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Client Alert | Fintech

The White House's Executive Order on Digital Assets: Key Takeaways for the Asset Management Industry

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I. Introduction

On March 9, 2022, President Biden signed an Executive Order on Ensuring Responsible Development of Digital Assets (the Executive Order) articulating the Administration's policy objectives related to digital assets and marshaling the resources of multiple federal agencies – primarily in the executive branch – to study and collaborate on a regulatory approach to the proliferation of digital assets in our financial markets.[1]

Digital assets have many applications, but for the asset management industry, they are principally used as investments, which are primarily regulated by the Securities and Exchange Commission (the SEC) and the Commodity Futures Trading Commission (the CFTC), both independent commissions of the federal government. Notwithstanding the fact that the Executive Order asks relatively little of the SEC and CFTC compared with its requirements for executive branch agencies, the SEC and CFTC regulatory responses to the Executive Order could have important implications for the asset management industry, both with respect to the adoption and use of digital assets as well as any new financial innovation.

This alert summarizes the Executive Order's policy statement, objectives, and the reports requested from various federal agencies and offices, followed by a focus on the Executive Order's request for action from the SEC and CFTC. This alert concludes with key takeaways that the asset management industry can draw from the Executive Order.

II. A Summary of the Executive Order[2]

Policy. Citing dramatic growth in the digital assets markets and the associated implications, the Executive Order's stated policy is to "take strong steps to reduce the risks that digital assets could pose to consumers, investors, and business protections; financial stability and financial system integrity; combating and preventing crime and illicit finance; national security; the ability to exercise human rights; financial inclusion and equity; and climate change and pollution."

Objectives. The Executive Order lists six objectives as the "principal policy objectives of the United States with respect to digital assets":

(i) protecting consumers, investors and business in the United States;
(ii) protecting U.S. and global financial stability;
(iii) mitigating the illicit finance and national security risks posed by the misuse of digital assets;

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[1] See Executive Order on Ensuring Responsible Development of Digital Assets (Mar. 9, 2022), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/.

[2] This summary does not address the following topics from the Executive Order: the Administration's statement of its policy toward central bank digital currencies (CBDCs), national security risks, and international cooperation and competitiveness.

(iv) reinforcing U.S. leadership in the global financial system and in technological and economic competitiveness, including through the responsible development of payment innovations and digital assets;
(v) promoting access to safe and affordable financial services; and
(vi) supporting technological advances that promote responsible development and use of digital assets.

Reports. The Executive Order requests reports from various federal agencies and offices on the specific uses and risks of digital assets and encourages regulators to consider areas to add to or update regulations. The requested reports are summarized below.

Agency/Office Responsible	Other Agencies/Offices Involved	Due Date	Focus of Report
Actions to Introduce U.S. Central Bank Digital Currencies (CBDC)			
Treasury	Secretary of State, Attorney General, Commerce, Homeland Security, Office of Management and Budget, National Intelligence	180 days after the Executive Order was issued	The future of money and payment systems, including the conditions that drive broad adoption of digital assets; the extent to which technological innovation may influence these outcomes; and the implications for the U.S. financial system, the modernization of and changes to payment systems, economic growth, financial inclusion, and national security.
Attorney General	Treasury, Federal Reserve	180 days after the Executive Order was issued	Whether legislative changes would be necessary to issue a U.S. CBDC.
Attorney General	Treasury, Federal Reserve	210 days after the Executive Order was issued	Proposed legislative changes, if any, based on the previous report.
Actions to Protect Consumers, Investors and Businesses			
Treasury	Labor, Federal Trade Commission (FTC), SEC, CFTC, Federal banking agencies, Consumer Financial Protection Bureau (CFPB)	180 days after the Executive Order was issued	Implications of developments and adoption of digital assets and changes in financial market and payment system infrastructures for U.S. consumers, investors, businesses, and for equitable economic growth.
Office of Science and Technology Policy	Treasury, Federal Reserve	180 days after the Executive Order was issued	The technological infrastructure, capacity, and expertise that would be necessary at relevant agencies to facilitate and support the introduction of a CBDC system should one be proposed.
Attorney General	Treasury, Homeland Security	180 days after the Executive Order was issued	The role of law enforcement agencies in detecting, investigating, and prosecuting criminal activity related to digital assets, including any recommendations on regulatory or legislative actions.
Office of Science and Technology Policy	Treasury, Energy, Environmental Protection Agency, Council of Economic Advisers, National Climate Advisor	180 days after the Executive Order was issued	The connections between distributed ledger technology and economic and energy transitions; the potential for these technologies to impede or advance efforts to tackle climate change at home and abroad; and the impacts these technologies have on the environment.

Actions to Promote Financial Stability, Mitigate Systemic Risk, and Strengthen Market Integrity			
Treasury and Financial Stability Oversight Council (FSOC)[3]	N/A	210 days after the Executive Order was issued	The specific financial stability risks and regulatory gaps posed by various types of digital assets and providing recommendations to address such risks.
Actions to Limit Illicit Finance and Associated National Security Risks			
Treasury, Secretary of State, Attorney General, Commerce, Homeland Security, Office of Management and Budget, National Intelligence	N/A	90 days after submission to the Congress of the National Strategy for Combating Terrorist and Other Illicit Financing (the "Strategy")	Annexes to the Strategy offering additional views on illicit finance risks posed by digital assets, including cryptocurrencies, stablecoins, CBDCs, and trends in the use of digital assets by illicit actors.
Treasury	Secretary of State, Attorney General, Commerce, Homeland Security, Office of Management and Budget, National Intelligence	120 days after submission to the Congress of the Strategy	An action plan based on the previous report's conclusions for mitigating the digital-asset-related illicit finance and national security risks addressed in the updated strategy.
Actions to Foster International Cooperation and U.S. Cooperativeness			
Treasury	Secretary of State, Commence, United States Agency for International Development	120 days after the Executive Order issued	A framework for interagency international engagement with foreign counterparts and in international fora to adapt, update, and enhance adoption of global principles and standards for how digital assets are used and transacted, and to promote development of digital asset and CBDC technologies consistent with our values and legal requirements (the "Treasury Framework").
Treasury	Secretary of State, Commerce, Office of Management and Budget, United States Agency for International Development	Within 1 year of the date of the establishment of the Treasury Framework	Priority actions taken under the Treasury Framework and its effectiveness.
Commerce	Secretary of State, Treasury	180 days after the Executive Order was issued	A framework for enhancing U.S. economic competitiveness in, and leveraging of, digital asset technologies.
Attorney General	Secretary of State, Treasury, Homeland Security	90 days after the Executive Order was issued	How to strengthen international law enforcement cooperation for detecting, investigating, and prosecuting criminal activity related to digital assets.

[3] Members of the FSOC include 10 voting members: the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the CFPB, the Chairman of the SEC, the Chairperson of the Federal Deposit Insurance Corporation, the Chairperson of the CFTC, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration and an independent member with insurance expertise who is appointed by the President and confirmed by the Senate for a six-year term; and 5 nonvoting members: the Director of the Office of Financial Research, the Director of the Federal Insurance Office, a state insurance commissioner designated by the state insurance commissioners, a state banking supervisor designated by the state banking supervisors, and a state securities commissioner(or officer performing like functions) designated by the state securities commissioners.

III. The Executive Order & the SEC and CFTC

Because the SEC and CFTC are independent federal commissions, rather than executive branch agencies, the Executive Order directly requests relatively little of these regulators. It does, however, assign three specific tasks to the SEC and the CFTC that the asset management industry will want to track going forward.

First, the Executive Order requests that the SEC and CFTC coordinate with the Secretary of the Treasury to submit a report addressing the further development of and changes to the digital asset financial market and payment system infrastructure and the implications for consumers, investors and businesses. The report will include sections on (i) conditions that would drive mass adoption of digital assets into mainstream financial markets and the risk and opportunities associated with such adoption, (ii) how technological innovation could impact the use of digital assets, and (iii) policy recommendations to protect consumers, investors and businesses while supporting the expanding access to safe and affordable financial services.

Second, the Executive Order encourages the Chair of the SEC and Chairman of the CFTC to consider the extent to which investor and market protections could be used to address the risks of digital assets and whether additional regulation would be appropriate.

Third, the Treasury and the FSOC, which includes the Chair of the SEC and Chairman of the CFTC, were asked to convene to produce a report outlining specific financial stability risks and regulatory gaps associated with the use of digital assets. The report will include consideration of different types of digital assets and proposals for additional or adjusted regulation, supervision, and legislation.

IV. Key Takeaways

While the Executive Order addresses innovation in the use of digital assets and the benefits of adopting digital assets in the consumer context, these sentiments are not expressed in the Executive Order in connection with the use of digital assets as investments. The Executive Order instead appears to encourage the SEC and CFTC to look at the existing regulatory framework and identify areas where additional or more restrictive regulation could be implemented. This approach is evident, for example, in the Administration’s expression of its policy objectives for the use of digital assets as investments:

Digital asset issuers, exchanges and trading platforms, and intermediaries whose activities may increase risks to financial stability, should, as appropriate, be subject to and in compliance with regulatory and supervisory standards that govern traditional market infrastructures and financial firms, in line with the general principle of “same business, same risks, same rules.” The new and unique uses and functions that digital assets can facilitate may create additional economic and financial risks requiring an evolution to a regulatory approach that adequately addresses those risks.

The asset management industry and investors may benefit from the approach called for in the Executive Order. However, in light of the order’s iteration of the “same business, same risks, same rules” principle and its reference to regulatory “evolution” only in connection with “risks,” there is a possibility that the Administration’s effort may lead to a less-than-optimal level of regulatory flexibility from the SEC or CFTC. Asset managers and others in the digital asset investment ecosystem that seek a balance between investor protection and innovation should consider how they might join the conversation now happening throughout the federal government.

The Executive Order is only the beginning of a very long process that is not likely to provide regulatory clarity in the immediate future. Nevertheless, the Executive Order provides a starting point for the asset management industry to provide input about digital assets investments specifically but also more broadly about the role of financial innovation and the benefits to industry and investors alike of smart, flexible regulation.

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