White House Issues Executive Order on Ensuring Responsible Development of Digital Assets

Four Things To Know

On March 9, 2022, President Biden issued an Executive Order on Ensuring Responsible Development of Digital Assets ("Executive Order" or "Order"). The Executive Order is comprehensive in scope, and addresses both the development of a Central Bank Digital Currency in the United States ("U.S. CBDC") and the regulation of privately-created digital assets.

1 The Order requires robust government study of the significant policy issue currently associated with digital assets, but it does not directly resolve them.

The Executive Order covers nearly every significant issue associated with digital assets. At a high level, these issues include:

- Protecting consumers, investors, and businesses, including with respect to individual privacy concerns and cybersecurity concerns around custody and storage of, and transacting in, digital assets;
- Protecting U.S. and global financial stability and the mitigation of systemic risk that may result because digital asset issuers, exchanges, and trading platforms, and their intermediaries, are not subject to the same regulatory and supervisory standards as govern traditional markets;
- Mitigating the illicit finance and national security risks posed by misuse of digital assets, including the risks of money laundering, cybercrime and ransomware, narcotics and human trafficking, and terrorism financing;
- Reinforcing the leadership of the United States in the global financial system and in technological and economic competitiveness, including through the responsible development of payment innovation and digital assets;
- Promoting safe and affordable financial services, including by making domestic and cross-border payments more accessible to Americans underserved by the traditional banking system; and
- Supporting technological advances that promote responsible development and use of digital assets, including with respect to privacy, security, defending against illicit exploitation, and reducing negative climate impacts.

The Order requires study and preparation of reports to the President with respect to these issues, but it does not direct specific action to resolve them. Actionable recommendations may -- and in some cases, must -- be included in the required reports, most of which are due to be completed in September 2022.

2 The Executive Order reflects the Administration's cautious receptivity to the development and eventual adoption of a U.S. CBDC.

Although the Order generally articulates Administration policy and directs work with respect to digital assets at a generic level, it addresses the potential development of a U.S. CBDC more specifically, perhaps underscoring more significant executive branch interest in an issue that to date has largely been the focus of the Federal Reserve. Following the Federal Reserve's recent release of a discussion paper that highlighted key monetary policy, privacy, and market structure issues associated with a U.S. CBDC but deferring any decision to further study, the Order directs the Secretary of the Treasury to lead work on a report (due in September 2022) on the future of money and payment systems that will include consideration of the implications, benefits, and risks of a U.S. CBDC. Within the same time frame, the Department of Justice must conduct an "assessment" of whether legislation is necessary for the implementation of a U.S. CBD, and by October 2022 DOJ must also produce a legislative proposal for doing so. These portions of the Order appear intended to address the Federal Reserve's desire for Congressional authorization for a U.S. CBDC. At the same time, the Order instructs the Director of the Office of Science and Technology and the Chief Technology Officer of the United States to prepare a "technical evaluation" of the technological infrastructure, capacity, and expertise necessary at the relevant government agencies to enable and support a U.S. CBDC.

3 The reports and other work required under the Order will require significant involvement, coordination, and consensus among as many as 17 government agencies.

Much of the work product that the Executive Order calls for, including the report and the "technical evaluation" described above, is to be prepared using a process originally developed for national security policymaking and described in a Memorandum on Renewing the National Security Council System, dated February 4, 2021. The process, which is not dissimilar to the process that the Financial Stability Oversight Council uses for policy development, requires the participation of 17 different cabinet-level and executive agencies, with elective participation by independent regulatory agencies including the federal banking agencies, the market regulators, the Consumer Financial Protection Bureau ("CFPB"), and the Federal Trade Commission ("FTC"). These agencies may be invited to attend meetings as appropriate, "with due respect for their regulatory independence." A similar concern for the protection of regulatory independence also likely informs the Executive Order's "encouragement" to the Chair of the Federal Reserve Board to continue the Board's work on a U.S. CBDC and to develop a strategic plan for its implementation.

4 Although the Executive Order requires further study of policy issues associated with digital assets, several of those issues are currently pending before regulatory agencies and are left to those agencies to address in the near term.

Regulators in the financial services sector -- including the federal banking agencies, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the CFPB, and the FTC -- have issues currently pending that may be ripe for decision before the work required by the Executive Order is complete. Such issues include the adaptation of the securities regulatory framework to digital assets; the availability of Federal Reserve payments services to digital assets companies; and the limits, if any, that will apply to the conduct of digital asset activities by federally-regulated banks and their affiliates. While these issues and many others could be viewed as falling within the very broad scope of the Executive Order, the Order does not suggest that the relevant agencies should cease their progress on these issues until all of the work set in motion by the Order is complete. It therefore appears that the independent regulatory agencies could decide the matters before them in regular order.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services practice:

Randy Benjenk	+1 202 662 5041	rbenjenk@cov.com
Jeremy Newell	+1 212 841 1296	jnewell@cov.com
Michael Nonaka	+1 202 662 5727	mnonaka@cov.com
Karen Solomon	+1 202 662 5489	ksolomon@cov.com