

# How To Wield The Clarity Act As A Litigation Defense Tool

By **David Zaslowsky and Peter Chan** (March 18, 2026)

Recent months have turned the Digital Asset Market Clarity Act from a "maybe someday" policy project into an active litigation variable — one that counsel can be evaluating now, even before the bill becomes law (assuming it does).

The reason is simple: When a market structure statute is plausibly on a near-term path to enactment, it can begin influencing litigation strategy before it is signed — by shaping settlement dynamics, reframing narratives about so-called regulation by enforcement, supporting stays and primary-jurisdiction arguments, and changing how judges and regulators talk about the underlying conduct.

In this article, we outline how litigators can think about the Clarity Act — not as a future compliance checklist, but as a present-day defense tool.

## Why the Clarity Act Is Suddenly a Litigation-Relevant Event

Momentum and time pressure are now part of the story. The bill cleared the U.S. House of Representatives by a wide bipartisan margin (294 to 134) and has remained a central focus of U.S. Senate negotiations. It is currently still in the Senate.

In February, Sen. Bernie Moreno, R-Ohio, publicly framed the remaining timeline in compressed terms — "hopefully by April" and within the next 90 days — underscoring that at least some lawmakers continue to push for a narrowing legislative window.

The stablecoin-yield impasse has become the gating issue. Multiple reports describe the White House stepping in to broker compromise language, including a reported March 1 deadline to resolve the stablecoin rewards/yield dispute that stalled progress. Even though that deadline passed without an agreement, active interbranch negotiation matters because it signals to courts that the political branches are working on the precise questions that litigants are asking judges to resolve.

In addition, regulatory signals are moving in parallel. On Feb. 19, U.S. Securities and Exchange Commission staff in the Division of Trading and Markets issued guidance indicating it would not object to broker-dealers applying a 2% haircut to proprietary positions in payment stablecoins under Exchange Act Rule 15c3-1 — an interpretation Commissioner Hester Peirce publicly endorsed in a statement urging consideration of formal rule amendments.[1]

This kind of contemporaneous agency posture — incremental clarity through FAQs and statements while Congress debates market structure — creates fertile ground for defense arguments about uncertainty, evolving standards and the need for harmonized rules rather than after-the-fact punishment.



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## **Four Litigation Defense Uses of the Clarity Act — Even Before Enactment**

### ***1. Fair Notice and Due Process Framing: From Abstract Complaint to Concrete Legislative Record***

A common defense theme in crypto cases has been that defendants lacked fair notice because the government relied on enforcement and post hoc characterization rather than tailored rules. Such a defense of a lack of fair notice of a legal standard has resulted in reversals of judgments or dismissals.

For instance, the U.S. Court of Appeals for the Fifth Circuit in 2024 reversed a judgment in a U.S. Commodity Futures Trading Commission enforcement action against EOX Holdings due to a lack of fair notice of a novel regulatory interpretation that the CFTC advanced via the enforcement action, despite what the court noted was 39 years of silence by the agency on the topic.[2]

Similarly, last year, the U.S. Court of Appeals for the Third Circuit criticized the SEC for its unconstitutional approach of "ex post enforcement without announcing ex ante rules or guidance" in connection with the agency's enforcement action against Coinbase.[3]

The Clarity Act debate strengthens this framing by supplying a legislative record that repeatedly acknowledges fragmented oversight and outdated or ambiguous standards — including the Senate Banking Committee's own description of the bill as establishing "clear, enforceable guardrails" in response to "fragmented oversight and outdated rules."

Thus, even before enactment, defendants can cite the existence of an active bipartisan project to define SEC versus CFTC lines, token classifications and intermediary obligations as evidence that the existing legal regime is unsettled enough to warrant caution in imposing the harshest sanctions — particularly where the alleged misconduct is not fraud-based but classification- or registration-based.

When briefing fair notice, one could anchor the argument in the government's own institutional behavior: "Congress is currently negotiating a statute precisely because existing law has proven ill-fitting for digital asset market structure."

For example, use committee materials, e.g., the Senate Banking Committee's "Myth vs. Fact" release, to show the problem is recognized across branches.[4]

Evidence of lack of fair notice can also demonstrate the existence of good faith and lack of scienter or negligence.

### ***2. Primary Jurisdiction and Stays: Let the Experts, or Congress, Speak First***

Courts sometimes stay proceedings or narrow issues when resolution depends on questions committed to an agency's expertise. The Clarity Act's core purpose — drawing bright lines between SEC and CFTC authority and creating registration pathways — invites defendants to argue that courts should avoid becoming de facto market structure regulators.

The argument strengthens when congressional negotiations are active and agencies themselves are actively clarifying adjacent questions through guidance. The Feb. 19 SEC stablecoin FAQ and Peirce's statement demonstrate that the commission is already contemplating rule modifications to account for payment stablecoins — suggesting that agency policy is still developing.[5]

Although stays are never automatic, defense counsel can plausibly argue for sequencing (decide fraud/manipulation first or defer classification); narrowing (limit relief while the framework is in flux); or administrative deference (await rulemaking and/or implementation guidance).

Courts are more receptive when the requested stay is time-bound and tied to concrete milestones, e.g., Senate markup, a White House deadline or anticipated committee action. The public reporting on the April target can support that structure.

### ***3. Retroactivity and Prospective Clarification: Using Pending Reform to Limit Remedies***

Even if the Clarity Act becomes law, most provisions will not be retroactive in the sense of immunizing past conduct. But retroactivity is not the only lever.

Courts routinely exercise discretion in remedies, especially when rules are evolving and defendants plausibly acted in a gray zone.

Here, the Clarity Act could be used to argue for:

- Prospective compliance orders rather than punitive sanctions;
- Narrower injunctions, e.g., conduct-specific rather than business-ending;
- Reduced penalties where uncertainty was widely acknowledged; and
- More generous cure periods, i.e., registration pathways or disclosure updates.

Again, the February stablecoin guidance illustrates how quickly capital markets treatment can change via staff interpretation — what was functionally a 100% haircut in practice can become 2% with a single FAQ update. That type of shift supports the argument that regulated entities are operating between moving goalposts.

### ***4. Settlement Leverage: Repricing Risk as the Law Moves Toward Clarity***

Settlement valuations in crypto litigation often hinge on uncertainty: Will the SEC treat the asset as a security? Will the CFTC assert spot-market authority? Will banks be permitted to compete with on-chain yield? The Clarity Act is explicitly designed to reduce these uncertainties by assigning lines of responsibility and establishing guardrails.

When a statute appears plausibly near, both sides may reassess the following:

- Plaintiffs' leverage may decline if the defendant can point to an impending registration pathway and clearer classifications;
- Defendants' downside may shrink if remedial discretion is likely to be exercised in a transition period; and
- Regulators' posture may evolve toward compliance-oriented outcomes as they prepare to implement a new framework and avoid adverse precedent that conflicts with forthcoming law.

The February White House mediation over stablecoin rewards and repeated public statements about timelines highlight that the market may already be repricing expected

regulatory outcomes — meaning settlement discussions that ignore legislative drift risk being stale.

### **Building the Record Now: Five Practical Steps for Litigators**

If the Clarity Act becomes law, the best defense use cases will belong to parties that build a contemporaneous record showing good faith compliance, risk management and responsiveness to evolving standards. Here are five steps to consider taking now.

#### ***1. Memorialize classification analyses and supervisory decisions.***

Document token-by-token reasoning (utility, governance, marketing and decentralization indicators), and update it as guidance evolves. This anticipates the Clarity Act's focus on clearer classifications and compliance obligations.

#### ***2. Track legislative milestones in board and committee materials.***

If management is actively monitoring the April legislative timeline, and was monitoring the March 1 stablecoin rewards negotiations, it supports the narrative of reasonable reliance and ongoing diligence.

#### ***3. Align stablecoin programs to emerging payment stablecoin criteria.***

The SEC's net capital FAQ and Peirce's statement describe the staff's definition and rationale for treating payment stablecoins more like money market funds (2% haircut), emphasizing reserve quality, attestation and redemption policies.

Designing and disclosing these criteria will not immunize the product, but could very well reduce unforced errors and strengthen the narrative that the product was built for payments, not investment.

#### ***4. Prepare a transition compliance plan.***

In regimes designed to channel activity rather than prohibit it, a carefully structured transition compliance plan can strengthen credibility and remedial positioning — but only if it preserves legal defenses and avoids implied admissions.

#### ***5. Consider targeted discovery and scheduling stipulations that are expressly nonconcessional and time-limited.***

Carve out evergreen merits discovery (fraud/manipulation, intent, communications, trading/transaction data, key representations and damages inputs) to proceed now, while narrowly deferring those categories of discovery and briefing that are likely to be mooted or reframed by anticipated statutory developments.

Build in triggers, preservation measures and a fast restart mechanism to prevent strategic delay.

### **The Bottom Line**

The Clarity Act is being discussed as so-called market structure legislation — but for litigators it is already a strategy input.

Even though the White House's reported March 1 compromise date on the stablecoin-rewards dispute was not met, and even if the April finish line is also not met, it is sensible to look beyond monitoring the Clarity Act to how to operationalize it in active matters.

Defense counsel can treat the Clarity Act as a tool to strengthen fair notice framing, support primary-jurisdiction stays and sequencing, argue for forward-looking remedies rather than punitive ones, and reprice settlement leverage as statutory clarity approaches.

The firms that do this best will not be those that wait for the final vote — but those that build the record now, when the contours of what is considered reasonable behavior in a transitioning regulatory environment are still being drawn.

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[1] <https://www.sec.gov/newsroom/speeches-statements/peirce-stablecoin-021926-cutting-two-would-do>.

[2] *CFTC v. EOX Holdings, LLC*, 90 F.4th 439, 441 (5th Cir. 2024).

[3] *Coinbase, Inc. v. SEC*, 126 F.4th 175, 204 (3d Cir. 2025) (Bibas, J., concurring).

[4] <https://www.banking.senate.gov/newsroom/majority/myth-vs-fact-the-clarity-act>.

[5] <https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/frequently-asked-questions-relating-crypto-asset-activities-distributed-ledger-technology>.