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# DIGITAL ASSET TRANSFERS AND THE SECTION 546(e) SAFE HARBOR: A GUIDE FOR TRANSACTION PLANNERS

*As digital asset markets mature, transaction planners can no longer treat bankruptcy avoidance risk as an afterthought. This Article explains how section 546(e) may protect certain digital asset transfers from clawback and suggests planning steps to minimize the risk of subsequent avoidance.*

By Lee M. Dunham and Irina Fox *

While the collapses of Celsius, Voyager, and FTX continue to generate disputes and reshape the digital asset landscape, the next wave of digital asset litigation will not be limited to failed exchanges and headline-grabbing frauds. It will also reach ordinary withdrawals, redemptions, token sales, stablecoin transfers, treasury-management transactions, and other movements of digital assets made during insolvency or on the eve of bankruptcy. For lawyers advising exchanges, funds, issuers, lenders, trading firms, founders, and other clients, the practical question is no longer simply whether a token is a security or a commodity. Increasingly, the question is whether the transfer was structured, documented, and executed in a manner that makes it more likely to fall within the Bankruptcy Code's section 546(e) safe harbor — or, conversely, whether the transaction looks like an ordinary insider, bilateral, or value-draining transfer vulnerable to avoidance.

This Article offers a practitioner-oriented framework for planning digital asset transfers to mitigate avoidance risk. It begins with the unsettled state of section 546(e), then explains why digital assets complicate the traditional safe harbor analysis, and finally identifies practical structuring considerations that may improve the likelihood that a transfer will be treated as protected if the transferor later enters bankruptcy.

## AVOIDANCE POWERS, MARKET FINALITY, AND THE EXPANDING SCOPE OF SECTION 546(E)

Bankruptcy avoidance law is designed to restore value to the estate when a debtor transferred property before bankruptcy in a way that unfairly preferred one creditor, stripped value from the estate, or hindered creditors. Section 547 allows a trustee to avoid certain preferential payments made shortly before bankruptcy.[1]

[1] 11 U.S.C. § 547.

* *LEE M. DUNHAM, PhD, CFA is a Professor of Finance and Chair of the Department of Economics and Finance at the Heider College of Business, Creighton University. IRINA FOX, JD, MA, is a Professor of Law and Associate Dean for Research and Innovation at Creighton University School of Law. Their e-mail addresses are LeeDunham@creighton.edu and irinafox@creighton.edu.* *The authors thank Carter Haagenson, Christie Leonard, Ben Brush, and Abigail Arkwright for their research assistance.*