

A NEW STEP FORWARD: PRESIDENT BIDEN SIGNS NEW CRYPTOCURRENCY EXECUTIVE ORDER

The Executive Order requires federal agencies to review crypto market risks and study issues associated with the creation of a U.S. Central Bank Digital Currency (CBDC).

Background

President Biden on Wednesday (March 9, 2022) signed an Executive Order on "Ensuring Responsible Development of Digital Assets" (the "**Order**").¹ The Order requires federal agencies to study and provide reports on various issues regarding digital currency, including, among other things, consumer protection, privacy, illicit finance, financial stability, environmental impact, and maintaining national security. The Order includes the Administration's first call for a detailed assessment of the environmental impact of blockchain technology, which could put energy inefficient proof-of-work protocols at a disadvantage in a future regulatory environment. The Order also mandates a study of the possibility and potential requirements (e.g., legislative changes) for the creation of a U.S. Central Bank Digital Currency ("**CBDC**"). The Order also emphasizes the threat of digital assets being used for illicit purposes by actors in jurisdictions with insufficient illicit finance controls and the need for the U.S. government to mitigate such risks through a range of authorities.

The Order does not indicate any specific changes that will be implemented for the regulation of Digital Assets. Notably, the Order does not resolve the question of which digital assets qualify as "securities" subject to the enforcement authority of the U.S. Securities and Exchange Commission and which qualify as "commodities" subject to the enforcement authority of the U.S. Commodity Futures Trading Commission.² The Order also does not indicate which Federal agency should be responsible for regulating digital assets, but rather provides for a more interagency approach. Furthermore, the Order does not address state regulation of the digital assets industry, which is notable, because state regulators are currently the primary supervisory authorities for many U.S. digital asset market participants.

¹ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>.

² Resolution of this question requires interpreting the meaning of the terms "security" and "commodity" as defined in the federal securities and commodities laws, respectively. Thus, this question might only be definitively resolved by Congress, through the passage of new legislation outlining which digital assets constitute securities and which constitute commodities.

Understanding the March 9 Order

The Order outlines a whole-of-government approach. Among other things, it specifically:

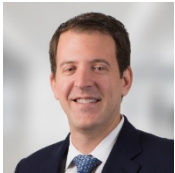
- directs the U.S. government to study and support technological advances while focusing on the responsible development and use of digital assets.
- directs the Department of Treasury and other agencies to assess crypto market risks and to submit a report to the President within 180 days of the Order containing policy recommendations, including potential regulatory and legislative actions to protect U.S. consumers and support access to safe and affordable financial services.
- encourages the Financial Stability Oversight Council to assess and identify the risks associated with digital assets and, within 210 days of the Order, to produce and submit a report specifically identifying financial stability risks and regulatory gaps, and to provide policy recommendations.
- directs federal agencies to focus on coordinated action when mitigating illicit finance and national security risks posed by the illicit use of digital assets and to ultimately develop a coordinated action plan addressing digital asset-related illicit finance and national security risks addressed within 210 days of submission to the Congress of the National Strategy for Combating Terrorist and Other Illicit Financing; it also directs these agencies to work with U.S. allies to ensure responses are aligned.
- directs the Department of Commerce to establish a framework to promote U.S. leadership in technology and economic competitiveness within 120 days of the Order.
- directs the Secretary of Treasury in consultation with other agencies to produce a report on the future of money and payments systems within 180 days of the Order, which will include conditions driving broad adoption of digital assets, implications for the U.S. financial system, and an analysis of the other potential implications that a U.S. CBDC might have on the U.S. economy.
- directs the U.S. government to research and assess the need for a potential U.S. CBDC and for the Attorney General, in consultation with the Secretary of Treasury and the Chairman of the Federal Reserve, to provide an assessment of whether legislative changes would be necessary to create a U.S. CBDC within 180 days of the Order and a legislative proposal within 210 days of the Order.
- directs the Director of the Office of Science and Technology Policy, in consultation with, among others, the Secretary of Energy and the Administrator of the Environmental Protection Agency, to produce a report on the connections between distributed ledger technology and short-, medium-, and long-term economic and energy transitions; the potential for these technologies to impede or advance efforts to tackle climate change at home and abroad; and the impacts these technologies have on the environment. The environmental report will also address the effect of cryptocurrencies' consensus mechanisms on energy usage, including research into potential mitigating measures and alternative mechanisms of consensus and the design tradeoffs those may entail, and the implications for energy policy as it relates to grid management and sources of energy supply.

- sets forth definitions of key terms that may inform the various reports mandated under the Order and could be incorporated into future legislative action and agency rulemaking, including definitions of "blockchain", "central bank digital currency", "cryptocurrencies", "digital assets", and "stablecoins".

Why Does This Matter?

The March 9 Order represents one of the largest-scale efforts yet by the U.S. federal government to understand digital assets and plot out an effective regulatory framework. To date, U.S. federal regulation of digital assets has been scattered, and U.S. federal regulators have seldom appeared to work together to design an efficient regulatory regime. This has led to a push for the Biden administration to pursue a more centralized, organized approach. The March 9 Order not only outlines the administration's priorities; it also asks U.S. policymakers and federal regulators to work more cohesively going forward. The ultimate effectiveness of the approach taken in the Order remains to be seen, but should be seen as a step in the right direction.

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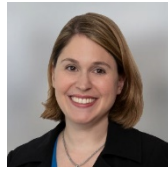
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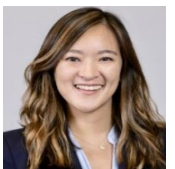
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