



## US DIGITAL ASSETS REGULATION AND LEGISLATION

*A GUIDE TO POLICY, POWERS, PLAYERS, AND PROCESS*



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## KEY TAKEAWAYS

- *The scope and complexity of the government decision-making process on digital assets are unprecedented, eclipsing the tobacco settlement, the ATT breakup, and the birth of the internet.*
- *The debate over digital asset regulation guarantees full employment for lobbyists and lawyers.*
- *It will take years for final policies to be put in place.*
- *Many of the final rules and bills will be litigated and make their way through the courts.*
- *The risks and rewards cannot be overstated, and there will be winners and losers.*

## 1 THE BIDEN EXECUTIVE ORDER ON DIGITAL ASSETS

“Study the risks and benefits of digital assets across six priorities -- consumer and investor protection; financial stability; illicit finance; U.S. leadership in the global financial system and economic competitiveness; financial inclusion; and responsible innovation.”

[FACT SHEET: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets](#)

### The plan to plan for a plan.

The Biden Administration issued an **Executive Order (EO)** on digital assets to establish a “whole-of-government” approach to policy development within the executive branch.

- The EO requires a series of reports from federal agencies that will be the basis for a future blueprint for future regulation. It’s a plan to plan for a plan. The industry praised the EO as a sign of respect and maturity for digital assets and congratulated the Administration for devising a thoughtful and thorough process. But the process is not policy, regulation, legislation, or enforcement, and the Executive branch is but one of three (or four depending on one’s viewpoint about independent regulatory agencies).
- The EO directs, and in some cases “encourages,” several federal agencies to issue reports on the risks and benefits of digital assets, and nothing more. In theory this could be a straightforward exercise in developing facts and identifying policy and legal gaps, but such a thing is rare in government. There are always ideas, judgements, and agendas baked in at the front end. It would be naïve to think that the EO clarifies anything for crypto or to know if outcomes will benefit or harm the industry, however that is defined.

### While the Executive branch plans, the other branches of government carry on.

- There are three branches of government, possibly four depending on one’s view of Independent agencies. Independent regulatory agencies are in fact *independent and not under the policy control of the White House*, and the EO can’t direct their activities.

- In fact, the EO barely mentions the two independent agencies – the SEC and the CFTC -- that have the primary jurisdiction over regulation, investigation, and enforcement. It doesn't mention the tug of war between SEC or CFTC over whether cryptocurrency is a security or a commodity or the controversial practice of "regulation by enforcement" represented by the BlockFi settlement, the Ripple lawsuit, or the shutdown of crypto lending platforms.
- The SEC, CFTC, and FTC investigations and enforcement will continue against this background, and the Justice Department's new National Cryptocurrency Enforcement Task Force (NCENT) will be eager for prosecutions. The IRS will continue implementing the new reporting requirements passed in the infrastructure bill for transactions involving over \$10,000 in a newly defined category of "digital assets."
- Moreover, the EO won't stop Congress, the states, or the courts from using their unique powers to pursue digital asset policy and rules with varying levels of public input. Certainly, the Administration hopes to put on the brakes and signal to the rest of government to wait for the EO process to conclude, but that is wishful thinking.
- Every agency reports to four congressional committees, and those committees are holding hearings, introducing bills, offering amendments, and planning appropriations to influence, compete with, or supersede the executive branch. (See section 2)

#### With the invasion of Ukraine, *national security is center stage*.

- The EO release was delayed because of the threat of Russian invasion of Ukraine. The Administration was careful that the EO anticipated the role of crypto in evading sanctions, funding the war effort on both sides, and extending humanitarian assistance.
- Indeed, the Senate Banking Committee held a hearing the week after on illicit finance and crypto, and the tenor would have been more partisan had the star witness not been the head of the Blockchain Association of Ukraine.

#### The process will take forever.

- The EO sets up a series of complex non-linear processes that will play out over a half-decade or more and that will extend beyond the tenure of the current occupant of the White House, even if he is re-elected to a second term.
- Once the Administration digests the reports, myriad policy matters will be vetted, not only in the agencies, but also in inter-agency working groups under the aegis of the National Economic Council (NEC), the National Security Council (NSC), and / or other standing working committees, such as the President's Working Group on Financial Markets (PWGFM), stakeholders will engage, and recommendations and (maybe) decisions will follow. Only then will the tedious process of drafting regulations begin, and all are subject to the Administrative Procedures Act (APA).
- The APA sets out detailed procedures for draft rules to be published in the *Federal Register* with at least two iterative rounds of public notice and comment, after which the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs (OIRA) make the ultimate decision to "clear" any rules for final publication. All draft rules, comments, and meetings are posted on [www.regulations.gov](http://www.regulations.gov). If stakeholders do not like the result, they have recourse in the courts and in Congress.
- When Congress finally passes legislation, implementing rules would follow, and this process would repeat.

### Executive Order Reports and Due Dates:

- **The Federal Reserve:** continue with “urgency” on research and development of a central bank digital currency (CBDC).
  - The Fed previously issued [reports on CBDCs](#) and public comment is well underway.
- **The Commerce Department:** work across the government to ensure that emerging policies protect U.S. leadership in the crypto field.
- **The Treasury Department:** report on the future of money and payments, with the goal of promoting wider access to the financial system.
  - The President’s Working Group on Financial Markets previously issued a [report on stablecoins](#) and asked for more congressional authority.
- **The Justice Department:** examine the role of law enforcement agencies in detecting, investigating, and prosecuting crypto-related crimes.
- **The Federal Stability Oversight Council (FSOC):** report on the potential systemic risks posed by digital assets.

#### **June 7, 2022**

- **The Attorney General** reports on international law enforcement cooperation for detecting and investigating digital assets criminal activity.
- The Treasury Department framework for interagency international engagement on adopting global principles for use and adoption of digital assets.

#### **March 9, 2023**

- Priority actions report from *the Treasury Department* on the framework for interagency international engagement on adopting global principles for use and adoption of digital assets.

#### **September 5, 2022**

- **The Treasury Department** on the potential implications of a United States CBDC.
- **The Treasury Department** on the implications of adoption of digital assets on the financial market and payment systems for United States consumers and investors.
- **The Office of Science and Technology Policy** on the technological infrastructure that would be needed for the adoption of a United States CBDC.
- **The Office of Science and Technology** on the potential benefits and drawbacks of distributed ledger technology on the environment.

#### **October 5, 2022**

- **The Treasury Department and the Financial Stability Oversight Council** report on the specific financial stability risks and regulatory gaps posed by digital assets and recommendations to address such risks.

### The Alphabet Soup: dozens of agencies have a role

- Department of Treasury: FinCen, SOC, IRS, OFAC, OCC, Office of Domestic Finance, Office of International Affairs, Office of Tax Policy, Office of Terrorism and Financial Intelligence
- Department of Justice: CNET; Tax, Criminal and Civil; and National Security Divisions; Office of Legal Policy, FBI

- Department of Commerce: Office of Economic Affairs, Economic Development Administration, International Trade Administration, Bureau of Industry and Security (Entity List and Commerce Control List)
- Department of Homeland Security: Office for Counterterrorism and Threat Prevention, Office for Cyber, Infrastructure, Risk, and Resilience, Office for Trade and Economic Security, US Secret Service
- Department of Labor
- Department of State: Bureau of Economic and Business Affairs
- Office of the Director of National Intelligence
- EPA
- Independent Agencies: SEC, CFTC, CFPB, FTC
- The Federal Reserve
- The White House: NEC, NSC, OSTP, Domestic Policy, Counsel's Office, OMB, OIRA, USTR, PWGFM

## 2 US CONGRESS

Congress passed only one piece of legislation relating to digital assets.

- The Infrastructure Investment and Jobs Act requires cryptocurrency “brokers” to furnish information about its users to the IRS starting in 2023, and it added “digital assets” to the traditional Anti-Money Laundering reporting requirements.
- The IRS will interpret the term “broker” and depending on how narrow or broad, the definition could include miners and software developers.
- This was the first dust-up between the industry and Washington, and the industry's new, untested advocacy groups were unprepared. Several bills were introduced to eliminate the requirement altogether or to define “broker” in statute. None is likely to pass.

Congressional Committees held at least nine hearings over 16 months, and more will follow .

- Topics include stablecoins, cryptocurrency, CBDC, illicit finance, terrorism, consumer protection, financial stability, investing, trading, payment systems, sanctions, climate impact, national security, cyber security, pensions and retirement, and more.
- Hearings create a record of testimony from stakeholders, sometimes the basis of legislation, but often are held to grill officials of the Executive branch and influence outcomes. There'll be a lot of both over the next few years.

Members of the House and Senate introduced thirty-five bills and growing on digital assets, but none will pass.

- Three bipartisan informal caucuses formed – the *Congressional Blockchain Caucus*, *Digital Asset Working Group* within the House Financial Services Committee, and the *US Senate Financial Innovation Caucus*.
- **Senator Toomey (R-PA)**, the top Republican on the Banking Committee, issued a set of principles to guide [policy on stablecoins](#).

- Senators **Cynthia Lummis (R-WY)** and **Kirstin Gillebrand (D-NY)** announced they'll draft the first bipartisan bill “to provide a framework for how [the digital assets] industry should *potentially be* regulated in the future “ and to create a system for classifying digital assets as either securities or commodities, with other provisions on cybersecurity, consumer protection, banking regulation, and stablecoins. This is a serious effort that could be a driver because Lummis is on the Banking Committee with jurisdiction over the SEC and Gillebrand is on the Agriculture Committee with jurisdiction over the CFTC.
- The Senate Republican Policy Committee, the policy arm of the Senate Republican caucus, published a paper, “Cryptocurrency Goes Mainstream.” <https://www.rpc.senate.gov/policy-papers/cryptocurrency-goes-mainstream>
- Normally, drafting legislation falls to Committee Chairs, but lately there's precedent for this kind of “ground-up” strategy to work in both the House and Senate, which produced the 2021 infrastructure bill.
- The Senate Foreign Relations Committee recently approved a bill to require a State Department study on El Salvador's decision to adopt bitcoin as legal tender and to plan to reduce potential risks to the US financial system.
- Complicating any effort to legislate is the fact of ten Senate committees and at least eight House Committees of jurisdiction over various aspects of digital assets— each with its own rules and prerogatives.

### 3 The STATES

- The states are generally unlikely to tackle digital assets on their own, except **New York** and **Wyoming**, but every state has a Governor, an Attorney General ,a legislature, a banking regulator, and a tax authority--all of whom might get into the mix.
- **New York** set up a regulatory regime in 2015, creating a BitLicense and a Limited Purpose Trust Charter.
- **Wyoming** created a Special Purpose Depository Institution where customers can make deposits and store or transfer cryptocurrencies, and the state allows Decentralized Autonomous Organizations (DAOs) to register as LLCs.
- **Virginia** allows state-chartered banks to provide custodial services for “virtual currency
- Almost all states have, one way or another, included cryptocurrency in their definitions of money and money transmission.
- Bills are being introduced in all state legislatures, and two organizations ( NCSL and ALEC) that recommend policy to state legislatures have model bills on digital asset regulation.
- New York City and Miami FL elected “crypto mayors” and both want to lure tech to their cities.

### 4 ADVOCATES AND STAKEHOLDERS

Dozens of organizations will lobby for and against proposals.

- Stakeholders include companies, trade associations, coalitions, hired-gun lobbyists, lawyers, unions, individuals, celebrities, think tanks, academics, public interest groups, political action committees, Super PACS, traditional and social media, the political parties, candidates, and state and local governments.
- There is no one-size-fits-all strategy for the industry.

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