Consumer Finance Monitor Podcast (Season 8, Episode 46): The GENIUS Act and the Future of Stablecoins: What Banks and Fintechs Need to Know – Part 1

Speakers: Alan Kaplinsky, Peter Jaslow, Richard Rosenthal and Art Wilmarth

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm very pleased to be moderating today's program. For those of you who want even more information, either about the topic that we're going to be talking about today or anything else in the world of consumer or financial services, please don't forget about our blog, consumerfinancemonitor.com. We've hosted our blog since 2011 when the CFPB became operational. There's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry.

So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you access your podcasts. And also, please let us know if you have ideas for any other topic that we should consider covering on a future podcast show or speakers that we should consider as guests on our show. Today's podcast show is part one of a repurposed webinar that we produced on September 3rd entitled The GENIUS Act and the Future of Stablecoins: What Banks and Fintechs Need To Know. During part One, we will consider the following topics, the key provisions of the GENIUS Act, that is licensing, oversight and enforcement, federal versus state jurisdiction, preemption of state stablecoin regimes, and the role of federal banking regulators, the comptroller of the currency, the Federal Reserve, and the FSOC.

The recently enacted GENIUS Act creates the first comprehensive federal regulatory framework for stablecoins, digital assets tied to the value of the US dollar or other reference instruments. The statute has very significant implications for banks, FinTech companies, crypto native platforms, and their legal advisors. The goal of our webinar today is to provide you with a practical and a legal analysis of how the GENIUS Act reshapes the regulatory landscape for the issuance, distribution, and supervision of stablecoins. Our expert panel will explain what the new requirements mean, identify key areas of uncertainty and risk and controversy, and there has been plenty of that in the aftermath of the enactment of the statute. And we will provide guidance for both compliance purposes and for purposes of fostering innovation.

So let me introduce our speakers for today. And first let me start with Art Wilmarth, who is no stranger to our podcast show, has been our guest on several occasions. Art is a professor emeritus at the George Washington University, which usually that means that it's somebody who's retired. In Art's case, he is far from retired. He is constantly writing about banking and consumer finance subjects, and he's published altogether more than 50 law review articles and book chapters in the field of financial regulation.

But of interest to those of you attending the webinar today are his articles on stablecoins and other crypto assets. He has written something called The Looming Threat of Uninsured Nonbank Stablecoins in the Delaware Journal of Corporate Law. That's going to be coming out very soon and something published in Washington University Law Review, We Must Protect Investors and Our Banking System From the Crypto Industry. He's written a lot of op-eds on the subject in Open Banker and in the American Banker. And on May 22nd of this year, I was pleased to have Art as my guest on our podcast show where he was very heavily criticized that pending stablecoin bill, which has now become the law. So welcome for sure to Professor Wilmarth.

Second, I want to introduce another outside guest. This is the first time this gentleman has been on our webinar program or on any of the programs that we offer. Richard Rosenthal. He's a principal in Deloitte's risk and Financial advisory practice. He leads complex and transformative projects, assisting banking and FinTech clients in setting up new entities, enabling M&A activity, aligning to regulatory requirements, launching new products, and helping address a broad range of regulatory and risk areas to enter and meet expectations of the US banking system. He leads Deloitte's business and entity transformation integrated services called banking for the Deloitte Center for Regulatory Strategy and also Deloitte's digital assets banking regulatory practice.

And finally, and last but not least, let me introduce my colleague Peter Jaslow. Peter is the Practice Co-Leader of our firm's blockchain technology and cryptocurrency group. He is a corporate and transactional lawyer who advises publicly and privately held companies in corporate and commercial transactions in particular. He represents companies in public and private offerings and other capital raising transactions, M&A transactions, and a variety of commercial technology and financial services transactions. So with all that out of the way, it's my pleasure to turn the program over to Peter Jaslow who's going to focus on the key provisions of the GENIUS Act and then we will go from there. Peter, floor is yours.

Peter Jaslow:

Great. Thanks so much, Alan. Hi everyone, I'm Peter Jaslow. Great to be here with you today. As Alan said, we're going to kick it off with a review or overview of the key provisions. There is a lot there so, but I'm going to try and go over really the highlights and leave a little time for the other panelists to maybe chime in with some thoughts there. So to start, the GENIUS Act or the Guiding and Establishing National Innovation for U.S. Stablecoins Act, this was signed into law in July 2025 and really was the first major federal regulation that established framework for stablecoins. And this has really been an initiative and a priority for the administration. And the first major act to address this. The Act establishes a licensing and regulatory regime for issuers of payment stablecoins and creates an ongoing compliance regime for those issuers. So to start with that, we have to look at what the definition of payment stablecoins are, and this was a pretty brief definition that referred to digital assets.

The payment stablecoins are digital assets that are designed for payments that an issuer is then required to redeem at a fixed monetary value. So it pegs by regulation that each stablecoin must have some kind of redemption value. This is often seen, in the crypto market, this was often seen as something like typically a dollar and the regs require that there be this redemption amount. Digital asset, I know I use the digital asset term in the definition. That's actually defined as well, and I would say followed somewhat of a customary definition from cryptocurrency and blockchain technologies being a digital representation of value using a distributed ledger, which I think that definition largely comes from what we've seen in blockchain technology over the years.

Next I wanted to get into the permitted issuers under the act, and there's a few different categories. Essentially they break down to larger issuers that must be federally qualified and come under the federal regulatory regime. If you are below a dollar threshold for size, they could come under and be state qualified. Those state regulated issuers, however must be in a state whose regime meets federal standards. And then lastly, regulated subsidiaries of insured banks. So for the federally qualified issuers, those could be non-bank entities so long as they're meeting the federal regulatory regime. Uninsured national banks, those would be supervised by other federal regulators, most likely the OCC or the Office of the Comptroller and possibly other federal branches that are approved by OCC to issue stablecoins. So to boil it down, all issuers either need to be licensed at the federal level and or certain smaller issuers may opt for state oversight. I'll come to in a minute, I left out foreign issuers.

The act leaves open some potential for foreign issuers to qualify or get licensed under the act. For state, just to drill down on state certification, to be state qualified, you need to be under the total outstanding issuance of the payment, stablecoin needs to be below 10 billion. And a stablecoin certification review committee must determine that the state's regulatory regime meets whatever the federal, the required federal standards. This committee is actually a new committee created by the act and is while not a ton of detail in the act on the formation of that committee is to be comprised of members from Treasury, Federal Reserve, and FDIC. And then the act also provides for transition periods for existing stablecoin issuers to come under compliance typically one year for those, I believe it's one year for those that are over the $10 billion threshold or a longer three year period if you're below that.

In terms of other issuer requirements, these are set forth in a pretty lengthy section, section four under the act. Most important I would say is probably the reserve requirements, meaning that the issuer must have reserves to satisfy redemption of all stablecoins on at least a one-to-one basis. And generally those reserves under the act must consist of high quality liquid assets. Those are spelled out as US currency, Treasury bills, securities in a registered investment company, but all, as I mentioned, high quality liquid reserves. The act also provides that those reserves need to be segregated. Prior to the act with other stablecoin issuers as well as other cryptocurrency companies there's always been an issue of what collateral, what a holder of cryptocurrency could do with a customer's cryptocurrency.

And so here the act required that they not be commingled and in addition, the issuers are prohibited from re-hypothecating or otherwise using the reserves for forms of investment while it has stablecoins issued. And again, those are activities that we saw undertaken quite regularly by cryptocurrency companies that for a long time, have engaged in lending or other types of transactions where they would take a customer's either reserve amount, collateral, or when they're custodying crypto, using that crypto for arbitrage, hypothecation, or other investments. The act also as I mentioned, requires that holders have a right to redeem the stablecoins and then while it doesn't have a specific requirement for timely redemption, does force issuers to adopt a redemption policy that's publicly disclosed, that's got to spell out the procedures for redemption as well as clearly, just clearly describe any applicable fees and limits the ability to easily change those fees.

There's other requirements in terms of monthly attestation reports regarding the issuers reserves, certification requirements by CEO and CFO, as well as potentially financial statement requirements for certain issuers, which could be involved because those annual financial statements would need to be reviewed by a public accounting firm. And so that could involve a decent amount of work for issuers. Quickly on other requirements, the act does require issuers to meet capital and liquidity requirements. Most of those, however, are supposed to be adopted through rulemaking, so that will remain to be seen. Payment permitted issuers are also treated as financial institutions under the Bank Secrecy Act. So will be required to comply with AML and suspicious transaction monitoring, among other things. And then the act limits the activities of permitted stablecoin issuers so that they can really only engage, their activities have to be limited to issuance of stablecoins, redemption of those coins and managing related services. Notably in one industry item, piece of chatter that has come up is issuers can't provide interest or other yield related to the coins.

That's not one of the permitted items. And again, a lot of the legacy crypto community often would offer yield or other interest on coins, so that would not be available here. While the ACT generally only allows for the creation of US regulated payment coin issuers, there was an exception left for foreign issuers where if a foreign regulator adopts a regime that the US Treasury determines is comparable as well as meets a few additional requirements. So that all would need to be done before we would see foreign issuers of payment stablecoins. I would say those are probably the high points that I wanted to flag in this introduction. There's obviously a number of other provisions, some of which we'll get into a little bit later on. I guess what I would say is when we talk about risks and enforcement, but wanted to pause there, open it up in case any of my panelists have other thoughts.

Richard Rosenthal:

Peter, I would just, maybe just reinforce a couple points you made to kind of start the conversation because I think we'll get into some of the issues, but it's a bare instrument. Banks have to hold this off balance sheet. It's really a custody instrument. So the rehypothecation point is really a foundational point, meaning it's not take deposits, make loans. It is manage this peg, manage this reserve. You issue a coin, the bank or the non-bank can invest in high-quality liquid assets, but they have to manage that reserve and that is the major source of revenue. They're earning a yield on that reserve. And the law defines how that works. There's a lot of nomenclature issues in the industry right now, crypto payment stablecoins, tokenized deposits. I think it's important that for this conversation we're really talking about payment stablecoins. Stablecoins can be backed by other things.

They can be backed by gold, they can be backed by other currencies. For purposes of this conversation and the GENIUS Act, we're really talking about US dollar backed stablecoins that are mean for payment purposes. I think timing-wise, just to throw that out there, to put this into context, the regulators have a year to basically write the regulation to enact the bill. We expect that to move quicker and it is moving a lot quicker than that. We will talk today, I think about the back door on interest. I know Art and Peter will get into a conversation on how business models may be designed around that provision, which says you can't pay interest directly, but how do you do that? And obviously I think we'll also get into the public-nonpublic dynamic, but I think it's important also just to kind of set the stage, that if you are a public company, you have to be engaged predominantly in financial services to issue, but there seems to be another loophole which we'll get into on private companies and whether they have to be engaged in financial services or not.

So I think in summary, it creates already a complex licensing framework and system. A lot of options. Sets the broad guardrails for what it takes to be an issuer, but there's a lot of ways of attacking that. And there's still a number of issues that we're going to discuss today that I think are substantial and potentially paradigm-shifting impacts for the industry.

Peter Jaslow:

Yeah, no, thanks for that, Richard. I guess on the effective date, maybe to just mention the act said that it would become effective within 18 months of enactment or 120 days after the final regs are implemented. So I think a lot are seeing that as possibly late 2026 timeline.

Art Wilmarth:

And I would agree, that the implementation by regulators will be critical because if you look at my paper, which was really a critique of the GENIUS Act, is an extremely open-ended bill with tremendous amounts of discretion for regulators, tremendous amounts of waiver authority. And so until we see the regulations, it's going to be hard, I think to quantify exactly what's the impact of this bill will be. Certainly taking Circle as an example, is a very large existing stablecoin issuer. I would think it's almost certain that they will opt for some type of federal license and come under federal jurisdiction because they're already well over the $10 billion threshold for state stablecoin issuers.

But there are many questions about, for example, what kind of diversification of reserves will be required. Obviously, I don't think that regulators will allow a stablecoin issuer to put all of its reserves in one place, whether that's bank deposits, maybe Treasury bills, they'd allow that. But for example, they could put their reserves, as Peter said, in money market funds. Would you allow an issuer to put all of its reserves in one money market fund? That would be certainly, I think quite risky. As Rich mentioned, rehypothecation of Treasury securities that are pledged for qualifying repurchase agreements or repos, that's going to be an enormous issue because we saw what rehypothecation could do leading up to the 2007 and eight crisis where the same collateral had been pledged multiple times to multiple creditors.

So I think liquidity and capital will be an enormous issue. The bill says that capital requirements and liquidity requirements can only be established to ensure the continued operation of the particular stablecoin issuer. That doesn't seem to leave much room for additional protective buffers that would provide protection against what I would call systemic risks or external shocks as opposed to idiosyncratic risks so that the regulators will have an enormous amount of work to do in really fleshing out what to me is really a barebone statute that has many, many open questions that it raises.

Alan Kaplinsky:

Well, maybe that's a good segue Art, into the next topic on our agenda, federal versus state jurisdiction, preemption of stablecoin regimes.

Art Wilmarth:

Yes, this bill obviously has a very complex set of overlaps between federal and state jurisdiction. So at the federal level there are three different regulators which we'll talk about in topic four, but it's pretty clear that I think the most important regulator will be the Office of the Controller of the Currency, which is currently and will continue to be the regulator of national banks. As Pete mentioned, there's a general threshold of 10 billion for state stablecoin issuers, so that if you're over that amount, at least presumptively, you would have to move to a federal charter. Again as we'll discuss more, I think that's most likely to be an OCC charter, but there are some interesting loopholes there because for one thing, there is no limitation on how many issuers can be owned by a single parent company. So potentially a single company could set up multiple state issuers each with under $10 billion of stablecoins outstanding and still qualify for the state option even if they had five or 10 or 15 or 20 of such issuers.

Again, unless federal regulators were to adopt some kind of rule prohibiting that, and then that might be subject to a judicial challenge. The second thing is that there is the ability for federal regulators to waive the $10 billion ceiling and say that a stablecoin issuer with more than $10 billion of outstanding stablecoins could remain within a state system. Obviously Wyoming has been the most active player from the state side in granting stablecoin licenses along with New York. So would the federal regulator agree that a Wyoming or New York stablecoin issuer could continue to stay under state supervision once it goes past the 10 billion? That's an interesting question. There's no real discussion as to what that would require. Interestingly, there's no real discussion or clarity as to which federal regulator would make that decision. Would it be the Fed, would it be the OCC? As I read the statute, it's not clear.

So that's one question. Could a state stablecoin issuer go beyond the 10 billion with a federal waiver from whom and how would that work? Then as the topic indicates, there are some very difficult and thorny preemption issues. So under section 4B, the OCC has given exclusive regulatory authority really over the most important federal chartering options, and 4B also says that the general preemption provisions in the National Bank Act regarding state consumer financial laws don't apply under 4B. Well, that raises a host of, I think, difficult questions, partly because the National Bank Act preemption provisions in many ways incorporate preexisting case law. So there are two important cases. The Barnett Bank case, which establish the prevent or significantly interfere standard for preempting state consumer laws and the Cuomo v. Clearing House case, which said that states had the right through their attorneys general to enforce their valid state laws through judicial proceedings, not administrative, but through judicial proceedings.

Presumably those two cases would still apply to federally chartered stablecoin issuers despite the apparent, not preemption, but really exclusion of the National Bank Preemption provisions. But that I think remains to be seen. Section seven raises, I think some very difficult interpretive questions. So section seven in section A seems to say that let's say if a Wyoming stablecoin issuer goes into New York, for example, that New York law would not apply to the Wyoming stablecoin issuer unless it would also apply to a federal stablecoin issuer. And I think the OCC generally would take the position that state law doesn't apply very much, if at all. That'll be interesting to see how they do it. So that would seem to say that the Wyoming stablecoin issuer would get the same treatment in New York that a federal issuer would get. But section 7F says, but nothing in this act is intended to override state consumer protection laws except those dealing with licensing, chartering, and authorization to do business.

Other words, it's pretty clear that the Wyoming issuer would not have to get a license or authorization to do business or charter from New York to do business in New York. That's pretty clear. But what about the other consumer protection laws that New York would apply? To me, 7A and 7F are in direct conflict, and it's going to take a lot of judicial sorting out to figure out how you harmonize those two provisions.

And then lastly, section 16D says that a licensed stablecoin issuer can go into a state, another state and it doesn't have to comply with the money transmitter laws of that state. So again, a Wyoming qualified stablecoin issuer could go into New York, would not have to qualify with New York money transmitter laws, which would be a huge change to existing law. And yet then it says, oh, but New York could still enforce those laws that are valid under 7F, the section I just mentioned, which I think New York would assert include money transmitter laws. So the application of money transmitter laws to out-of-state licensed qualified stablecoin issuers chartered by other states is going to be another enormous issue. So for all the litigation lawyers out there, I think the GENIUS Act is going to be a field day for litigation over a host of preemption and applicable state law issues. I'll stop there.

Richard Rosenthal:

Just, maybe just add to your point, I think you're teasing out some of the bigger issues and the complexity of this. There is a lot that goes to, and if you're a bank, you're a non-bank, how do you set yourself up? What is the charter type? And I think that's why you will probably see a lot of people gravitate towards the national license because of some of the issues that may exist at the state level. If you went down the state route, do you still need money transmission licenses? Do you need the BitLicense in the state of New York? I think it creates not only your point about the legal issues, but just also the business model arbitrage and different options of how you can set yourself up to enable this.

And I think what's also important Art, is that what does this license give you the power to do? It allows you to issue payment stablecoins, you can redeem them, you can manage related reserves. So is this a backdoor national money transmission regime? I think you're teasing out some important points. There are some ways that the regulatory system has worked today that if you engage in payments, you need the state money transmission licenses. If you engage in digital assets at the state level, you need a certain additional licenses. I think there are some interesting tension points of how you interpret the permitted activities. Do you then extend that to include, because if you're redeeming stablecoins, redeeming them in a fiat, does that now mean that I have broad fiat powers akin to what I would get in money transmission? I think the bottom line for me is that there will be creative minds that will take advantage of some of the loose language here. And there is a lot of people saying, here's the best way to set up.

And I think in your open, you made this point, we've already seen a number of people rush towards that limited purpose trust charter and say, hey, that thing looks pretty good in GENIUS. I'm going to get some pretty good powers. The OCC has interpreted that, the Comptroller has interpreted that charter historically to be in a fairly broad way and how do I set myself up to take advantage of the points you made? I think we'll get into that more. Those are the things I would add to your framework.

Alan Kaplinsky:

Okay. Well, let's go back to you again, Art to talk about the next item on the agenda, which we've talked about a little bit already, but the role of the federal bank regulators, the Comptroller, the Fed, and the FSOC.

Art Wilmarth:

Yeah, so I would start by, again by saying that I think the legislation is quite designed to give the OCC the lion's share of the power at the federal level to put them in the driver's seat, which I think is no surprise because the OCC sits within the Treasury Department, and I think it's pretty clear the Treasury Department is driving financial regulatory policy for the entire, not only the executive branch offices, but also the independent agencies. That's quite clear. So the Federal Reserve and the FDIC along with the National Credit Union Administration have a very limited role, which is they can charter stablecoin issuers that are subsidiaries of either Fed member state banks or in the case of the FDIC, FDIC-insured state non-member banks, or in the case of the NCUA, NCUA-regulated credit unions.

So each of these would have to be a direct subsidiary of an insured depository institution. You couldn't have uninsured depository institutions. And so the question becomes, and I think it's the question we might get into later when we get into business models, is it likely that any existing organization that has an insured depository institution is going to choose to use payment stablecoins as opposed to tokenized deposits? And that's an interesting question that we'll get into later. Myself, I'm quite skeptical on that point, so it's not clear to me that the subsidiary of insured depository institution model is going to be widely used at all, but I'll be interested to hear Rich's thoughts and Pete's thoughts on that. But the OCC has really three choices. One is, actually four. One is a subsidiary of an already FDIC insured National Bank. Again, I don't think that's too likely. The second one is something completely new, which is an uninsured national bank that OCC has never had authority, although they've made noises about it, but in my view, they've never had authority to issue an uninsured national bank charter before.

This law does give them that right to issue an uninsured national bank charter for the purpose of being a stablecoin issuer. Then they also have the option to use a non-bank charter, which I think would encompass, as I understand it, the non-depository trust charter that Rich just mentioned, that the OCC has specific authority to issue non-depository trust charters, which have been used by a number of institutions, and this would seem to say yes, you could have a non-depository, in a sense, non-bank trust charter as an OCC charter stablecoin issuer. So it seems to me the OCC is going to offer some interesting choices with regard to what would an uninsured national bank look like as a stablecoin issuer, and what would a non-bank trust charter look like, the so-called national trust charter. A couple interesting questions here. One is, would the uninsured national rank qualify to become a Federal Reserve member bank and therefore get master account with Federal Reserve Services?

That is an enormously complex and difficult question. I think that there are real arguments on both sides, maybe three sides, and it's not clear to me that the Fed will go along with giving an uninsured national bank a Fed member status with a master account, but that's yet to be determined. My strong sense is from what I know, that your national trust, what I will call a non-bank charter, doesn't get you master account status with Fed services. So that's a limitation on that particular charter.

Another interesting question is, and I think Rich set this up, what can be done other than simply issuing and redeeming stablecoins and managing reserves for stablecoins? Well, actually quite a bit. I mean, the federal regulators, and in this case the OCC can approve activities that are so-called incidental, not only to the activities that we mentioned, but also to the activities of a digital asset provider. That would seem to possibly authorize all sorts of issuances of crypto assets, derivatives on crypto assets. The OCC has used the incidental powers provision of the National Bank Act to authorize a dizzying unbelievable array of derivatives activities for national banks, many of which came to grief in 2008 during the crisis. But one can certainly imagine, as Rich said, that innovative lawyers will find ways to say, well, this incidental authority for OCC chartered stablecoin issuers will allow a whole host of activities. Yet to be determined. And I think that's going to be a major issue.

Peter Jaslow:

I'll go real quick to just add on there, Art. Yeah, I think that digital asset service provider was a separately divine term that had, as you noted, a broader range of services, although I think that will have to be more defined. I think a lot of, when first looking at that, that I think was geared towards kind of custodial service providers, those are providing custody of digital assets, payment stablecoins, and is paid for those services. It did exclude the parties that are developing the protocols, the blockchain protocols from falling into that category. And then I know the next point I'll be speaking about is legal risks, right, but to just add on to some of your first comments, I do think there's been some, I don't know if I'd say controversy, but I think some market participants, regulators did want there to be more focus on consumer protection, and when they gave the powers to the OCC, the Federal Reserve, it didn't provide for powers in, for instance, the CFPB in order to emphasize kind of the consumer protection nature of the regime.

Alan Kaplinsky:

I want to thank Peter Jaslow, Art Wilmarth and Richard Rosenthal. And I want to remind everyone that part two of this repurposed webinar dealing with the GENIUS Act will be released next Thursday on October 23rd. And during that part two, we will be discussing the following topics, legal risks, key issues, and constitutional challenges are already surfacing, the business model impact, including the role of tokenized deposits, implications for FinTechs, banks, and other market participants, compliance roadmaps and operational readiness strategies, and opportunities for privately owned and publicly traded big tech firms and other commercial enterprises to acquire stablecoin issuers and enter the banking business. I want to thank all of our listeners today and hope you enjoy the rest of your day.