GIBSON DUNN

The Biden Administration's Digital Assets Executive Order and Its Implications

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Click for PDF On March 9, 2022, President Biden signed a long-awaited Executive Order (titled "Ensuring Responsible Development of Digital Assets" and issued with an accompanying Fact Sheet) regarding the U.S. government's strategy for digital assets, defined to include cryptocurrencies and other forms of exchange that are recorded on the blockchain.[1] Citing the need for the federal government to address the role of digital assets in the financial system, the Executive Order represents the first whole-of-government approach to the benefits and risks of digital assets. It is a general policy statement that reflects the views of the administration, as opposed to a specific proposal for regulation. In our view, there are three principal takeaways from the Executive Order. First, it acknowledges the exponential growth and opportunity that the digital asset ecosystem presents, and outlines a policy interest in "responsible financial innovation" and the need for evolution and coordination to ensure that the United States continues to be a leader in the space. Second, the Executive Order identifies a number of perceived general risk areas that digital assets can pose on issues ranging from consumer protection to national security to the environment. Third, to address these risks, the Executive Order tasks various federal agencies—working in coordination—to draft a host of reports, frameworks, and action plans to evaluate the various perceived challenges and opportunities presented by digital assets. We discuss each takeaway in order below. **U.S. Commitment to Digital Asset Leadership** To date, countries around the world have taken divergent stances on digital assets. Cryptocurrency transactions are banned in China, for instance, whereas other jurisdictions have gone as far as to make bitcoin legal tender.[2] It was not clear where the White House would come down on this spectrum, as individual U.S. lawmakers, regulators, and enforcers have offered differing views on how to approach digital assets. The Executive Order offers a strong endorsement of the potential of digital assets and the need for the United States to play a leading role in shaping the design of this ecosystem. Specifically, it declares that "[w]e must reinforce United States leadership in the global financial system and in technological and economic competitiveness, including through the responsible development of payment innovations and digital assets."[3] Further, it provides that the U.S. has an interest in remaining at the "forefront" of the "responsible development and design of digital assets," where its leadership can "sustain United States financial power and promote United States economic interests."[4] One potential way to do so is by creating a central bank digital currency ("CBDC"), which, as discussed below, the Executive Order tasks various parts of the government to study at length. The Executive Order also recognizes the benefits that digital assets can provide to consumers, as they may help expand equitable access to financial services by, for instance, "making investments and domestic and cross-border funds transfers and payments cheaper, faster, and safer."[5] At the same time, the Executive Order acknowledges that many opportunities and challenges posed by blockchain-based ecosystems fall outside the scope of existing laws and that government approaches to date have been "inconsistent," "necessitating an necessitate an evolution and alignment of the United States Government approach to digital assets."[6] **Potential Risks in the Digital Asset Ecosystem** The Executive Order identifies a number of broad potential risk areas involving digital assets that may implicate a wide range of participants in the ecosystem including exchanges, custody providers, investors, token issuers, and

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companies that accept digital assets for payment. Specific risks cited in the Executive Order include:

- *Data Protection*—Without "sufficient oversight and standards," firms providing digital asset services "may provide inadequate protections for sensitive financial data, custodial and other arrangements relating to customer assets and funds."[7]
- *Privacy*—Key "safeguards" identified in "responsible development" of digital assets include "maintain[ing] privacy" and "shield[ing] against arbitrary or unlawful surveillance."[8]
- *Risk Disclosures*—An important facet of protecting investors is ensuring adequate "disclosures of risks associated with investment."[9]
- *Cybersecurity*—Cybersecurity issues that have occurred at major digital asset exchanges and trading platforms to date have contributed to billions of dollars of losses.[10]
- *Systemic Risk*—In order to mitigate systemic risk, digital asset issuers, exchanges and trading platforms, and other intermediaries "should, as appropriate, be subject to and in compliance with regulatory and supervisory standards that govern traditional market infrastructures and financial firms."[11] Moreover, new and unique uses of digital assets "may create additional economic and financial risks" that require "an evolution to a regulatory approach."[12]
- *National Security and Illicit Finance*—Noting that digital assets can pose significant national security and illicit finance risks ranging from terrorism financing to cybercrime, the Executive Order aims to "ensure appropriate controls and accountability" for digital asset systems to "promote high standards for transparency, privacy, and security" in order to counter these activities.[13]
- *Sanctions Evasion*—Digital assets may be used to circumvent sanctions.[14]
- *Climate and Pollution*—The United States also has an interest in reducing "negative climate impacts and environmental pollution" from "some cryptocurrency mining."[15]

In light of some of these risks, President Biden's Executive Order provides that the United States "must support technological advances that promote responsible development and use of digital assets," including by ensuring that digital asset technologies "are developed, designed, and implemented in a responsible manner" that includes privacy and security, features and controls to defend against illicit exploitation, and efforts to reduce negative environmental impacts.[16] **Researching the Path Forward** To determine the next steps for the U.S. government in the digital asset space, the Executive Order establishes an interagency process to address many of the opportunities and challenges outlined above.[17] Further, it calls for a number of reports, frameworks, action plans, and more to be developed, as outlined in the table below. Critically, the Executive Order does not itself implement any new regulations over the digital asset space or require that agency reviews adopt particular rules or requirements. Instead, it just identifies what homework needs to be done. Accordingly, the Executive Order has not changed the jurisdiction of any U.S. regulator or enforcer with respect to digital assets, nor does it call for Congress to act to expand the jurisdiction or authority of independent agencies such as the CFTC or SEC, even as it opens by acknowledging that the novel challenges and opportunities presented by digital assets may not be within the scope of existing federal laws.[18] Various federal agencies are therefore instructed to "consider" whether some of the digital asset risks that are identified—such as privacy, consumer protection, and investor protection—are within the jurisdiction of existing regulators or "whether additional measures may be needed."[19] The agencies' conclusions to those questions, of course, will be of great interest to all market participants and those interested in digital assets and blockchain technology, including potentially to members of Congress. Notably absent from the Executive Order is any reference to regulations implementing the tax information reporting provisions of HR 3684, the Infrastructure Investment and Jobs Act, signed into law on November 15, 2021.

As discussed in this Gibson Dunn Client Alert, those provisions are one of the few recent legislative measures addressing digital assets and include effective dates that contemplate reporting requirements on a broad range of digital asset transactions beginning in January of 2023.

Subject	Lead Agency	Supporting Agencies	Detailed Description	Due
Action Plans, Frameworks, and Reports				
Report on Strengthening International Law Enforcement[18]	DOJ	State, Treasury, DHS	How to strengthen international law enforcement cooperation for detecting, investigating, and prosecuting criminal activity related to digital assets.	Within (June 7
Framework for International Engagement[19]	Treasury	State, Commerce, USAID, other relevant agencies	Establishing a framework for interagency international engagement to enhance adoption of global principles and standards for how digital assets are used and transacted.	Within 120 (July 7, 20 and an up one year
Report on Prosecution of Crimes related to Digital Currency[20]	DOJ	Treasury, DHS	The role of law enforcement agencies in detecting, investigating, and prosecuting criminal activity related to digital assets, including any recommendations on regulatory or legislative actions.	Within 180 (Septemb 2022)
Report on the Future of Money and Payment Systems[21]	Treasury	State, DOJ, Commerce, DHS, OMB, DNI	Topics include (i) the conditions that drive broad adoption of digital assets; (ii) the extent to which technological innovation may influence these outcomes; and (iii) the implications for the United States financial system, the modernization of and changes to payment systems, economic growth, financial inclusion, and national security. Also, various considerations related to the potential development of a CBDC.	Within 180 (Septemb 2022)
Report on the Implications of Development and Adoption of Digital Assets[22]	Treasury	Labor and other agencies, potentially including FTC, SEC, CFTC, CFPB, and Federal banking agencies	Conditions that would drive mass adoption of different types of digital assets and the risks and opportunities such growth might present. Policy recommendations to protect United States consumers, investors, and businesses, and support expanding access to safe and affordable financial services.	Within 180 (Septemb 2022)
Report on Environmental Impact Mitigation[23]	OSTP	Treasury, DOE, EPA, CEA, National Climate Advisor, other relevant agencies	Connections between distributed ledger technology and economic and energy transitions, including the potential for these technologies to impede or advance efforts to tackle climate change and the impacts these technologies have on the environment.	Within 180 (Septemb 2022), up one year
Framework for Enhancement of United States Economic Competitiveness[24]	Commerce	State, Treasury, other relevant agencies	A framework for enhancing United States economic competitiveness in, and leveraging of, digital asset technologies.	Within 180 (Septemb 2022)
Report on Financial Stability Risks and Regulatory Gaps[25]	Treasury	FSOC[26]	The specific financial stability risks and regulatory gaps posed by various types of digital assets and recommendations to address such risks, including any proposals for new legislation or additional or adjusted regulation and supervision.	Within 210 (Octobe 2022)
Coordinated Action Plan to Mitigate Identified Risks[27]	Treasury	State, DOJ, Commerce, DHS, OMB, DNI, other relevant agencies	The role of law enforcement and measures to increase financial services providers' compliance with AML/CFT obligations related to digital asset	Within 120 of submis of the Nati

			activities.	Strategy Combati Terrorist Other Illi Financi
CBDC Research				
Assessment of Legislative Changes[28]	DOJ	Treasury, Federal Reserve	Whether legislative changes would be necessary to issue a United States CBDC.	Within 180 (Septemb 2022)
Technical Evaluation of the Requirements to Support a CBDC System[29]	OSTP; U.S. CTO	Treasury, Federal Reserve, other agencies	The technological infrastructure, capacity, and expertise that would be necessary at relevant agencies to facilitate and support the introduction of a CBDC system.	Within 180 (Septemb 2022)
Legislative Proposal related to a United States CBDC[30]	DOJ	Treasury, Federal Reserve	Based upon Future of Money Report and any relevant materials developed by the Federal Reserve.	Within 210 (Octobe 2022)
Recommendation for Continued Research[31]	Federal Reserve		Encouraged to continue research on the extent to which CBDCs could improve future payments systems, to assess the optimal form of a U.S. CBDC, to develop a strategic plan that evaluates the necessary steps and requirements for the potential implementation and launch of a U.S. CBDC, and evaluate the extent to which a U.S. CBDC could enhance or impede the ability of monetary policy to function effectively as a macroeconomic stabilization tool.	N/A
Considerations, Notices, and Voluntary Submissions				
Submission of Supplemental Annexes relating to Illicit Finance Risks[32]	Treasury, State, DOJ, Commerce, DHS, OMB, DNI, other agencies		Agencies may submit supplemental annexes offering additional views on illicit finance risks posed by digital assets.	Within 90 of submiss the Natio Strategy Combati Terrorist Other Illi Financi
Consideration of Competition Policy[33]</td	DOJ, FTC, CFPB		Potential effects the growth of digital assets could have on competition policy.	N/A
Consideration of Consumer Protection and Privacy[34]	FTC, CFPB		Whether privacy or consumer protection measures within their respective jurisdictions may be used to protect users of digital assets and whether additional measures may be needed.	N/A
Consideration of Investor and Market Protections[35]	SEC, CFTC, Federal Reserve, FDIC, OCC		Whether investor and market protection measures within their respective jurisdictions may be used to address the risks of digital assets and whether additional measures may be needed.	N/A

Conclusion The Executive Order is both a landmark and a question mark for U.S. digital asset policy. It boldly proclaims that the United States intends to lead in promoting the responsible development and design of digital assets, even as it details in broad strokes many of the risks that the digital asset ecosystem could pose to consumers, investors, and citizens. But it does not address how these risks will be addressed in concrete terms, nor does it speak to the unique privacy, consumer and cybersecurity values and opportunities that are furthered by the technological innovation of the blockchain. As a result, continued uncertainty remains in the digital asset space with respect to, among other things, a clear regulatory framework, with regulation by enforcement continuing to be significant, even on certain fundamental questions. In the coming months, Gibson Dunn will be closely monitoring additional developments and the research outputs required by the Executive Order in order to help its clients across the digital asset space navigate regulatory risks and requirements in the United States.

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[1]   Many of the top administration officials and heads of agencies announced their support for the Executive Order, including Treasury Secretary Yellen, Consumer Financial Protection Bureau ("CFPB") Chairman Chopra, Commerce Secretary Raimondo, National Security Advisor Sullivan and National Economic Council Director Deese, Commodity Futures Trading Commission ("CFTC") Chairman Behnam, and a tweet from Securities and Exchange Commission ("SEC") Chair Gensler. The White House also convened a background call with senior administration officials to discuss the Executive Order. [2] *See, e.g.*, Alun John, Samuel Shen and Tom Wilson, *China's top regulators ban crypto trading and mining, sending bitcoin tumbling*, Reuters (Sept. 24, 2021), https://www.reuters.com/world/china/china-central-bank-vows-crackdown-cryptocurrency-trading-2021-09-24/; Aaryamann Shrivastava, *Swiss City To Make Bitcoin a Legal Tender After Mexico and El Salvador*, FX Empire (Mar. 4, 2022), https://www.fxempire.com/news/article/swiss-city-to-make-bitcoin-a-legal-tender-after-mexico-and-el-salvador-922943. [3] Executive Order, § 2(d). [4]   Executive Order, § 2(d). [5]   Executive Order, § 2(e). [6] Executive Order, § 2(a). [7]   Executive Order, § 2(a). [8]   Executive Order, § 2(a). [9] Executive Order, § 2(a). [10]   Executive Order, § 2(b). [11]   Executive Order, § 2(b). [12] Executive Order, § 2(c). [13]   Executive Order, § 2(c). [14]   Executive Order, § 2(f). [15] Executive Order, § 2(f). [16]   Executive Order, § 3. [17]   Executive Order, § 5(b)(v); *see also* Executive Order, § 4(b). [18]   Executive Order, § 8(b)(iv). [19]   Executive Order, §§ 8(b)(i); 8(b)(ii). [20]   Executive Order, § 5(b)(iii). [21]   Executive Order, § 4(b). [22] Executive Order, § 5(b)(i). [23]   Executive Order, §§ 5(b)(vii); 5(b)(viii). [24]   Executive Order, § 8(b)(iii). [25]   Executive Order, § 6(b). [26]   The FSOC comprises 10 voting members (the heads of Treasury, the Federal Reserve, OCC, CFPB, SEC, FDIC, CFTC, FHFA, NCUA, and a Senate-confirmed member with insurance expertise) and five nonvoting members (Office of Financial Research, Federal Insurance Office, a state insurance commissioner, a state banking supervisor, and a state securities commissioner). *See* About FSOC, U.S. Department of Treasury, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/about-fsoc. [27]   Executive Order, § 7(c). [28]   Executive Order, § 4(d)(i). [29]   Executive Order, § 5(b)(ii). [30] Executive Order, § 4(d)(ii). [31] Executive Order, § 4(c). [32] Executive Order, § 7(b). [33] Executive Order, § 5(b)(iv). [34] Executive Order, § 5(b)(v). [35]   Executive Order, § 5(b)(vi)

Gibson Dunn stands ready to help guide industry players through the most complex challenges that lay at the intersection of regulation, public policy, and technical innovation of blockchain and cryptocurrency. If you wish to discuss any of the matters set out above, please contact Gibson Dunn's Crypto Taskforce (cryptotaskforce@gibsondunn.com), or any member of its Financial Institutions, Global Financial Regulatory, Public Policy, Administrative Law and Regulatory, Privacy, Cybersecurity and Data Innovation, Tax Controversy and Litigation, or White Collar Defense and Investigations teams.

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