

Crypto Assets: From Off The Grid To A Seat At The Table

by Erin Bryan

The Beginning

Crypto assets were initially “off the grid,” and many early proponents celebrated the promise of their regulatory independence. While conventional assets were governed by a virtual alphabet soup of federal and state regulations, the new crypto assets were different. Tied to a new technology called blockchain, crypto assets offered a different approach to making profits and selling interests. The allure lay in part in the simplicity. Skip the Securities and Exchange Commission (SEC) registration process and all that complex paperwork; use a simple, brief “White Paper”; raise the necessary capital; use a smart contract instead of a complex agreement. All new; all simple; all linked to new technology.

Interest exploded and the public was fascinated, even if they did not quite understand. It seemed everyone wanted to get on the bandwagon. Headlines were everywhere. Values gyrated up and down at light speed, occasionally making massive winners and losers in mere moments. It was only a matter of time before the U.S. regulators would step in to regulate this new class of assets.

The Regulators

Regulators were drawn to speculate about the new asset class from the early days, noting concerns such as consumer protection, market stability, and safety and soundness. The Federal Deposit Insurance Corporation (FDIC), Department of Treasury (Treasury), SEC, Commodity Futures Trading Commission (CFTC) and Financial Crimes Enforcement Network (FinCEN) expressed interest to varying degrees in recent years.¹ For example,

- The SEC investigated, declaring some crypto assets to be unregistered securities;²
- The CFTC concluded crypto coins were a commodity subject to its jurisdiction;³ and
- FinCEN determined that there were AML questions.⁴

Related People

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- Technology

In response, the industry players developing and investing in crypto assets frequently asserted that the traditional regulatory schemes did not apply.⁵ While those working in the new space often lost suits brought by regulators such as the SEC, it failed to dull the public's keen interest and crypto holdings experienced exponential growth.

Today the debate continues about the use, risks, and validity of crypto assets, but key regulators have recently begun to signal an intent to regulate these assets. Virtually every federal regulator is discussing crypto as a new asset class. For example:

- The Federal Reserve recently released research examining the possible benefits of a digital currency;⁶
- Treasury has issued statements regarding the risks involved with this asset class;⁷
- FinCEN is issuing new AML regulations;⁸
- SEC Chair Gensler has discussed the need for new legislation;⁹ and
- A number of states have pending legislation regarding crypto assets.¹⁰

However, a unified approach had failed to emerge from the fray, leaving many to wonder which agencies would ultimately be empowered to regulate the crypto market and how eventual rulemaking could help or hurt the industry.

A New Sheriff

Now a new sheriff has emerged – President Biden. On March 9, 2022, he signed an executive order to ensure the responsible development of digital assets (the “Order”).¹¹ The Order, for the first time, outlines a “whole-of-government” approach to address the risks and benefits of digital assets. As outlined in the Order, the basic building blocks are:

- consumer and investor protection;
- financial stability;
- responsible finance and inclusion;
- U.S. leadership in global finance; and
- responsible innovation.

The Order calls for measures to: 1) develop policy recommendations; 2) protect U.S. global financial stability and mitigate risk; 3) mitigate illicit finance; 4) promote U.S. leadership in tech and economic competitiveness with the Commerce Department working across the government to drive services; 5) promote equitable access to safe and affordable financial services; 6) direct the Treasury Secretary, working with others, to develop a report to support tech advances and ensure responsible development and use of this new asset class; and 7) explore a U.S. central bank digital currency. The Biden administration will align U.S. and international interests, according to the Order.

The Future

President Biden's landmark Order adds a new and urgent momentum to the previously measured and deliberate exploration of crypto assets by the regulators. Now crypto is being given a seat at the table and viewed as a partner to help drive U.S. international economic leadership. While there have always been issues and challenges from others,

the U.S. has long been an international economic leader and its currency is the reserve currency of the world. President Biden's Executive Order is designed to help maintain that leadership and navigate the constant challenges to that position. No doubt the outcome of this battle will have a huge international impact.

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As the regulation of crypto assets continues to evolve, Dorsey attorneys are available to assist in obtaining clarifications from U.S. regulators for our clients. If you have any questions regarding this eUpdate, please contact the attorneys profiled below.

To read crypto-related articles that Tom Gorman has written, please see below.

- [Crypto, Tech and Slow Evolution Forward](#)
- [Crypto and the Regulators: Will the Revolution Get Rules?](#)
- [How To Get Your Crypto Currency Offering Enjoined](#)

¹ See, e.g., FinCEN's *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies* (FIN-2019-G001) (May 9, 2019) (available at: <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>) (last accessed Mar. 15, 2022); FDIC's *Request for Information and Comment on Digital Assets* (RIN 3064-ZA25), 86 Fed. Reg. 97 (May 21, 2021); Office of Foreign Assets Control's *Sanctions Compliance Guidance for the Virtual Currency Industry* (Oct. 2021) (available at: https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf) (last accessed Mar. 15, 2022); Joint Agency Statement, *Leaders of CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets* (Oct. 11, 2019) (available at: <https://www.sec.gov/news/public-statement/cftc-fincen-secjointstatementdigitalassets>) (last accessed Mar. 15, 2022); Press Release, Treasury, *Treasury Continues Campaign to Combat Ransomware as Part of Whole-of-Government Effort* (Oct. 15, 2021) (available at: <https://home.treasury.gov/news/press-releases/jy0410>) (last accessed Mar. 15, 2022) (addressing sanctions compliance issues for the virtual currency industry).

² See, e.g., Press Release, SEC, *SEC Sanctions Operator of Bitcoin-Related Stock Exchange for Registration Violations* (Dec. 8, 2014) (available at: <https://www.sec.gov/news/press-release/2014-273>) (last accessed Mar. 15, 2022); Press Release, SEC, *SEC Obtains Emergency Order Halting Alleged Diamond-Related ICO Scheme Targeting Hundreds of Investors* (May 21, 2019) (available at: <https://www.sec.gov/news/press-release/2019-72>) (last accessed Mar. 15, 2022); Press Release, SEC, *SEC Charges Promoter with Conducting Cryptocurrency Investment Scams* (Nov. 18, 2021) (available at: <https://www.sec.gov/news/press-release/2021-237>) (last accessed Mar. 15, 2022).

³ CFTC's *Written Statement to the CFTC Global Markets Advisory Committee* (Oct. 9, 2014) (available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/gmac_100914_bitcoin.pdf) (last accessed Mar. 15, 2022).

⁴ FinCEN's *Advisory on Illicit Activity Involving Convertible Virtual Currency* (FIN-2019-A003) (May 9, 2019) (available at:

<https://www.fincen.gov/sites/default/files/advisory/2019-05-10/FinCEN%20Advisory%20VC%20FINAL%20508.pdf>) (last accessed Mar. 15, 2022).

⁵ See, e.g., Emma Newberry, *Do We Need More Crypto Regulation? Two Sides of the Story*, The Ascent (Oct. 21, 2021) (available at: <https://www.fool.com/the-ascent/cryptocurrency/articles/do-we-need-more-crypto-regulation-two-sides-of-the-story/>) (last accessed Mar. 15, 2022) (briefly summarizing arguments for and against regulation).

⁶ Press Release, Federal Reserve, *Federal Reserve Board releases discussion paper that examines pros and cons of a potential U.S. central bank digital currency (CBDC)* (Jan. 20, 2022) (available at: <https://www.federalreserve.gov/newsevents/pressreleases/other20220120a.htm>) (last accessed Mar. 15, 2022).

⁷ See, e.g., Press Release, Treasury, *Remarks by Deputy Secretary of the Treasury Wally Adeyemo at LINKS Conference Presented by Chainalysis* (available at: <https://home.treasury.gov/news/press-releases/jy0466>) (last accessed Mar. 15, 2022); Press Release, Treasury, *Treasury Publishes National Risk Assessments for Money Laundering, Terrorist Financing, and Proliferation Financing* (Mar. 1, 2022) (available at: <https://home.treasury.gov/news/press-releases/jy0619>) (last accessed: Mar. 15, 2022).

⁸ FinCEN Notice of Proposed Rulemaking, *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets* (RIN 1506-AB47) 85 Fed. Reg. 247 (Dec. 23, 2020).

⁹ See, e.g., Katanga Johnson, *U.S. SEC Chair Gensler calls on Congress to help rein in crypto 'Wild West'*, Reuters (Aug. 3, 2021) (available at: <https://www.reuters.com/technology/us-sec-chair-gensler-calls-congress-help-rein-crypto-wild-west-2021-08-03/>) (last accessed: Mar. 15, 2022).

¹⁰ Heather Morton, *Cryptocurrency 2022 Legislation*, National Conference of State Legislatures (Feb. 8, 2022) (available at: <https://www.ncsl.org/research/financial-services-and-commerce/cryptocurrency-2022-legislation.aspx>) (last accessed: Mar. 15, 2022) (summarizing legislation pending in 31 states and Puerto Rico as of Feb. 2022).

¹¹ See Executive Order 14067 of Mar. 9, 2022, *Executive Order on Ensuring Responsible Development of Digital Assets* (available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>) (last accessed Mar. 15, 2022).