

President Biden Issues Executive Order Detailing National Policy Objectives for Digital Assets

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On March 9, 2022, the President issued an [Executive Order](#) (the “E.O.”) that articulates a high-level, wide-ranging national strategy for regulating and fostering innovation in the burgeoning digital assets space. The strategy is intended to encourage innovation yet still provide adequate oversight to control systemic risks and the attendant investor, business, consumer and environmental concerns.

The E.O. is very broad in scope. It focuses on the myriad of issues associated with “digital assets,” a term defined in a way to capture a wide variety of existing and emerging “crypto” implementations. Specifically, the E.O. defines digital assets to include “all central bank digital currencies (CBDCs), regardless of the technology used, and to other representations of value, financial assets and instruments, or claims that are used to make payments or investments, or to transmit or exchange funds or the equivalent thereof, that are issued or represented in digital form through the use of distributed ledger technology.” Significantly, the E.O. does not make an attempt at defining the regulatory status of digital assets and notes a digital asset “may be, among other things, a security, a commodity, a derivative, or other financial product.”

While the E.O. itself doesn't really set forth any new requirements, it puts into motion a process that may yield specific regulatory approaches to digital assets. Of course, this process is happening in parallel with other initiatives by the Securities and Exchange Commission ("SEC") and Congress itself and thus, there is a possibility that the E.O will result in approaches that are in ways inconsistent with other ongoing regulatory developments. For example, in January 2022 the SEC [released](#) a [proposal](#) that would enhance investor protections and cybersecurity for alternative trading systems that trade Treasuries and other government securities. The proposal prompted a [dissenting statement](#) from SEC Commissioner Hester Peirce (often referred to as "Crypto Mom" for her advocacy of the industry), who objected to the speed and breadth of the January 2022 proposal. The E.O. sidesteps some of the controversial issues addressed in the SEC proposal, such as how "exchanges" should be defined, as well as the greater issue of how different digital assets should be classified (and therefore, which financial regulatory agencies have jurisdiction over various digital products and platforms). At the same time, there seems to be some amount of bipartisan interest in Congress to pass its own legislation regulating certain aspects of cryptocurrency and related technologies (e.g., [in the stablecoin area](#)), Whether or not that legislation would be consistent with the results of the E.O.-driven processes is also hard to tell.

Some of the key elements of the E.O. are summarized below:

- **CBDC:** The Administration sees "merit" in U.S. leadership on this issue and continuing discussion with international partners. The E.O. acknowledges that, among other things, a CBDC could support efficient and low-cost transactions (including involving cross-border funds) and support the "unique role" the dollar plays in global finance. The E.O. directs the Secretary of the Treasury (along with other agencies) to submit a report about the implications of a U.S. CBDC on the financial system, and its implications for national security and AML risks; it also directs the Federal Reserve to continue its work in the area and report on potential design options. The Attorney General, in consultation with other agencies, is also directed to provide an assessment as to whether legislative changes would be required before the government could issue a CBDC (and if so, submit a legislative proposal within 210 days of the E.O.). On a related note, certain agencies are requested, within 180 days of the E.O., to submit a technical evaluation of the infrastructure, capacity, and expertise that would be necessary at relevant agencies to facilitate and support the introduction of a CBDC system.

- **Consumer, Business and Investor Protection:** Within 180 days of the E.O., various agencies (including Treasury, FTC, SEC, CFTC) are directed to issue a report on the effects from the further development and adoption of digital assets and potential changes in financial market and payment system infrastructures for U.S. consumers, investors and businesses, and for equitable economic growth. This would include addressing the conditions that would drive mass adoption of different types of digital assets and the risks and opportunities stemming from such growth.
- **Financial Stability:** Within 210 days of the E.O., the Secretary of Treasury is directed to convene the Financial Stability Oversight Council (FSOC) to produce a report outlining the specific financial stability risks and regulatory gaps posed by various types of digital assets and providing recommendations to address such risks.
- **Illicit Activity:** Within 180 days of the E.O., the U.S. Attorney General is directed to submit a report on the role of law enforcement agencies in detecting and prosecuting illegal financial activity related to digital assets (along with any related regulatory or legislative proposals). The E.O. also requests reports to the President offering additional strategies in combatting illicit finance risks posed by digital assets, including cryptocurrencies, stablecoins, CBDCs, and trends in the use of digital assets by criminals. A separate directive mandates that various agencies develop an action plan to increase financial services providers' compliance with AML/CFT obligations related to digital asset activities (including an exhortation to continue existing work regarding inadequate AML oversight in some foreign countries).
- **Consumer Protection:** Within 180 days of the E.O., the Chair of the FTC and Director of the CFPB are encouraged to consider which privacy and consumer protection powers may be used to protect users of digital assets, while the Chair of the SEC and other financial regulators are similarly urged to consider how investor and market protections may be further used to govern digital assets (and whether additional measures are needed).

Final Thoughts

The E.O. is big news in that it is the first national policy we have seen from the Administration about the government's views on the increasing development and use of digital assets and related innovations.

With the E.O. as a guiding document, one could imagine that, in a number of policy areas, more regulation may be coming in the next several years for the cryptocurrency industry, replacing what has largely been a regulation-by-enforcement federal strategy. Still, the real impact of the order will be seen much later, after the federal agencies' study and work on the host of issues surrounding digital assets is completed. Then, we will see how much appetite there is to tighten controls under existing powers or create new regulation and agency authority.

Put simply, there are still a lot of moving pieces on this front. Hopefully, the process will be thoughtful so that federal agency initiatives and new legislation are consistent and provide a regulatory environment that offers needed clarity and transparency for the responsible development of digital assets. Similarly, we hope the approach will also encourage innovation and new entrants into the market. Of course, the technology and business models are moving so fast in this area that whatever comes out of this initiative is likely to be at least partially obsolete before the ink is dry on the reports submitted to the President.

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- **Jeffrey D. Neuburger**
Partner