

The Role of Law Enforcement in Directing, Investigating, and Prosecuting Criminal Activity Related to Digital Assets – The Department of Justice

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On September 16, 2022, the U.S. Department of the Treasury (Treasury), the Department of Justice (the DOJ), and other U.S. government agencies released eight highly anticipated reports¹ (the Reports) on different aspects of digital asset regulation, setting forth the agencies' respective legislative, regulatory, and policy recommendations and priorities. The Reports were issued in response to White House Executive Order 14067 on Ensuring Responsible Development of Digital Assets (the Executive Order), which calls for a whole-of-government alignment of the federal government's approach to digital assets.

The Reports confirm the Biden-Harris Administration's acknowledgement that digital assets have potential benefits and are likely to remain a component of the U.S. financial system, but that the proliferation of the asset class presents unique risks that should be addressed. While the Reports provide some insight into the Administration's thinking about digital assets and articulate some recommendations and "calls to action," many significant regulatory questions remain unaddressed.

This post summarizes the Department of Justice Report regarding the initiatives and recommendations for improving law enforcement's ability to combat crypto-related crimes.

The Role of Law Enforcement in Directing, Investigating, and Prosecuting Criminal Activity Related to Digital Assets

On September 6, 2022, United States Attorney General Merrick Garland announced the release of a report on the Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets. This Report, which was issued pursuant to Section 5(b)(iii) of the Executive Order, was a collaborative effort prepared by the DOJ's National Cryptocurrency Enforcement Team (NCET) in consultation with the Secretary of Treasury, the Secretary of Homeland Security, and multiple federal regulatory agencies that are expected to continue to play pivotal roles as part of a whole-of-government approach to regulating and ensuring the lawful use of digital assets.

In this Report, the DOJ addresses the different criminal exploitation typologies of digital assets, including (i) the use of cryptocurrency as a means of payment for or manner of facilitating criminal activity; (ii) the use of digital assets as a means of concealing illicit financial activity; and (iii) crimes involving or undermining the digital asset ecosystem. It

notes the challenges raised by the growth of DeFi and NFTs and highlights examples of law-enforcement efforts to date, notwithstanding those challenges included in high-profile matters involving the Hydra darknet marketplace, the Bitfinex virtual currency exchange, and a first-of-its kind insider-trading case involving cryptocurrency recently brought by the United States Attorney's Office for the Southern District of New York. In this Report, the DOJ summarizes its various initiatives and the initiatives of other law-enforcement agencies, including the recently announced launch of the nationwide Digital Asset Coordinator (DAC) Network by the DOJ's criminal division. Comprising of over 150 designated federal prosecutors from United States Attorney's Offices and different litigating components across the DOJ (including in the Criminal and National Security Divisions and law enforcement agencies such as the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA), the network will serve as a forum for prosecutors to obtain and disseminate training, technical expertise, and guidance about the investigation and prosecution of digital asset crimes, with each DAC acting as its district's or litigating component's subject-matter expert on digital assets, serving as a first-line source of information and guidance about legal and technical matters related to these technologies. Led by the NCET working in close coordination with the DOJ criminal division's Computer Crime and Intellectual Property Section (CCIPS) and the Money Laundering and Asset Recovery (MLAR) Section digital currency initiatives, the network will also continue to raise awareness about the benefits of leveraging collaborative international and cross-border relationships in combating illicit activities related to digital assets.

This Report concludes with the following nine recommendations for improving law enforcement's ability to combat crypto-related crimes:

Expand the Anti-Tip-Off Provision: The DOJ recommends that the existing Anti-Tip-Off provision (18 U.S.C. § 1510(b)), which makes it illegal for officers or agents of financial institutions to notify customers when their records are subpoenaed as part of a government investigation, be expanded to apply to VASPs operating as Money Service Businesses (MSBs) and cover crypto-related offenses.

Increase Penalties for Operating an Unlicensed Money Transmitting Business: The DOJ proposes increasing the maximum sentence contained in 18 U.S.C. § 1960 for covered money transmitters that fail to register with FinCEN, fail to obtain the requisite state licensing, or otherwise transmit funds known to be criminally derived, from five to 10 years. It also suggests adding an "enhanced penalties provision" doubling or even tripling criminal fines (depending on whether the defendant is an individual or corporation) in instances involving a money transmitter's business of more than \$1 million in a 12-month period. The DOJ additionally recommends codifying existing case law holding that the general-intent requirement included in the state-licensing prong of § 1960 apply to the federal-registration prong.

Extend Limitations Periods for Crypto-Related Crimes: The DOJ recommends amending 18 U.S.C. § 3293 (which extends the mail and wire fraud statute of limitations to 10 years for offenses "affecting a financial institution") to provide for a 10-year statute of limitations for all crimes involving the transfer of digital assets, and amend § 3292 to provide for a longer tolling or "suspension" period in instances where the U.S. government seeks to obtain foreign evidence related to an offense involving the transfer of digital assets.

Expand Forfeiture Authority: The DOJ proposes expanding criminal and civil forfeiture authority for commodities-related violations of the securities and commodities fraud statute (18 U.S.C. § 1348) and the Commodity Exchange Act (7 U.S.C. § 13(a)(2)).

Lift Monetary Limit on Administrative Forfeiture of Cryptocurrency: The DOJ recommends that the \$500,000 cap on administrative forfeiture be lifted, either via Treasury providing that cryptocurrency is not a monetary instrument subject to the cap or Congress amending 19 U.S.C. § 1607 to lift the cap with respect to cryptocurrency and other digital assets altogether.

Amend the Sentencing Guidelines for BSA Violations: The DOJ suggests that the Sentencing Commission should amend U.S.S.G. § 2S1.3 (which covers structuring, failure to report transactions, filing false reports, etc.) to include the specific offense characteristics tied to BSA violations and/or tie the base offense level to the amount of funds involved in a BSA violation.

Apply the BSA's Recordkeeping/Travel Rule to Virtual Currency: The DOJ proposes supporting FinCEN in its enforcement and implementation of a rule, once finalized, clarifying that the BSA's recordkeeping and travel rule regulations apply to transactions involving convertible virtual currency and digital assets with legal tender status.

Amend the BSA to Apply to NFT Platforms: The DOJ suggests that the BSA should be amended to clarify that its key AML provisions apply to NFT platforms, including online auction houses and digital art galleries.

Fund Law Enforcement Operations: Lastly, the DOJ suggests that Congress should seek funding for resources necessary to support digital asset-related investigations and hire personnel essential to addressing emerging threats related to digital assets.

In sum, the Biden-Harris Administration continues to build on its prior statements and the statements of high-level officials within the DOJ about the need for various departments and agencies across the government to work collaboratively and in close coordination with each other to prevent and disrupt the criminal exploitation of digital assets. The recommendations contained in this Report are also in line with Winston's past forecasts that the government will seek both to expand existing laws and regulations to cover the digital assets space and to create new vehicles through which to identify, investigate, prosecute, and adequately punish, as well as deter, the illicit use of digital assets.

For more insights on the Reports, read our full briefing: [The Future of Digital Assets Regulation in the United States](#).

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■ The complete Reports mandated by President Biden's Executive Order and issued by Treasury, DOJ, and White House explored in this Winston Alert can be located at the following links:

- [Action Plan to Address Illicit Financial Risks of Digital Assets](#) issued by Treasury
- [Crypto-Assets: Implications for Consumers, Investors and Businesses](#) issued by Treasury
- [The Future of Money and Payments](#) issued by Treasury
- [Climate and Energy Implications of Crypto-Assets in the United States](#) issued by the White House
- [Policy Objectives for a U.S. Central Bank Digital Currency System](#) issued by the White House
- [Technical Evaluation for a U.S. Central Bank Digital Currency System](#) issued by the White House
- [The Role of Law Enforcement in Directing, Investigating, and Prosecuting Criminal Activity Related to Digital Assets](#) issued by the DOJ
- [Responsible Advancement of US Competitiveness in Digital Assets](#) issued by the U.S. Department of Commerce

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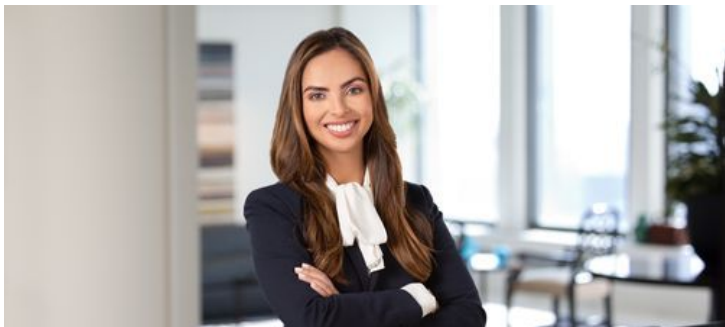
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