

Biden Administration Orders Review of Digital Assets

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On March 9, 2022, President Biden issued an executive order on the “responsible development of digital assets.” He directed a “whole government” review of cryptocurrency assets, including directing the Secretary of the Treasury to convene the Financial Stability Oversight Council (“FSOC”), which, in conjunction with other agencies, will study the risks and impact of digital assets and explore the possibility of creating a Central Bank Digital Currency (“CBDC”) in the United States.

CBDCs are digital versions of traditional currency issued by a sovereign state. Biden’s proposal in essence directs the executive agencies to explore creating a digital version of the U.S. dollar that could be used to facilitate digital transactions while still being controlled by the U.S. Department of the Treasury. Like cryptocurrencies, CBDCs can be used for digital transactions in electronic tokens using public/private key pairs, though other structures are also being considered.¹ However, CBDCs are not cryptocurrencies, and there are significant differences. Rather than relying on distributed ledgers using cryptography, CBDCs are controlled by the issuing sovereign.² To date, nine countries have launched CBDCs, though several more are in the research and development phase.³

In issuing the executive order, President Biden expressed concern about the impact of cryptocurrencies on “financial system integrity . . . crime and illicit finance, national security, the ability to exercise human rights; financial inclusion and equity; and climate change and pollution.”⁴ The executive order is, at least in part, motivated by concerns that bad actors may use cryptocurrencies to circumvent domestic and foreign financial sanctions as well as anti-money laundering laws.⁵

¹ Raphael Auer and Rainer Boehme, *The technology of retail central bank digital currency*, BIS Quarterly Review, at 93-94 (March 2020), available at https://www.bis.org/publ/qtrpdf/r_qt2003j.pdf.

² *Id.* at 87.

³ Atlantic Council CBDC Tracker, available at <https://www.atlanticcouncil.org/cbdctracker/>.

⁴ *Executive Order on Ensuring Responsible Development of Digital Assets*, Joseph R. Biden, Jr. § 1 (March 9, 2022), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/> (“Executive Order”).

⁵ See *Executive Order* § 2(c).

The U.S. government shall now explore ways to:

- protect consumers, investors, and businesses that transact in digital assets;
- protect U.S. and global financial stability and mitigate systemic risk;
- mitigate illicit finance and national security risks posed by the misuse of digital assets;
- reinforce U.S. economic and technological competitiveness and leadership in the global financial system;
- promote access to safe and affordable financial services; and
- support technological advances that promote responsible development and use of digital assets.⁶

The executive order directs the FSOC to submit a report to Congress by October of this year, with supplemental comments to be submitted by thirteen cabinet members as well as various heads of relevant agencies by January 2023.⁷ The Secretary of the Treasury will then submit a proposed action plan by February 2023, and government agencies should receive notice of new rulemaking by May of next year. Though, it is possible that drafts of proposed rules will be available for public comment sooner.

The proposed review is striking in its inclusiveness of agencies with purviews beyond financial services, though the Departments of the Treasury and Commerce feature most prominently. The inclusion of the Department of State recognizes the potentially global impact of any proposed rules, while the inclusion of the Department of Homeland Security signals national security concerns. The inclusion of the Department of Energy and EPA reflects a recognition of the potentially significant environmental impacts of using digital assets that rely heavily on multiple computers racing to solve complex cryptographic computations.

This is a bipartisan issue and follows efforts by the previous administration to begin regulating digital assets, particularly in relation to anti-money laundering.⁸ The current administration renewed its focus on digital assets last fall. In October, the Justice Department and the FBI each created special task forces to

⁶ Executive Order § 2.

⁷ Executive Order § 4(b).

⁸ Federal Register, *Notice of Proposed Rulemaking: Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, FinCEN (Dec. 23, 2020), available at <https://www.federalregister.gov/documents/2020/12/23/2020-28437/requirements-for-certain-transactions-involving-convertible-virtual-currency-or-digital-assets>.

investigate and prosecute criminal activity involving cryptocurrencies.⁹ This January, the Federal Reserve Board released a discussion paper on the pros and cons of instituting a CBDC.¹⁰ The report emphasized the importance of “broad support from key stakeholders,” which was echoed in last week’s executive order.

Going forward, we expect further guidance concerning the regulation of cryptocurrencies, though significant rule changes will likely only come following a prolonged review with opportunities for comment from several government agencies as well as members of the public. On the other hand, we expect to see an immediate increased focus on digital assets in enforcement activities applying existing anti-fraud and anti-money laundering rules as well as aggressive enforcement of U.S. sanctions—particularly against Russian entities and individuals.

⁹ Sarah Lynch and Chris Prentice, *FBI to form digital currency unit, Justice Dept taps new crypto czar*, REUTERS (Feb. 17, 2022) available at <https://www.reuters.com/technology/fbi-form-new-digital-currency-unit-justice-dept-taps-new-crypto-czar-2022-02-17/>.

¹⁰ White paper, *Money and Payments: The U.S. Dollar in the Age of Digital Transformation*, Board of Governors of the Federal Reserve (January 2022), available at <https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf>.; see also Press release, *Federal Reserve Board releases discussion paper that examines pros and cons of a potential U.S. central bank digital currency (CBDC)*, (January 20, 2022), available at <https://www.federalreserve.gov/newsevents/pressreleases/other20220120a.htm>.

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