

# STAKING: REGULATORY LANDSCAPE IN THE UNITED STATES AND SWITZERLAND

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## 1. WHAT IS STAKING ?

Staking is a core pillar of Web3.

It is a mechanism specific to blockchains operating on the Proof of Stake (“**PoS**”) consensus model. But it is also a way to generate yield for digital asset holders and institutions.

Digital asset holders can lock up their tokens (“stake”) to participate in transaction validation and help secure the network. In return, they receive rewards, usually in the form of digital assets.

This mechanism is considered a more environmentally friendly alternative to mining (Proof of Work) and has become central to major projects such as Ethereum, Solana, Avalanche, and Cosmos.

The changing stance of the U.S. Securities and Exchange Commission (SEC) on the legal status of staking services — positioned at the intersection of technology, finance, and regulation — is pivotal and opens new avenues for institutional investors to generate returns.

## 2. UNITED STATES : MAJOR REGULATORY DEVELOPMENT

On May 29, 2025, the SEC issued a significant statement regarding the staking of cryptocurrencies on PoS-based networks.

This statement clarifies that certain staking activities, described as “**Protocol Staking**,” are not considered securities offerings, marking a significant shift from the SEC’s previous position.

Until now, the SEC had treated some staking services — particularly those offered by centralized platforms like Coinbase, Kraken, or Binance — as securities under the Howey test. In February 2023, Kraken was forced to end its U.S. staking program and pay a \$30 million fine.

The SEC now defines digital assets used for staking as those that are intrinsically tied to the programmatic functioning of a public, permissionless network and used to participate in the network’s PoS consensus mechanism or to support its technology and security.

The SEC’s Division of Corporation Finance has specified that the following staking activities do not constitute securities offerings, provided certain criteria are met:

- **Solo staking**: where a crypto holder stakes their own assets directly on a PoS network.
- **Delegated staking (non-custodial)**: where a holder delegates validation rights to a third-party operator while retaining control over the digital assets.

- **Custodial staking:** where a holder entrusts a third party to custody their assets for staking, provided the service provider acts solely in an administrative capacity and does not undertake entrepreneurial efforts.

The SEC emphasized that custodians selecting node operators or holding assets in custody do not, by themselves, meet the “efforts of others” criterion under the Howey test, as these are considered ministerial or administrative functions rather than entrepreneurial or managerial efforts.

This opens the door for institutional investors and new service providers to enter the staking market. The SEC’s position explicitly confirms that staking-related services are permitted as long as they do not involve entrepreneurial or managerial efforts and remain protocol-level in nature, without independent or enhanced returns beyond those provided by the protocol.

Specifically, this applies to the following services:

- **Slashing coverage:** the provider compensates or reimburses the staker in the event of losses due to validator misconduct.
- **Early unbonding:** the provider allows early withdrawal of staked assets before the protocol’s unbonding period ends.
- **Alternative reward schedules or amounts:** the provider distributes rewards at a different frequency or amount than the protocol, as long as these are not fixed, guaranteed, or higher than protocol rewards.
- **Cryptoasset aggregation:** the provider enables users to pool assets to meet minimum staking thresholds.

Offered individually or together, these services do not imply a managerial or entrepreneurial role for the provider, as long as they are limited to administrative or execution tasks.

The SEC underscores that such activities, when limited to administrative or ministerial roles, do not require registration as securities offerings.

However, the SEC position does not clarify the legal situation of staking models, such as:

- **Liquid staking:** where users receive tokens representing their staked assets, enhancing liquidity.
- **Restaking:** where staked assets are used to secure multiple protocols simultaneously.

### 3. SWITZERLAND : FINMA’S POSITION ON STAKING

In Switzerland, FINMA (Swiss Financial Market Supervisory Authority) clarified its position on staking in Guidance 08/2023, issued on December 20, 2023.

FINMA distinguishes between several forms of staking:

- **Direct staking:** where the service provider operates the validation node itself or delegates the task, while retaining withdrawal keys.
- **Staking chain:** assets are passed to one or more other providers who run the node and hold the withdrawal keys.
- **Non-custodial staking:** the client retains exclusive control over the withdrawal keys, and the provider does not hold the assets.

To ensure staked assets are protected in the event of provider bankruptcy, FINMA states that cryptoassets must be “available to the client at all times.” This means providers must be able to return staked assets without undue delay. If availability is uncertain, the assets are not protected under Swiss bankruptcy law (Art. 242a para. 2 DEBA) or banking law (Art. 16 para. 1bis BA).

From a regulatory standpoint, FINMA assesses staking services based on the nature of the assets and the provider’s role:

- If the staked tokens are simple digital assets (utility tokens or cryptocurrencies), staking is generally seen as a technical process and not classified as a financial product — unless accompanied by promises of returns or fund management by intermediaries.
- When third parties offer staking with custody (custodial staking) or combine asset management with return promises, FINMA may qualify these as asset management services or regulated financial products (e.g., requiring an asset manager license or compliance with anti-money laundering rules).
- For investor protection, FINMA stresses the importance of clear transparency about staking risks (such as technical risks like slashing), and adherence to AML/KYC obligations.
- Liquid staking — which allows use of representative tokens for greater flexibility — is subject to specific legal analysis, particularly regarding the classification of the issued tokens.

Providers must also ensure that third parties (like external node operators) meet equivalent standards in prudential supervision and cryptoasset handling in case of insolvency.

### Identified Risks

FINMA identifies several risks associated with staking:

- Technical risk: staking process failures or slashing due to validator misconduct.
- Counterparty risk: legal uncertainty in case of provider bankruptcy, especially if delegation involves foreign entities.
- Market risk: inability to sell staked assets during volatility due to lock-up periods or withdrawal delays.

These risks can be covered by using distributed validation technology with Swiss institutional service providers and hedging strategies to cover the market risk.

### Supervisory Practices

FINMA recommends that institutions:

- Increase client awareness of risks;
- Conduct thorough due diligence on node operators;
- Develop contingency plans for third-party failures;
- Regularly update a Digital Assets Resolution Package (DARP) to allow bankruptcy liquidators quick access to digital assets.

Financial institutions offering staking by delegating technical transaction validation to third parties must also comply with FINMA Circular 2018/3 “Outsourcing” (effective April 1, 2018) and Circular 2023/1 “Operational Risks and Resilience – Banks” (effective January 1, 2024). They must therefore select staking providers that meet Swiss regulatory requirements in terms of security and risk management. To mitigate risks, it is recommended using Swiss-based providers certified under industry standards such as SOC2, ISAE 3402, or ISO 27001. In summary, FINMA takes a pragmatic, case-by-case approach to staking, evaluating each service based on its structure and its impact on investor rights, with particular scrutiny of those involving third-party asset management and return guarantees.

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#### **4. CONCLUSION**

These regulatory clarifications around staking mean that institutional players can offer staking — and attractive yields on digital assets — without violating securities laws.

The SEC's recent statement marks an important step toward a clearer understanding of staking and greater institutional adoption, particularly by banks and issuers of financial products (such as ETFs and ETPs) backed by digital assets eligible for staking.