at least 50 percent of the fund’s total assets must consist of “securities” within the meaning of the 1940 Act.³³ A direct investment in digital assets would not count as a security for this purpose; in general, neither would an investment in a partnership or trust that holds digital assets. However, a derivative instrument tied to an entity that holds digital assets, as discussed above, may be considered a security for purposes of the asset diversification tests.

iii. Tokenization of Registered Fund Shares

More industry participants are considering creating a tokenized share class or tokenizing an existing class that is then able to settle both on-chain and off-chain.³⁴ These tokenized shares may allow issuers to reach an entirely

³¹ I.R.C. § 851(b).

³² I.R.C. § 851(b)(3)(B).

³³ I.R.C. § 851(b)(3)(A).

³⁴ See, e.g., U.S. Sec. & Exch. Comm’n, Div. of Trading & Mkts., No-Action Letter Request Related to the Depository Trust Company’s Development of the DTCC Tokenization Services (Dec. 11, 2025), available [here](#). Examples of other industry participants include issuers offering or seeking exemptive relief to offer tokenized funds for U.S. Treasuries or ETF shares in a digital format on a distributed ledger.

new group of investors—namely, those who generally conduct their financial transactions through decentralized finance or otherwise using blockchain technology. In addition, tokenization could facilitate more efficient trading and extended trading hours, settlement and investor service, including, for example, through automated processes, fractional fund shares and the ability for investors to use such tokens as collateral on platforms beyond traditional financial markets.³⁵ In evaluating tokenization, industry participants may benefit from carefully considering the applicable regulatory framework to evaluate whether a token constitutes a separate security. In July 2025, SEC Commissioner Hester M. Peirce stated:

“Market participants who distribute, purchase, and trade tokenized securities also should consider the nature of these securities and the resulting securities laws implications. For example, depending on the particular facts and circumstances, a token could be a ‘receipt for a security,’ which is itself a security but is distinct from the underlying security held by the distributor of the token. Alternatively, a token that does not provide the holder with legal and beneficial ownership of the underlying security could be a ‘security-based swap’ that cannot be traded off exchange by retail persons.³⁶ While blockchain-based tokenization is new, the process of issuing an instrument representing a security is not. The same legal requirements apply to on- and off-chain versions of these instruments.”³⁷

On January 28, 2026, the SEC Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets published a Statement on Tokenized Securities that further explored tokenization and the idea that tokenized securities may be security-based swaps.³⁸ This statement reaffirms the SEC staff’s position that tokenized securities are a change in form, not substance, and are therefore subject to the same securities laws as their non-tokenized counterparts. The statement offers a definition of “tokenized security” as “a financial instrument enumerated in the definition of ‘security’ under the federal securities laws that is formatted as or represented by a crypto asset, where the record of ownership is maintained in whole or in part on or through one or more crypto networks.” The statement goes on to explore two categories of tokenized securities (issuer-sponsored tokenized securities and third-party sponsored tokenized securities) to aid market participants in better understanding the applicable regulatory frameworks and considerations for each category. There are numerous models and considerations to evaluate before tokenizing assets.

³⁵ Larsen et al., Futures & Derivatives Law Report, The Tokenized Collateral Transformation, Volume 45, Issue 4 (Apr. 2025), available [here](#).

³⁶ In a statement expanding on these considerations on tokenized securities, discussed below, SEC staff noted that a person not acting on behalf of any security issuer may issue a token that provides synthetic exposure to a security or certain events relating to the security issuer, without conveying to the holder any rights from the referenced security’s issuer or with respect to the referenced security. Staff explained that such a token would likely meet the definition of a “security-based swap” under 15 U.S.C. § 78c(a)(68), and noted that if this is the case, the token could only be sold to eligible contract participants unless a Securities Act registration statement is in effect as to the token and the transactions in the crypto asset are effected on a national securities exchange. The staff noted that even if the token falls within an exclusion from the definition of “swap” or does not satisfy any prong of the “security-based swap” definition in the first instance, it may nevertheless be a “linked security,” an economically similar instrument that likewise provides synthetic exposure to a security without imposing obligations on or conveying rights or benefits from the security issuer.

³⁷ Peirce Tokenization Statement.

³⁸ Div. of Corp. Fin., Div. of Inv. Mgm’t, Div. of Trad. and Mkts., U.S. Sec. & Exch. Comm’n, Statement on Tokenized Securities (Jan. 28, 2026), available [here](#) (noting that a financial instrument formatted as a crypto asset may meet the statutory definition of a security-based swap under Section 3(a)(68) of the Exchange Act).

d. Crypto ETPs

Asset managers are considering the formation of funds that invest substantially all of their assets in digital assets or digital asset derivatives. These “Crypto ETPs,” which are generally ETFs registered under the 1940 Act (and taxed as RICs) or ETFs registered only under the Securities Act (and taxed as grantor trusts), also provide investors with digital asset exposure. These products allow investors who seek to add digital asset exposure to their portfolios to do so conveniently and without directly owning digital assets, which would require them to have a crypto wallet.

2025 brought several notable regulatory developments with respect to crypto ETPs. In July 2025, SEC staff provided greater clarity on certain Securities Act disclosure requirements as applied to crypto asset ETPs.³⁹ In September 2025, the SEC approved proposed rule changes by three national securities exchanges (Nasdaq, NYSE Arca, and Cboe BZX) to adopt generic listing standards for ETPs that hold spot commodities, including digital assets.⁴⁰ Specifically, these “Generic Standards” allow exchanges to list qualifying crypto Commodity-Based Trust Shares⁴¹ without filing a separate Form 19b-4 and awaiting SEC approval for each product. The rule may permit faster listings and lower costs where the underlying token benefits from more mature markets (e.g., Bitcoin and Ether).⁴² However, many crypto products do not qualify for the Generic Standards’ automatic listing pathway, including actively managed strategies, leveraged or inverse products, and products with features like lending or rehypothecation. Exchanges will still need to submit Form 19b-4 for these products.

Additionally, while the SEC clarified guidance with respect to certain protocol proof-of-stake activities in May 2025 (as discussed above), staking in exchange-traded funds remains in development. In July 2025, the launch of the REX-Osprey™ ETH + Staking ETF and REX-Osprey™ SOL + Staking ETF marked the first U.S. RICs 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.⁴³ Managers continue to explore new crypto products that are staking-enabled and activating staking features in existing crypto ETFs.

³⁹ Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n, Statement on Crypto Asset Exchange-Traded Products (July 1, 2025), available [here](#).

⁴⁰ Press Release, U.S. Sec. & Exch. Comm’n, SEC Approves Generic Listing Standards for Commodity-Based Trust Shares (Sept. 17, 2025), available [here](#).

⁴¹ For the definition of “Commodity-Based Trust Shares,” see Securities Exchange Act Release No. 34-103995; File Nos. SR-NASDAQ-2025-056; SR-CboeBZX-2025-104; SR-NYSEARCA-2025-54; Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; NYSE Arca, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To Adopt Generic Listing Standards for Commodity-Based Trust Shares; 90 Fed. Reg. 45414 (Sept. 22, 2025), available [here](#).

⁴² The underlying crypto asset or other commodity held by the trust must satisfy one of the following criteria: (i) the commodity trades on a market that is an Intermarket Surveillance Group (“ISG”) member (and the exchange listing the Commodity-Based Trust Shares may obtain information about trading in such commodity from the member market); (ii) the commodity underlies a futures contract that has been trading on a CFTC-registered futures exchange (termed a “designated contract market” or “DCM”) for at least six months, provided that the listing exchange has a comprehensive surveillance sharing agreement with the DCM, directly or through common ISG membership; or (iii) a national securities exchange lists an ETF providing economic exposure of no less than 40% of its net asset value to the commodity.

⁴³ Rex Shares, Rex-Osprey™ Launches First U.S. ETF with Solana Exposure plus Staking Rewards (July 2, 2025), available [here](#). For additional information, see Brian Baltz et al., Recent Developments for Crypto Asset Exchange-Traded Products and Exchange-Traded Funds, Willkie Farr & Gallagher LLP (July 15, 2025), available [here](#).

Guidance issued by the Internal Revenue Service in November 2025 should facilitate efforts to form Crypto ETPs that are classified as grantor trusts for tax purposes.⁴⁴ Grantor trust classification avoids entity-level tax and provides simplified tax reporting for investors (similar to reporting by an ETF or mutual fund on a Form 1099). However, a state-law trust cannot be treated as a grantor trust for tax purposes if there is a power to vary the investments of the certificate holders. By following the 14-point safe harbor set forth in guidance by the Internal Revenue Service, a crypto ETP can ensure that its staking activity will not constitute such a power to vary its investments, so that it preserves its tax status as a grantor trust.

Among other considerations, advisers evaluating crypto ETPs are encouraged to carefully consider custody and security arrangements, particularly with respect to policies and procedures for the movement of crypto assets between a custodian and a trading account. Given the novel structure of such products, conferring with relevant regulators may be appropriate.

4. Conclusion

Record regulatory activity in the field of digital assets occurred in 2025 and the beginning of 2026. This Alert is by no means exhaustive of the totality of considerations for asset managers who may be considering crypto exposure in 2026, and the field continues to develop rapidly. Issues range from foundational questions regarding anti-money laundering processes and obligations, regulation-specific inquiries such as application of principal and cross trading restrictions to crypto transactions, evolving tax treatment, the priority of liens and governing rules for digital assets under the Uniform Commercial Code⁴⁵ and more. While much remains uncertain, additional industry and regulatory activity regarding the application of the current regulatory framework to digital assets is a given.

Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the federal securities and commodity derivatives laws, including the application of those laws to digital assets. We would be pleased to assist on your matters.

⁴⁴ IRS Rev. Proc. 2025-31; Roger Wise, IRS Revenue Procedure 2025-31 Attempts to Put Stake Through Heart of Concerns about Staking by Digital Asset Exchange-Traded Products, Willkie Farr & Gallagher LLP (Nov. 14, 2025), available [here](#).

⁴⁵ Chernuchin, Cindy, Willkie Farr & Gallagher LLP, UCC Article 12, Controllable Electronic Records (Aug. 5, 2025), available [here](#).

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