

March 11, 2022

# Biden Issues Executive Order Instituting a “Whole-of-Government” Approach to Supporting Digital Asset Innovation and Mitigating Its Risks

On March 9, 2022, President Biden issued the “Executive Order on Ensuring Responsible Development of Digital Assets” (the “EO”),<sup>1</sup> outlining a first-of-its-kind “whole-of-government” approach to supporting digital asset innovation, studying and mitigating digital asset risks, and reinforcing U.S. leadership in this area.<sup>2</sup> The detailed, thirteen-page EO lays out a national policy for digital assets across six key priorities: (1) consumer and investor protection; (2) financial stability; (3) illicit finance; (4) U.S. leadership in the global financial system and economic competitiveness; (5) financial inclusion; and (6) responsible innovation.<sup>3</sup> To address these priorities, the EO tasks various federal agencies with leading the review and ultimately issuing policy recommendations in roughly six months to one year depending on the study.

Key takeaways from the EO are:

- **The EO Generally Signals Support of Crypto on the Whole.** While recognizing the many risks and uncertainties posed by the growth of cryptocurrencies and distributed ledger technologies, the EO and related statements issued by the Administration can be read as supportive—and even embracing of digital assets. (The White House noted on a background press call that the EO was developed with significant industry engagement, including “Crypto Sundays,” during which Administration officials consulted with a wide range of interested participants.<sup>4</sup>) The EO recognizes that cryptocurrencies surpassed a \$3 trillion market cap last fall and that around 16% of adult Americans have used cryptocurrencies.<sup>5</sup> The fact sheet accompanying the EO states that the “rise in digital assets creates an opportunity to reinforce American leadership in the global financial system at the technological frontier,” and that the United States “must maintain technological leadership in this rapidly growing space.”<sup>6</sup> These positive statements are paired by recognition of the need to mitigate risks in light of the “substantial implications for consumer protection, financial stability, national security, and climate risk.”<sup>7</sup> In particular, the EO places particular emphasis on the development of a U.S. central bank digital currency (“CBDC”), stating that the Administration “places the highest urgency on research and development efforts into the potential design and deployment options of a United States CBDC.”<sup>8</sup> The EO further states: “My Administration sees merit in showcasing United States leadership and participation in international fora related to CBDCs and in the multi-country conversations and pilot projects involving CBDCs.”<sup>9</sup>
- **The White House is Retaking the Initiative.** The rapid growth of digital assets and the accompanying regulatory uncertainty and fragmentation at the U.S. federal level explain the need for a “whole-of-government” approach driven by the White House. It appears that one overriding motivation for the EO was the Administration’s desire for the United States to retake a leadership role in cryptocurrency innovation and potential regulation and standard-setting on a global level. The EO emphasizes that the United States “derives significant economic and national security benefits from the central role that the United States dollar and the United States financial institutions and markets play in the global financial system” and states

© 2022 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

the desire for this central role to continue.<sup>10</sup> Concerns about the potential use of cryptocurrency to evade sanctions targeted at Russia may have prompted the White House to issue this framework now. The EO may also indicate a desire by the White House (working through the executive agencies, such as Treasury) to drive policy-making in this space vis-à-vis the independent regulatory agencies, which have thus far had an outsized role in shaping developments in digital assets. Notably, the Treasury Department will play the lead role (in consultation with other agencies) in studying and making recommendations on U.S. CBDC, with the Federal Reserve encouraged to continue its study of the matter.<sup>11</sup> And although legislative recommendations are contemplated in some EO sections, the EO does not give prominence to the need for Congressional action, unlike the recent President’s Working Group’s “Report on Stablecoins.”<sup>12</sup> Rather, the EO shows a strong desire for the White House to chart the messaging, priorities and policy-making in this space.

- **The Practical Impact of the EO.** The EO does not have any immediate legal or regulatory impact, but rather mandates various agencies to review specific topics and to provide recommendations. The review periods have different timeframes, and it is common for such reviews to exceed the timeframes; it will then take time to consider the recommendations and to put them into effect (for those that can be accomplished by Executive Branch action). More broadly, the fact of this detailed EO and its strong policy statements will likely have a near-term practical effect in terms of raising the priority of digital assets at each agency and driving the dedication of personnel and resources to this area. Companies with offerings or interests in the cryptocurrency or blockchain space may experience more active engagement by these agencies. At the same time, the fact of a “whole-of-government” review of digital assets may in some cases delay or impede near-term progress in terms of regulatory adjustments and guidance that agencies may have been able to make using their own authorities.
- **The Treasury Department is taking a leading role.** As noted, the Treasury Department will play a central role in the “whole-of-government” approach outlined by the EO, including by: (i) leading the study of the creation of a U.S. CBDC;<sup>13</sup> (ii) identifying the impact on consumers, investors and business as a result of the adoption of digital assets and the corresponding changes in the financial markets and payment;<sup>14</sup> (iii) convening the Financial Stability Oversight Committee to produce a report outlining the specific financial stability risks and regulatory gaps posed by digital assets and provide recommendations to address these risks and gaps;<sup>15</sup> (iv) coordinating with various law enforcement agencies to provide views on illicit finance risks posed by digital assets, including stablecoins, CBDCs and trends in the use of digital assets by illicit actors;<sup>16</sup> and (v) establishing a framework for engagement with foreign counterparts—including the Financial Action Task Force—on adapting, updating and enhancing global principles and standards for the treatment of digital assets globally.<sup>17</sup>
- **The EO does not directly address whether cryptocurrencies are securities under federal law.** While the U.S. Securities and Exchange Commission (“SEC”) is identified as one of the many federal agencies that are involved in the interagency review process,<sup>18</sup> the EO does not directly call for recommendations or a report dealing with the applicability of the federal securities laws to cryptocurrencies. The EO calls for the SEC to be consulted—among other agencies—on the impact that digital assets have had and will have on consumers, investors, and businesses as well as the impact on financial markets and payment system.<sup>19</sup> The EO also “encourages” multiple agency heads, including SEC Chair Gensler, to “consider the extent to which 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.”<sup>20</sup>
- **The EO suggests strong interest by the Biden Administration in developing a U.S. CBDC.** The EO states that the “Administration places the highest urgency on research and development” into a potential U.S. CBDC.<sup>21</sup> The EO mandates four separate reports that assess the potential benefits and risks of a U.S. CBDC.
  - *First*, the EO tasks the Secretary of Treasury to issue a report in 180 days that addresses the future of money and payments systems, with an analysis of (i) the potential implications of a U.S. CBDC for national interests, including implications for economic growth and stability; (ii) the potential implications that a U.S. CBDC might have on financial inclusion; (iii) the potential relationship between a U.S. CBDC and private sector digital assets; (iv) the future of fiat currency and digital assets and implications for the federal financial system; (v) the extent to which foreign CBDCs

could displace existing fiat currencies and alter the payment system in ways that could undermine the United States’ financial centrality; (vi) the potential implications on a U.S. CBDC on national security and financial crime, including an analysis of illicit financing risks, sanctions risks, other law enforcement and national security interests, and implications for human rights; and (vii) an assessment of the effects of the growth of foreign CBDCs.<sup>22</sup> As part of the “whole-of-government” approach, the Secretary of Treasury is to consult with the Secretary of State, the Attorney General, the Secretary of Commerce, the Secretary of Homeland Security, the Director of the Office of Management and Budget, the Director of National Intelligence, and the heads of other “relevant agencies.”<sup>23</sup>

- *Second*, the EO “encouraged” the Chairman of the Board of Governors of the Federal Reserve System to (i) issue a report based on its research into whether CBDCs could improve the efficiency and reduce the costs of existing and future payments systems; (ii) continue to assess the optimal form of a U.S. CBDC; and (iii) develop a strategic plan for the potential implementation and launch of a U.S. CBDC.<sup>24</sup>
- *Third*, the EO tasks the Attorney General to issue a first report in 180 days that assesses whether legislative changes would be necessary to issue a potential U.S. CBDC, and a second report in 210 days that develops a legislative proposal based on the report submitted by the Secretary of Treasury.<sup>25</sup>
- *Finally*, the Director of the Office of Science and Technology Policy and the Chief Technology Officer of the United States were tasked with issuing a report in 180 days that evaluates the technological infrastructure, capacity and expertise that would be necessary to facilitate and support the potential launch of a U.S. CBDC.<sup>26</sup>
- **The EO affirms a commitment to addressing illicit finance and national security risks.** The EO notes the role of digital assets in “sophisticated cybercrime-related financial networks and activity, including through ransomware activity.”<sup>27</sup> The EO calls for a cross-governmental team of law enforcement agencies to submit multiple reports to address this risk—including one that is to be submitted to Congress in 90 days on the trends in the use of digital assets by illicit actors.<sup>28</sup> During the White House background press call regarding the EO, senior officials expressed concern about “[t]he insufficiency of international implementation of anti-money laundering network and frameworks for digital assets,” stating that the EO should be viewed as “a signal” that digital asset systems should be implementing “critical controls” such as “identity, sanctions screening, and revocability of illicit transactions”<sup>29</sup>—potential design requirements that are no small matter. The EO’s concern with illicit finance and national security echo a series of previous actions taken by the Treasury Department’s Office of Foreign Assets Control (“OFAC”) and its Financial Crime Enforcement Network (“FinCEN”), as well as by DOJ and other agencies, to address financial crimes issues in the cryptocurrency space.<sup>30</sup>
- **The EO calls for consumer protection measures while acknowledging the potential benefits of increased financial inclusion.** As previously noted, the EO tasks the Treasury Department with issuing a report in 180 days that addresses the implications of digital assets and the associated change in the financial system on consumers, investors and businesses. This report will focus, in part, on the impact that the digital assets innovation will have on “those most vulnerable to disparate impacts” while also providing policy recommendations for “expanding access to safe and affordable financial services.”<sup>31</sup> During the White House press background call, senior officials noted the potential for digital assets to address an “[a]ntiquated payment infrastructure” that offers consumers “options that are slow, costly, or altogether inaccessible,” citing cross-border payments as an example.<sup>32</sup>
- **The EO is seeking insight into the impact of digital asset technologies on the climate.** As part of its focus on protecting consumers, investors and businesses, the EO tasks the Director of the Office of Science and Technology Policy with submitting a report in 180 days that identifies (i) the connection between distributed ledger technology and short-, medium-, and long-term economic and energy transitions; (ii) the potential for these technologies to impede or advance efforts to tackle climate change at home and abroad; (iii) the impacts these technologies have on the environment; and (iv) the effect of cryptocurrencies’ consensus mechanisms on energy usage.<sup>33</sup> The desire to understand the environmental impact—particularly, the energy usage associated with mining—has been a growing focus of governmental entities and investors.

While the EO suggests a desire by the Administration to provide much needed regulatory clarity to the development and use of cryptocurrency and other digital assets in the United States, it seems clear that the process for doing so will be time-consuming and multi-faceted. We will continue to monitor these developments.

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content.

**Jonathan H. Ashtor**  
+1-212-373-3823  
[jashtor@paulweiss.com](mailto:jashtor@paulweiss.com)

**Susanna M. Buerge**  
+1-212-373-3553  
[sbuerge@paulweiss.com](mailto:sbuerge@paulweiss.com)

**Jessica S. Carey**  
+1-212-373-3566  
[jcarey@paulweiss.com](mailto:jcarey@paulweiss.com)

**Lewis R. Clayton**  
+1-212-373-3215  
[lclayton@paulweiss.com](mailto:lclayton@paulweiss.com)

**Andrew J. Ehrlich**  
+1-212-373-3166  
[aehlich@paulweiss.com](mailto:aehlich@paulweiss.com)

**Manuel S. Frey**  
+1-212-373-3127  
[mfrey@paulweiss.com](mailto:mfrey@paulweiss.com)

**Michael E. Gertzman**  
+1-212-373-3281  
[mgerzman@paulweiss.com](mailto:mgerzman@paulweiss.com)

**Roberto J. Gonzalez**  
+1-202-223-7316  
[rgonzalez@paulweiss.com](mailto:rgonzalez@paulweiss.com)

**David S. Huntington**  
+1-212-373-3124  
[dhuntington@paulweiss.com](mailto:dhuntington@paulweiss.com)

**Brad S. Karp**  
+1-212-373-3316  
[bkarp@paulweiss.com](mailto:bkarp@paulweiss.com)

**Raphael M. Russo**  
+1-212-373-3309  
[rrusso@paulweiss.com](mailto:rrusso@paulweiss.com)

**Rachel Fiorill**  
+1-202-223-7346  
[rfiorill@paulweiss.com](mailto:rfiorill@paulweiss.com)

**Jacobus J. Schutte**  
+1-212-373-3152  
[jschutte@paulweiss.com](mailto:jschutte@paulweiss.com)

*Associate Carly Lagrotteria contributed to this Client Alert.*

- 
- <sup>1</sup> The White House, *Executive Order on Ensuring Responsible Development of Digital Assets* (Mar. 9, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets>;
- <sup>2</sup> The White House, *FACT SHEET: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets* (Mar. 9 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets>.
- <sup>3</sup> *Executive Order on Ensuring Responsible Development of Digital Assets*, supra note 1, at Sec. 2.
- <sup>4</sup> The White House, *Background Press Call by Senior Administration Officials on the President’s New Digital Assets Executive Order* (Mar. 9, 2022), <https://www.whitehouse.gov/briefing-room/press-briefings/2022/03/09/background-press-call-by-senior-administration-officials-on-the-presidents-new-digital-assets-executive-order>.
- <sup>5</sup> *Executive Order on Ensuring Responsible Development of Digital Assets*, supra note 1, at Sec. 1.
- <sup>6</sup> *FACT SHEET: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets*, supra note 2.
- <sup>7</sup> *Id.*
- <sup>8</sup> *Executive Order on Ensuring Responsible Development of Digital Assets*, supra note 1, at Sec. 4(a)(i).
- <sup>9</sup> *Id.* at Sec. 4(a)(ii).
- <sup>10</sup> *Id.* at Sec. 2(d).
- <sup>11</sup> *Id.* at Sec. 4(b).
- <sup>12</sup> See Paul, Weiss, *Federal Regulators’ Report Recommends Urgent Legislation to Regulate Stablecoins* (Nov. 8, 2021), <https://www.paulweiss.com/practices/litigation/financial-institutions/publications/federal-regulators-report-recommends-urgent-legislation-to-regulate-stablecoins?id=41673>.
- <sup>13</sup> *Executive Order on Ensuring Responsible Development of Digital Assets*, supra note 1, at Sec. 4(b).
- <sup>14</sup> *Id.* at Sec. 5(b)(i).
- <sup>15</sup> *Id.* at Sec. 6(b).

<sup>16</sup> *Id.* at Sec. 7(b).

<sup>17</sup> *Id.* at Sec. 8(b).

<sup>18</sup> *Id.* at Sec. 3, 5(b)(i).

<sup>19</sup> *Id.* at Sec. 5(b)(i).

<sup>20</sup> *Id.* at Sec. 5(b)(vi).

<sup>21</sup> *Id.* at Sec 4(a)(i), (ii).

<sup>22</sup> *Id.* at Sec. 4(b)(iii).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at Sec. 4(c).

<sup>25</sup> *Id.* at Sec. 4(d).

<sup>26</sup> *Id.* at Sec. 5(b)(ii).

<sup>27</sup> *Id.* at Sec. 7(a).

<sup>28</sup> *Id.* at Sec. 7(b).

<sup>29</sup> *Background Press Call by Senior Administration Officials on the President’s New Digital Assets Executive Order*, supra note 4.

<sup>30</sup> Paul, Weiss, *New OFAC Guidance for the Cryptocurrency Industry Highlights Increased Regulatory Focus* (Oct. 25, 2021), <https://www.paulweiss.com/practices/litigation/economic-sanctions-aml/publications/new-ofac-guidance-for-the-cryptocurrency-industry-highlights-increased-regulatory-focus?id=41498>; Paul, Weiss, *CFTC and FinCEN Impose \$100 Million Penalty on BitMEX* (Aug. 20, 2021), <https://www.paulweiss.com/practices/litigation/economic-sanctions-aml/publications/cftc-and-fincen-impose-100-million-penalty-on-bitmex?id=40790>.

<sup>31</sup> *Id.* at Sec. 5(b)(i).

<sup>32</sup> *Background Press Call by Senior Administration Officials on the President’s New Digital Assets Executive Order*, supra note 4.

<sup>33</sup> *Executive Order on Ensuring Responsible Development of Digital Assets*, supra note 1, at Sec. 5(b)(vii).