

CLIENT ALERT

Biden Administration Calls for Whole-of-Government Review of Approach to Digital Assets

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On March 9, 2022, President Biden issued an Executive Order entitled “Ensuring Responsible Development of Digital Assets” (the “**Order**”) in response to the explosive growth of the digital asset and cryptocurrency sectors, which have grown from a cumulative \$14 billion market capitalization to \$3 trillion in just the last five years.¹ The Order outlines the nation’s first “whole-of-government approach” to evaluate the risks and potential benefits of digital assets, including the design and development of a U.S. central bank digital currency (a “**CBDC**”). It calls for action from nearly all of the Federal financial regulators, various departments of the U.S. Cabinet (including Treasury, State, Justice, and others), the Office of Science and Technology Policy, the Director of National Intelligence, and a number of other agencies and officials.

Like many executive orders, the Order serves a messaging function to indicate the Biden Administration’s broad view of digital assets. Refreshingly, the Order takes a balanced approach that recognizes both the challenges and opportunities of digital assets and a CBDC domestically and as a matter of national security. Importantly, it proclaims a national interest in technological leadership and the need for the United States to act swiftly to establish regulatory guardrails for digital assets, develop technology, and engage in dialogue with its partners to ensure American principles are at the forefront of

¹ The sources for this summary include: Press Release, The White House Executive Order on Ensuring Responsible Development of Digital Assets (March 9, 2022); and White House Fact Sheet (March 9, 2022).

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digital asset innovation and CBDC advancements. As a messaging document, the Order is an important step in Washington's policy response to the emergence of a revolutionary new architecture of digital money and distributed finance.

By design, the Order does not address many of the important legal and regulatory issues that continue to challenge the U.S. growth and development of digital assets, including the adoption of a bespoke taxonomy for the many forms of cryptoassets, the need for clarity regarding jurisdictional lines between Federal regulators, the role of state regulators and Federal preemption, and the question of Federal regulation of markets for "spot" transactions in commodity-based cryptocurrencies. Presumably, these details will be addressed by the agencies by their own accord or, in time, by Congressional action. Yet, it is somewhat disappointing that the Order does not instruct Federal regulators to take affirmative steps now to adopt regulatory safe harbors and/or clarify ambiguous application of traditional regulatory standards to the new architecture of digital assets.

While it is commonly believed that executive orders are unique outward communications from the White House to government agencies, they often are driven by executive branch agencies seeking "air cover" from the White House to redirect limited agency resources away from routine agency projects to the particular subject of the executive order. The Order will provide the Commodity Futures Trading Commission ("**CFTC**"), the Securities and Exchange Commission ("**SEC**"), the Office of the Comptroller of the Currency ("**OCC**"), and the many other agencies referenced in the Order with justification to reallocate limited resources away from ongoing initiatives to work on the various digital asset studies and reports mandated by the Order without specific Congressional authorization or additional funding.

I. Key Policy Initiatives

The Order establishes a national policy for digital assets that addresses six key objectives: consumer and investor protection; financial stability; illicit finance; U.S. leadership in the global financial system and economic competitiveness; financial inclusion; and responsible innovation. In addition, the Order directs the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy to coordinate an interagency process that identifies the actions necessary for the executive branch to implement the Order. The Order further directs executive agencies, and encourages independent agencies, to study and issue reports concerning a number of issues that inform the objectives outlined in the Order.

The Order also outlines the principal policy objectives of the Biden Administration to ensure the growth, development, and maturity of the digital asset industry.

Consumer and Investor Protection

The Order stresses the unique and varied features of digital assets that can pose significant risks to consumers, investors, and businesses if appropriate protections are not in place. There is concern that firms providing digital asset services

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may provide inadequate protections and disclosures in the absence of sufficient regulatory oversight. In that regard, the Order directs the Secretary of the Treasury, together with the Secretary of Labor, and the heads of other regulatory agencies, to issue a report addressing the implications of developments in and the adoption of digital assets and changes in the market and payment infrastructure.

Financial Stability

According to the Order, digital asset issuers, exchanges, trading platforms, and intermediaries should be subject to and in compliance with regulatory and supervisory standards that govern traditional financial firms and infrastructures. This is due to the concern that the rapid growth and size of digital asset market participants may increase the risk of global financial stability and systemic risk. As a result, the Order calls for the general principle of “same business, same risks, same rules” to apply to the digital asset industry and notes that a regulatory approach will need to address the economic and financial risks created by the digital asset industry. The Order calls on the Secretary of the Treasury to convene the Financial Stability Oversight Council to prepare a report outlining specific financial stability risks and regulatory gaps posed by digital assets and to prepare recommendations addressing the same.

Illicit Finance

The Biden Administration cautions that the United States must mitigate the illicit finance and national security risks resulting from the misuse of digital assets such as money laundering, cybercrime, human trafficking, and others. The Order also highlights the potential for sanctioned persons to rely upon digital assets to circumvent U.S. and foreign sanctions regimes. In addition, the Order highlights that market participants conducting business in jurisdictions that have yet to implement the international anti-money laundering/countering the financing of terrorism standards set by the Financial Action Task Force (“**FATF**”) may enable illicit finance. Furthermore, the Order notes that the decentralized finance ecosystem and peer-to-peer payments could serve as additional avenues for illicit finance activities. Given the potential significant threat to the national security of the United States, the Order calls for numerous agencies to provide a report devising a plan to mitigate digital asset illicit finance and national security risks.

U.S. Leadership in the Global Financial System

The Order focuses on the need for the United States to remain a leader in the global financial system through the responsible development of digital assets and underlying technologies that are spurring payment innovation. As a result, the Order calls for the United States to set international standards that promote privacy, consumer and enterprise protection, and interoperability with existing infrastructure and payment systems.

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Financial Inclusion

The Order addresses how the United States must promote access to safe and affordable financial services to Americans who remain underbanked and responsible innovation that expands equitable access to financial services, including domestic and cross-border transactions and affordable payment systems.

Responsible Innovation

The Order seeks to ensure that digital assets and their related technologies are developed, designed, and implemented in a responsible manner that promotes privacy, security, and reduces negative climate-related impacts, including those related to mining of digital assets.

II. Central Bank Digital Currency

The Order emphasizes research and development efforts into the design and deployment of a U.S. CBDC and calls for an assessment of whether legislative changes are necessary to issue a U.S. CBDC. Moreover, the Order encourages pilot projects involving CBDCs, but underscores the importance of prioritizing democratic values, including privacy, transparency, connectivity, and interoperability. The Order notes that a CBDC's supporting infrastructure could include both public and private-sector participants even if issued by a central bank.

The Order acknowledges potential benefits of a U.S. CBDC such as low-cost transactions and the ability to promote further economic inclusion. Citing the potential to support U.S. leadership within the world of international finance, the Order notes that a U.S. CBDC may boost economic growth in the event of interoperability with other global monetary authorities.

The Order requests a report from the Department of Treasury in consultation with other government institutions that includes an analysis of the potential implications of a U.S. CBDC, including the potential implications for financial inclusion; the extent to which a foreign CBDC could displace existing currencies and alter the payment system to the detriment of the United States; and the potential relationship between a CBDC and private-sector administered digital assets.

We will continue to keep our clients apprised and informed as further developments are released.

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