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DIGITAL ASSETS **RECENT UPDATES**

JULY 6, 2023

We are pleased to provide you with the first edition of Gibson Dunn's digital assets regular update. This update will cover recent legal news regarding all types of digital assets, including cryptocurrencies, stablecoins, CBDCs, and NFTs, as well as other blockchain and Web3 technologies. Thank you for your interest.

ENFORCEMENT ACTIONS

UNITED STATES

- **SEC Sues Binance, Binance.US, and Founder Changpeng Zhao**

On June 5, the SEC filed a 13-claim complaint against Binance, Binance.US, and Binance founder Changpeng Zhao in D.C. federal court, alleging they engaged in unregistered offers and sales of crypto asset securities, including the Binance branded, fiat-backed stablecoin BUSD. The SEC claims Binance and Binance.US were acting as an exchange, broker-dealer, and clearing agency, and intentionally chose not to register with the SEC. Binance and Binance.US dispute these allegations. The SEC subsequently filed a motion for a TRO, seeking to freeze Binance.US's assets. On June 13, after a hearing, Judge Amy Berman Jackson ordered the parties to mediation to attempt to negotiate a resolution to the SEC's requested TRO. On June 19, the parties submitted and Judge Jackson signed a consent order. [Complaint](#); [Law360](#); [Law360 2](#); [Law360 3](#); [Rolling Stone](#); [Order](#)

- **SEC Sues Coinbase**

On June 6, the SEC filed a 5-count complaint against Coinbase and its parent company Coinbase Global in the Southern District of New York. The SEC alleges that Coinbase violated securities laws since 2019 by failing to register as an exchange, broker, or clearing agency despite facilitating trading and settlement of several digital assets that the SEC alleges are securities, including ADA, SOL, MATIC, and others. The SEC also alleges that Coinbase has operated as an unregistered broker by offering its Coinbase Prime and Coinbase Wallet services, and that Coinbase's staking service for several digital assets, including Ethereum, constitutes unregistered securities offerings. On June 28, Coinbase filed a 177-page answer to the SEC's complaint, calling the suit an "extraordinary abuse of process"

Contributors to This Issue:

Ashlie Beringer
Stephanie Brooker
Jason Cabral
M. Kendall Day
Jeffrey Steiner
Sara Weed
Ella Capone
Grace Chong
Chris Jones
Jay Minga
Nick Harper
Alfie Lim
Bart Jordan
Andrea Lattanzio
Jan Przerwa

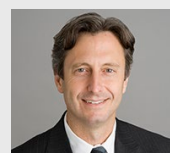
FinTech and Digital Assets Group Leaders / Members:



Ashlie Beringer

Palo Alto
650.849.5327

aberinger@gibsondunn.com



Michael D. Bopp

Washington, D.C.
202.955.8256

mbopp@gibsondunn.com

that “offends due process and the constitutional separation of powers.” In a separate letter to the Court, Coinbase said that it intended to file a motion for judgment on the pleadings on the ground that the SEC lacks jurisdiction over the subject matter of the suit because the tokens at issue are not securities. [Complaint](#); [CoinDesk](#); [CoinDesk 2](#); [Rolling Stone](#).

- ***Crypto Exchange Bittrex Moves to Dismiss SEC Enforcement Action***

On June 30, crypto exchange Bittrex moved to dismiss an SEC enforcement action alleging that the exchange operated as an unregistered securities exchange, broker, and clearing agency. Echoing arguments made by others in the industry, Bittrex argues that the major questions doctrine bars the SEC’s efforts to regulate tokens as securities, that secondary market transactions in tokens do not involve “investment contracts,” and that the SEC’s lawsuit deprives Bittrex of constitutionally required fair notice. The case is pending in the U.S. District Court for the Western District of Washington. [CoinTelegraph](#); [Motion](#).

- ***Judge Severs Bankman-Fried Criminal Charges, Declines to Dismiss Them***

On May 8, FTX’s founder and former CEO filed motions to dismiss most of the criminal charges against him, marking Bankman-Fried’s first detailed defense in his U.S. federal criminal case. Among other things, Bankman-Fried argued that under the U.S.-Bahamas extradition treaty the Bahamas needs to “consent” to the additional charges brought after the extradition. On May 30, prosecutors responded to these motions. Among other things, the government argued it has sought the consent of the Bahamian government to proceed with the charges brought post-extradition and will drop those charges if the Bahamas does not consent. On June 15, District Judge Lewis Kaplan severed the post-extradition charges against Bankman-Fried and ordered a second trial on those charges in March 2024. On June 30, Judge Kaplan denied Bankman-Fried’s motions to dismiss. [CoinTelegraph 1](#); [CoinDesk](#); [New York Times](#); [Law360](#); [Docket](#); [CoinTelegraph 2](#).

- ***CoinEx Agrees to Settle Registration Charges for \$1.8 Million***

On June 14, global cryptocurrency exchange CoinEx agreed to settle charges that it had failed to register as a broker-dealer with the New York Attorney General for \$1.8 million. The company also terminated its U.S. users’ accounts and blocked them from creating new accounts. [Law360](#); [Stipulation](#).

- ***Wahi Brothers Settle Insider Trading Charges with the SEC***

On May 30, the SEC settled charges with a former Coinbase product manager, Ishan Wahi, and his brother Nikhil. The two were arrested last year on charges of wire fraud conspiracy and “wire fraud in connection with a scheme to commit insider trading.” Both brothers pleaded guilty. Ishan Wahi was sentenced to 24 months in prison and ordered to forfeit 10.97 ether and 9,440 Tether, and Nikhil was sentenced to 10 months in prison and ordered to forfeit \$892,500—



Stephanie L. Brooker
Washington, D.C.
202.887.3502
sbrooker@gibsondunn.com



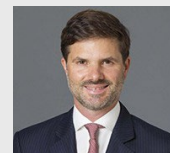
Jason J. Cabral
New York
212.351.6267
jcabral@gibsondunn.com



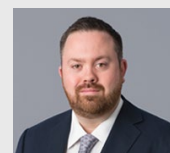
M. Kendall Day
Washington, D.C.
202.955.8220
kday@gibsondunn.com



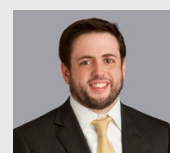
Michael J. Desmond
Los Angeles/Washington, D.C.
213.229.7531
mdesmond@gibsondunn.com



Sébastien Evrard
Hong Kong
+852 2214 3798
sevrard@gibsondunn.com



William R. Hallatt
Hong Kong
+852 2214 3836
whallatt@gibsondunn.com



Martin A. Hewett
Washington, D.C.
202.955.8207
mhewett@gibsondunn.com

with more than half as restitution to Coinbase as a victim of the Wahi defendants' misconduct. The court has since held the restitution order in abeyance while the brothers contest the amount of attorneys' fees awarded to Coinbase. On June 29, Coinbase asked the court to again grant its restitution request. The SEC announced that because of the brother's prison sentences, it will not seek any other penalties. The settlement puts an end to the case brought by the SEC which was set to answer the question of whether cryptocurrencies at the heart of the case were indeed securities, as the SEC has argued and Coinbase, as amicus, forcefully disputed. [SEC](#); [CoinDesk](#); [Law360](#).

- **Judge Torres Denies SEC's Motion to Seal Hinman Documents**

On May 16, United States District Judge Analisa Torres denied the SEC's motion to seal records of its internal deliberations regarding a speech by former director William Hinman. In the June 2018 speech, the former SEC corporation finance director stated that ether is not a security. The SEC filed the motion on December 22, 2022 to seal the internal emails, text messages, and expert reports that followed Hinman's speech. Judge Torres found that these documents "are not protected by the deliberative process privilege because they do not relate to an agency position, decision or policy." Ripple has considered the speech a key piece of evidence in its ongoing legal battle with the SEC, which alleges that sales of Ripple's XRP violated U.S. securities laws. [Order](#); [CoinTelegraph](#).

- **Gemini Moves to Dismiss SEC Suit**

On May 29, Gemini filed a motion to dismiss the SEC's lawsuit claiming that the operation of Gemini's now defunct crypto lending program, called Gemini Earn, was a sale of unregistered securities. Gemini argued that the contracts involved were "simple lending arrangements" and that the SEC case is complicating the process of returning funds to investors. [Law360](#); [CoinTelegraph](#)

- **Green United Executives Argue SEC Has No Authority Over Crypto**

On May 19, Wright Thurston and Kristoffer Krohn filed motions to dismiss an SEC enforcement action in the U.S. District Court for the District of Utah. The SEC sued the defendants in March 2023, alleging that the defendants fraudulently offered securities by selling "Green Boxes" and "Green nodes" marketed as miners for the GREEN token on the "Green Blockchain." The SEC claimed the hardware sold didn't mine GREEN as it was an Ethereum-based ERC-20 token that could not be mined and the Green Blockchain didn't exist. The defendants in their motions to dismiss argue, among other things, that the SEC has no authority over the digital asset ecosystem, claiming that Congress "considered and rejected" the SEC's authority over crypto. They also argue that the SEC has been "unclear and inconsistent" in defining digital assets and criticize the agency's regulation-by-enforcement approach in the crypto space. [CoinTelegraph](#); [Thurston's Motion](#); [Krohn's Motion](#)

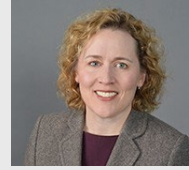


Michelle M. Kirschner

London

+44 (0)20 7071.4212

mkirschner@gibsondunn.com



Stewart McDowell

San Francisco

415.393.8322

smcdowell@gibsondunn.com



Mark K. Schonfeld

New York

212.351.2433

mschonfeld@gibsondunn.com



Orin Snyder

New York

212.351.2400

osnyder@gibsondunn.com



Jeffrey L. Steiner

Washington, D.C.

202.887.3632

jsteiner@gibsondunn.com



Eric D. Vandeveld

Los Angeles

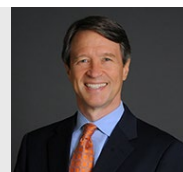
213.229.7186

evandeveld@gibsondunn.com

INTERNATIONAL

- ***Do Kwon Wins Bail Request, Upends Montenegrin Elections with Campaign Funding Claim, Is Sentenced to Four Months***

On June 5, a Montenegro high court again approved \$428,000 bail for Do Kwon subject to house arrest pending an extradition request from South Korea. Only days before a June 11 election in Montenegro, Do Kwon claimed in a letter from custody that “crypto friends” had provided campaign funding to a leading candidate, upending the election’s anticipated results. In March, Kwon, along with former Terraform Labs executive Han Chang-joon, was arrested in Montenegro for allegedly attempting to travel with falsified documents. South Korean authorities had been searching for Kwon since Terraform Labs collapsed in May last year. The two South Korean nationals were back in court on June 16 for a hearing in which Kwon’s lawyers said their client denied having funded the leading candidate’s campaign. Kwon and Han were subsequently sentenced to four months for falsifying official documents. Since his arrest, both South Korea and the U.S. have requested Kwon’s extradition to face criminal charges following his trial in Montenegro. [CoinDesk 1](#); [CoinTelegraph 1](#); [CoinDesk 2](#); [New York Times](#); [CoinTelegraph 2](#); [TechCrunch](#).



Benjamin Wagner
Palo Alto
650.849.5395

bwagner@gibsondunn.com



Sara K. Weed
Washington, D.C.
202.955.8507

sweed@gibsondunn.com

REGULATION AND LEGISLATION

UNITED STATES

- ***Republicans Release Digital Asset Market Structure Proposal***

On June 2, Chairman McHenry of the House Financial Services Committee and Chairman Thompson of the House Committee on Agriculture released a discussion draft of legislation providing a statutory framework for digital asset regulation. The discussion draft represents a “common approach to digital asset regulation that would bring existing consumer and investor protections to digital asset-related activities and intermediaries.” The House Financial Services Committee plans to vote on the proposed legislation in the second week of July. [Press Release](#); [Discussion Draft](#); [The Block](#).

- ***House Proposed a Comprehensive Regulatory Framework for Stablecoins***

On June 13, the House Financial Services Committee released a discussion draft of a proposed statutory framework for stablecoins. During a June 21 oversight hearing, Chairman McHenry indicated that the committee will debate the bill during the July session. [Press Release](#); [Discussion Draft](#); [The Block](#).

- ***New NFA Regulation Takes Effect***

On May 31, a new rule issued by the National Futures Association—the self-regulatory organization for the U.S. derivatives industry—takes effect. Compliance Rule 2-51 is applicable to NFA member firms and associated persons engaging in activities involving bitcoin and ether, including spot or cash market activities. The rule imposes anti-fraud, just and equitable principles of trade, and supervision requirements on members and associates, and codifies members’ existing disclosure obligations under NFA Interpretative Notice 9073. [Law360](#).

- ***Prometheum Congressional Testimony Attracts Industry Criticism***

On June 13, Aaron Kaplan, the founder and co-CEO of crypto exchange Prometheum, testified before the House Financial Services Committee that the SEC has laid out a compliant path for crypto in the United States. Prometheum recently received a first-of-its-kind FINRA approval to operate as a special purpose broker-dealer for digital assets in anticipation of listing digital assets for trading. Kaplan’s remarks provoked some controversy across the industry and on Twitter, with

certain competitors criticizing the company and Kaplan's remarks. The Blockchain Association submitted FOIA requests for more information about the company. [Hearing](#); [CoinTelegraph 1](#); [CoinTelegraph 2](#).

- ***CFTC Warns Clearing Agencies to Monitor Crypto Risks***

On May 30, the CFTC's Division of Clearing and Risk issued a staff advisory warning clearing agencies that provide services for crypto products that they must contain risks associated with digital assets through mitigation strategies, or they will face the agency's scrutiny. The advisory also notes that, given increased cybersecurity risks and other perceived dangers involving digital assets, the CFTC's division will emphasize compliance regarding its "core principles" of system safeguards, conflicts of interest, and physical delivery." [Law360](#).

- ***Proposed Tax on Crypto Mining Removed from Spending Bill***

On May 28, in the lead up to legislation to raise the U.S. debt ceiling, lawmakers released a draft bill that did not include the previously proposed Digital Assets Mining Energy (DAME) 30% excise tax on electricity used by crypto miners. The tax would have increased by 10% each year over three years on electricity generated starting in 2024. [CoinTelegraph](#).

- ***Filecoin Sponsor Receives SEC Comment Letter***

On May 17, Grayscale announced that it received a comment letter from the SEC asking it to withdraw the registration of a trust investing in Filecoin, because the SEC believes Filecoin meets the definition of a security. On May 31, crypto trading firm Cumberland announced that it would halt over-the-counter trading in the token used by the decentralized storage platform Filecoin, citing regulatory environment concerns. [GlobeNewswire](#); [The Block](#).

- ***Federal Bank Regulatory Agencies Release Interagency Guidance on Third-Party Risk Management***

On June 6, the Federal Reserve, FDIC and OCC released final interagency guidance designed to aid banking organizations in managing risks associated with third-party relationships, including those with FinTechs and companies in the digital assets space. The interagency guidance replaces prior guidance of the agencies and details risk management strategies at various stages of third-party relationships, such as planning, due diligence, contract negotiation, ongoing monitoring, and termination. The agencies underscore that the interagency guidance does not have the force and effect of law and does not impose any new requirements on banking organizations. Nonetheless, third-party risk management will remain an area of heightened focus and scrutiny by supervisors and examiners, particularly with respect to third parties that are: FinTechs; digital assets providers; critical to bank operations or organizational business continuity and resiliency; customer-facing; subject to heightened consumer compliance and other prudential requirements; or represent concentration risk. As such, FinTechs and other companies and service providers that partner with banks to deliver regulated financial services should expect potential additional scrutiny from both their bank partners and their bank partners' regulators. [Interagency Press Release](#); [Interagency Guidance on Third-Party Relationships: Risk Management](#); [Federal Reserve Board Memo](#); [Federal Reserve SR 23-4: Interagency Guidance on Third-Party Relationships: Risk Management](#); [FDIC Financial Institution Letter \(FIL-29-2023\)](#); [OCC Bulletin 2023-17](#).

- ***Federal Deposit Insurance Corporation Continues Focus on Deposit Insurance Representations***

On June 15, the FDIC issued advisory letters demanding three companies cease and desist from making false and misleading statements about FDIC deposit insurance. The advisory letters highlight the FDIC's continuing efforts to review companies' public statements, disclosures and other marketing materials for compliance with Section 18(a)(4) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(a)(4)) and the FDIC's 2022 final rule regarding advertising or other

representations about FDIC deposit insurance (12 C.F.R. Part 328, Subpart B). To ensure compliance, banks and bank partners should, at a minimum, ensure subject materials: (a) clearly disclose that the nonbank company offering the service is not an insured bank; (b) identify the insured bank(s) where any customer funds may be held on deposit; (c) communicate that FDIC deposit insurance is not available in the event of the bankruptcy of the nonbank company and is only available should the FDIC-insured bank at which deposits are properly held fail; and (d) communicate that non-deposit products are not FDIC-insured products and may lose value.

[FDIC's Letter to Bodega Importadora de Pallets](#); [FDIC's Letter to Money Avenue, LLC](#); [FDIC's Letter to OKCoin USA, Inc.](#)

INTERNATIONAL

- ***EU Formally Adopts Markets in Crypto-Assets Regulation (MiCA)***

On May 31, the EU formally adopted MiCA, the first EU legal framework expressly regulating crypto assets. MiCA aims to protect investors by increasing transparency and putting in place a comprehensive framework for issuers and service providers such as trading venue and crypto asset wallets, including compliance with anti-money laundering rules. MiCA was published in the EU's official journal on June 9, 2023, and entered into force on June 29, 2023, the 20th day following the date of its publication. Stablecoin issuers, which will face much stricter regulations under the new law, will have 12 months to ensure they are in compliance with the law, while other crypto issuers and so-called crypto asset service providers (CASPs) will have 18 months to prepare. [CoinDesk](#); [European Council](#).

- ***EU Countries, Lawmakers Reach Deal on Data Act***

On June 27, legislative negotiators from the European Union reached an agreement on the Data Act, a set of new rules governing fair access and use of data on internet-connected devices. The Act, which was passed by the European Parliament on March 14, has been criticized by the crypto industry for imposing requirements on smart contracts, including requiring them to include a kill switch. There are conflicting reports about whether the final draft, which has not yet been released, will assuage these concerns. The Data Act now awaits voting by the European Parliament and Council before it can become law. [CoinDesk](#).

- ***UK Crypto, Stablecoin Legislation Formally Approved***

On June 29, King Charles formally approved the Financial Services and Markets Act, which gives UK regulators authority to supervise cryptocurrencies and stablecoins. The bill treats all crypto as a regulated activity, supervises crypto promotions, and incorporates stablecoins into payment rules. The U.K.'s Treasury, Financial Conduct Authority, the Bank of England, and Payments Systems Regulator will have the power to introduce and enforce regulations for the sector. Specific rules for the crypto sector could be implemented within a year. [CoinDesk](#).

- ***ESMA Calls on EU Investment Firms to Clearly State That Crypto Is Unregulated***

On May 25, the European Securities and Markets Authority (ESMA), EU's securities regulator, issued a public statement highlighting the risks arising from the provision of unregulated products and/or services by investment firms in the EU. ESMA expressed its concerns that where "investment firms engage in providing both regulated and unregulated products and/or services there is a significant risk that investors may misunderstand the protections they are afforded when investing in those unregulated products and/or services." In such situations, ESMA recommended few steps for the investment firms, including noting in all marketing communications whether a given product is regulated or not, or clearly explaining "what investor protections are lost/not applicable when investing in a product." [ESMA](#).

- ***UAE Issues New AML Rules for Digital Assets***

On May 31, the Central Bank of the United Arab Emirates published guidance for licensed financial institutions on risks "related to virtual assets and virtual assets service providers." The

guidance specifies new rules on anti-money laundering and combating the financing of terrorism for banking institutions engaging with crypto in the UAE, including requiring licensed financial institutions to verify the identities of all customers. [CoinTelegraph](#).

- ***Hong Kong and UAE Central Banks Coordinate on Crypto Regulations***

On May 29, the Central Bank of the UAE and the Hong Kong Monetary Authority held a bilateral meeting in which they agreed to cooperate on regulating virtual assets by implementing financial infrastructure and cross-border trade settlements. [Decrypt](#).

- ***Singapore Releases New Crypto Regulations***

On July 3, the Monetary Authority of Singapore (MAS) announced new regulations for Digital Payment Token (DPT) service providers to safekeep customer assets under a statutory trust before the end of the year. The statutory trust is intended to mitigate the risk of loss or misuse of customers' assets, and facilitate the recovery of customers' assets in the event of a DPT service provider's insolvency. MAS will also restrict DPT service providers from facilitating lending and staking of DPT tokens by their retail customers. These measures were introduced following an October 2022 public consultation on regulatory measures to enhance investor protection and market integrity in DPT services. Among other things, the MAS also issued a new consultation paper proposing requirements for DPT service providers to address unfair trading practices.

[Consultation Feedback](#); [Consultation Paper on Proposed Amendments](#); [Consultation Paper on Market Integrity](#)

CIVIL LITIGATION

UNITED STATES

- ***Court Rules Bankman-Fried Cannot Subpoena Former FTX Counsel***

On June 23, Judge Kaplan of the Southern District of New York denied FTX founder and former CEO Sam Bankman-Fried's request to subpoena documents from Fenwick & West related to their earlier legal work for FTX, finding that the requested subpoena was "a fishing expedition." Judge Kaplan also rejected Bankman-Fried's argument that FTX was "so enmeshed in the government's investigation that [it] must be considered part of the 'prosecution team' for purposes of the government's discovery obligations," holding that documents held by FTX are not in the government's "possession, custody, or control." [CoinDesk](#); [Law360](#); [Order](#).

- ***Third Circuit Retains Jurisdiction over Coinbase Mandamus Petition***

On June 20, the U.S. Court of Appeals for the Third Circuit ruled that the SEC must provide an update on its progress in deciding Coinbase's petition for rulemaking by October 11, 2023. The Court will maintain jurisdiction over Coinbase's rulemaking petition in the interim. Coinbase's rulemaking petition asks the SEC to explain, among other things, which digital assets the SEC believes to be securities and how industry players should go about registering them. [CoinGeek](#).

- ***Supreme Court Rules in Favor of Coinbase in Arbitration Lawsuit***

On June 23, the U.S. Supreme Court held that a lawsuit against Coinbase should have been automatically stayed when the company appealed the federal district court's denial of its motion to compel arbitration of a putative class action. Although the decision does not touch on issues specific to the crypto industry, the ruling is the first by the Supreme Court involving a crypto industry participant. [Client Alert](#); [Law360](#); [Opinion](#)

- ***Proposed Class Action Suit Filed Against Shaq for NFT Promotion***

On May 23, a proposed class action was filed against basketball player Shaquille O'Neal, alleging that his promotion of Astrals Project NFTs violated securities laws by marketing unregistered digital assets. [Law360](#).

- ***MDL Created for FTX Investor Actions***

On May 25, FTX investors asked the Judicial Panel on Multidistrict Litigation (JPML) to consolidate investor litigation actions relating to the demise of FTX before one federal judge in the Southern District of Florida. On June 5, the panel granted the motion and ordered the creation of a multi-district litigation before U.S. District Judge K. Michael Moore in Miami. [Law360](#); [Bloomberg](#).

SPEAKER'S CORNER

UNITED STATES

- ***Senator Elizabeth Warren Calls for Crypto Legislation to Stop Fentanyl Trade***

On May 31, Elizabeth Warren stated during a Senate hearing that she aims to combat cryptocurrency's role in the illegal Chinese fentanyl trade. Warren suggested her Digital Asset Anti-Money Laundering Act may help cut off the crypto payments, and she said the bill will be reintroduced in this Congress. [CoinDesk](#).

- ***DeSantis Urges to 'Protect' Bitcoin in His Campaign Launch***

On May 24, in announcing a bid for President in an interview on Twitter with Elon Musk, Ron DeSantis said that "as president, we'll protect the ability to do things like Bitcoin." DeSantis called those on Capitol Hill "central planners" who "want to have control over society." DeSantis also mentioned that Congress has never specifically addressed cryptocurrency, and instead the regulation was created by "the bureaucracy" and made it so "that people cannot operate in that space." [CoinTelegraph](#).

INTERNATIONAL

- ***Chief of G-7's Financial Action Task Force Calls for Stronger Global Collaboration to Target Crime and Terrorism Financing***

On May 18, T. Raja Kumar, President of FATF, an intergovernmental organization that sets money laundering and terrorist financing standards, urged G-7 leaders to "effectively" implement FATF's crypto anti-money laundering norms ahead of the May G-7 summit in Hiroshima. Kumar said that "countries need to take urgent action to shut down lawless spaces, which allow criminals, terrorists and rogue states to use crypto assets." In particular, he called on the implementation of the 'travel rule,' which requires virtual assets service providers to identify the sender and receiver of the transaction. His recommendations were echoed by the G-7 finance ministers and central bank governors meeting on May 13 in Japan. Global [Governance Project](#); [G7 Finance Ministers and Central Bank Governors Meeting Communiqué](#).

OTHER NOTABLE NEWS

- ***BlackRock Applies for Spot Bitcoin ETF***

On June 15, BlackRock filed an S-1 with the SEC for the iShares Bitcoin Trust, whose assets would consist primarily of Bitcoin held by Coinbase and which would reflect the spot price of Bitcoin. The move was seen as an indication of continued institutional support for crypto and was quickly followed by a number of similar filings, including by Fidelity Investments. According to a June 30 Wall Street Journal report, the SEC informed Nasdaq and Cboe Global Markets, the exchanges that filed on behalf of Blackrock and Fidelity, that their applications are not sufficiently clear and comprehensive. Cboe updated and re-filed its applications on June 30. On July 3, BlackRock resubmitted its filing through Nasdaq with new details. [CoinDesk 1](#); [S-1](#); [CoinDesk 2](#); [Wall Street Journal](#); [MarketWatch](#).

- ***Crypto Custodian Prime Trust Faces Nevada Receivership, Asset Freeze***

On June 27, Nevada's Financial Institutions Division filed a request to take crypto custodian Prime Trust into receivership and freeze its operations due to alleged insolvency. The request for

receivership states that Prime Trust owes clients around \$150 million in fiat currency and cryptocurrencies and that part of this shortfall resulted from the company losing its ability to access “legacy wallets.” [CoinDesk](#).

- ***NY Fed and Singapore Monetary Authority Publish Joint CBDC Study Results***

On May 18, the Federal Reserve Bank of New York’s New York Innovation Center and the Monetary Authority of Singapore published a research report detailing the results of a joint study, with findings that distributed ledger technology could be used to improve the efficiency of cross-border wholesale payments and settlements involving multiple currencies. [Report](#); [CoinTelegraph](#).

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