

Article Information

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Blockchain Bites: USA crypto reports, SEC catches up with the Kardashians, Service by chatbot?, EU MiCA laws finalised, and Square joins Circle on remittance

Michael Bacina, Steven Pettigrove, Jake Huang and Jordan Markezic of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

True to Label? White House digital asset “framework” reports pile up

In [March](#), the Biden White House issued an Executive Order requiring federal agencies to examine the risks and benefits of crypto-assets. [Nine\(!\) reports](#) have been tabled since that order, and in that time the various agencies involved have dutifully prepared reports on crypto-assets, CBDCs and digital currencies, leading to the White House to recently announce a “comprehensive framework for responsible development of a digital assets”. How much of a framework emerges from the reams of reports published? We explore this below.

The reports include:

[*Action Plan to Address Illicit Financial Risks of Digital Assets*](#)

This report was published by the Department of the Treasury and focuses on on [anti-money laundering and illicit finance regulations](#) as they apply to digital currency and crypto. The action plan “identifies priority and supporting actions to support this commitment in line with the priorities and supporting actions identified in the Illicit Financing Strategy specific to uncovering and mitigating the misuse of digital assets by illicit actors.” It is worth noting that the [Chainalysis Crypto Crime report](#) has shown how little relative illicit use there is of crypto, while the headline figure of illicit use increases as greater transaction flow enters the space.

[*Crypto-Assets: Implications for Consumers, Investors and Businesses*](#)

This report was published by the Department of the Treasury. This report focuses on [government recommendations on consumer protection](#), including calls for greater access to information about the risks of investing in digital assets. There is also a great emphasis on the efforts of the European Union in the development of the Markets in Crypto Assets regulations (MiCA), which will create rules and guidance for EU member states on crypto assets. Could MiCA provide the framework the US is looking to build?

[*The Future of Money and Payments*](#)

The Department of the Treasury looked at the interaction between [crypto, payments and the US economy](#). Central Bank Digital Currencies are also considered in the report, following on from the White House Office of Science and Technology Policy’s report published earlier this year. The report provided several recommendations that focus on a more holistic approach to reshaping the US payments system, noting potential regulatory and technological changes and it represents the most forward looking of the reports.

[*Climate and Energy Implications of Crypto-assets in the United States*](#)

The most anticipated of the reports, from the White House Office of Science and Technology Policy noted the [size of the US crypto mining ecosystem](#), and attracted polarising commentary from [critics](#), including assertions that it is not about

climate [but about control of Bitcoin](#). The report calls for long-term restrictions on proof-of-work mining – the primary form of mining that bitcoin uses – including by Executive Order, due to asserted excessive energy use and costs.

Continuing with an [environmentally friendly ethos](#), the report also suggested that certain forms of energy generation may create overall climate benefits such as those that ‘capture vented methane to produce electricity’ which ‘can yield positive results for the climate, by converting the potent methane to CO2 during combustion.

[Policy Objectives for a U.S. Central Bank Digital Currency System](#)

This report from the White House Office of Science and Technology Policy provided a series of [objectives and policy goals](#) for a potential CBDC issued by the US Treasury. At the time of writing, the Federal Reserve is conducting research and is inviting submissions into this area. This will move far slower than Australia’s RBA CBDC pilot or any of the other CBDC pilots operating around the world, but will be closely watched as the US is such a significant financial market.

[Technical Evaluation of a U.S. Central Bank Digital Currency System](#)

This report, also from the White House Office of Science and Technology Policy expands upon the [Policy Objectives for a US CBDC](#) report above, and focused on the technological aspects of a potential digital dollar. The report recommended the support of the Federal Reserve’s work by involving the National Science Foundation, as well as improving the overall technological infrastructure of the US Government. Given how much antiquated technology exists in the US (where cheques are still somehow a thing).

[The Role Of Law Enforcement In Detecting, Investigating, And Prosecuting Criminal Activity Related To Digital Assets](#)

The DOJ’s report provided an overview of the Department’s work around its [enforcement with respect to cryptocurrency matters to date](#). In addition, it contains a series of recommendations “on how to further strengthen [the DOJ’s] ability to detect, investigate, prosecute, and otherwise disrupt criminal activity.” This approach naturally focuses on prosecutions and in the current US climate of “regulation by enforcement” is consistent with that narrative.

[Responsible Advancement of U.S. Competitiveness in Digital Assets](#)

This report seeks to lay a path forward to achieve regulatory and technological leadership in the digital asset market for the US. The report was organised around four categories, and if these were all adopted, the Department of Commerce believes that could advance the competitiveness of the US-based digital asset industry. The four areas area:

1. Ensuring effective regulatory approaches and addressing regulatory gaps
2. International engagement and trade promotion
3. Meaningful public-private engagement
4. Sustained US leadership in R&D

Of the four, the first is the most interest to many lawyers in the space, and many projects struggling to understand where the lines of enforcement will fall. Unfortunately the Department of Commerce misses an opportunity to advocate for better understanding of the technology and disruption Blockchain offers, and provides only a high level comment on how “[c]ontinued and regular enforcement of applicable financial laws and regulations is a foundational principle of U.S. competitiveness in financial services, including digital assets”, without any comment on the number of projects which leave or avoid the US because of the unclear application of those foundational principles to a technology which does not neatly align with existing laws.

A further comment that “financial regulation and supervision must be equally applied to digital assets and their related products and services compared to similar traditional assets, products, and services” shows that Commerce is firmly within a traditional viewpoint and has yet to understand how digital assets truly function.

What does it all add up to?

While the White House has promoted this as a “digital asset framework”, on close examination of the reports, there is many laudable phrases about the need for regulation, and balancing consumer protection with innovation but overall there is a greater emphasis on the risks and dangers of digital currency instead on examination of ways to harness the benefits of this innovative technology.

Despite this, the reports comprise perhaps the start of a discussion which might lead to a framework in time, and will have triggered education and learning within the various government agencies and departments, which remains an important first step so that later actions can be based on informed understanding and, hopefully, not fear of change and disruption. While this may be frustrating to those who wish for leadership by the US and a more embracing approach to digital

currency, it is a feature, not a bug, of the legal reform process.

The writer recalls the inspiration brought by JFK's Moon Speech in 1962 and can only wonder just how far the US could go in research, development and bringing in a technological blockchain revolution with even greater impacts than the space race, if it chose to do those things, not because they are easy, but because they are hard.

The SEC catches up with the Kardashians

The US Securities and Exchange Commission (SEC) has [announced charges and settlement](#) against Kim Kardashian, best known for her family's reality TV show and her father defending O.J. Simpson, and launched it's own influencerish video warning of the dangers of influencers touting products.

The SEC Order found that Ms Kardashian failed to disclose that she was paid USD\$250,000 to publish a post promoting a crypto-asset, which the SEC has alleged is a security (but noting that no action has been taken by the SEC against the token issuer).

The Order said the following about the token, which broadly aligns to the tenets of the *Howey* test in the USA:

Based on [the issuer's] marketing materials, as well as public statements by [the issuer's] affiliates, ... website, and ... social media handles, purchasers of ... tokens would have had a reasonable expectation of profits from their investment in the tokens.

[Issuer] frequently touted the token's rise in price on its social media pages as it offered and sold ... tokens.

Based on ... public statements, purchasers of the ... tokens would have had a reasonable expectation that [the issuer] and its agents would expend significant efforts to develop the [issuer's] platform, which would increase the value of their ... tokens, resulting in investor profit.

... marketing materials highlighted that the [issuer] and its agents would ensure a secondary trading market for ... tokens by creating a trading market for ... tokens... [and] also emphasized the purported expertise of the ... management.

marketing materials, moreover, contained numerous direct statements that the ... tokens would rise in value as a result of the efforts of the [issuer] and its agents, including by touting future deals and relationships that would "drive value."

[Issuer] also promised to develop certain "token enhancements," including "additional tokenomics to enhance economic value," future rewards and staking programs, national sporting and event partnerships, and a general expansion of the ... token ecosystem.

SEC Director of Division of Enforcement, Gurbir Grewal said:

The federal securities laws are clear that any celebrity or other individual who promotes a crypto asset security must disclose the nature, source, and amount of compensation they received in exchange for the promotion

The SEC Chair, Gary Gensler, approached this prosecution as he does similar regulation by enforcement, by declaring in the complaint that a crypto-asset is a security, and moving on to the consequences of those who have dealt with the crypto-asset as if it is a security. Ms Kardashian has agreed to pay a USD\$1.26M fine for her actions.

Simultaneously, Mr Gensler starred in a [slick video](#) warning about influencers promoting financial products, which is a far cry from the dry presentations one would expect from regulators.

While it only has 6,800 views as of time of publishing, it seems that the SEC is keeping up with the Kardashians in more ways than one.

Service by chatbot? Objections filed to CFTC service on Ooki DAO

The DeFi Education Fund (DEF) – a Washington DC based lobbying group – has echoed the sentiments of lawyers in the crypto industry in arguing that the Commodity Futures Trading Commission (CFTC) should [not be allowed to serve court](#)

[documents](#) upon defendants to proceedings by merely posting them to a forum and chatbot.

Last month, the [CFTC sued OoKi DAO](#) alleging that it was offering margined and leveraged trading products without first registering as a futures commission merchant, or having any sufficient KYC processes. The CFTC had previously settled with bZeroX – the DAO’s predecessor – and the company’s directors.

DEF has followed a group of crypto lawyers and developers called LeXpunk Army by [filing to join the case](#) as an *amicus curiae* – or, friend of the court – arguing that the way the CFTC has approached service meant:

“token holders could be held liable for conduct committed by other parties, in a matter they had no meaningful opportunity to defend. That would yield an inequitable result, and would also chill novel and innovative forms of software development”

The CFTC brought an application in the District Court for the Northern District of California for [an enforceable declaration that a forum post and a website help chatbot submission were both sufficient methods of effecting service](#) on the OoKi DAO, as well as the members that were named as defendants. The Court ruled in the CFTC’s favour that these were in fact effective methods of service.

In its *amicus curiae* application, the DEF noted that DAOs are not the same as centralised businesses and accordingly cannot be [treated as such](#):

“In many cases, DAOs lack any central organization or management, and many DAO token holders often lack coordination or common objectives. As a result, DAOs will often not be ‘associations’ of any kind, and therefore will not be proper defendants in an enforcement action brought under the Commodity Exchange Act (‘CEA’), which requires that a defendant be a ‘person’ (defined to include ‘associations’)...”

According to the DEF, the CFTC ought to prove at first instance that OoKi DAO is an association before it can be served. As the CFTC failed to do this, DEF argue, the purported service on OoKi DAO was defective and unlawful. The matter is expected to be heard within the next few weeks.

The CFTC latest move raises issues of due process and represents a marked departure from ordinary methods of service. It follows a [UK High Court decision](#) earlier this year permitting service by NFT. While the Court’s attempt to incorporate new means of communication is welcome, the CFTC’s latest move has raised serious concern as to whether members of the DAO will be given due opportunity to defend the case.

EU releases full MiCA text: Are NFTs in or out?

Members of the European Council have approved the [full text of the Markets in Crypto Assets Regulation \(MiCA\)](#), which will shape the regulatory landscape for how crypto assets and crypto asset service providers will be regulated in the European Union (EU) member states.

The European Parliament will now meet to vote on the proposal to formally adopt MiCA. If approved, [MiCA will likely come into force in 2024](#).

MiCA is a broadly based regulation which will establish new EU rules for token and stablecoin issuers, crypto asset service providers including exchanges and custodians and market conduct in cryptocurrency markets. There are also specific restrictions on providing cross-border crypto-asset services from third countries into the EU.

While it had been anticipated that non-fungible tokens (NFTs) would be excluded from the regulation entirely, it would appear that lawmakers have backtracked requiring a more nuanced assessment of whether an NFT is in substance unique and therefore whether those who issue or deal in those NFTs will be required to comply with the MiCA regulation.

Article 2a of the draft Regulation excludes “crypto-assets that are unique and not fungible with other crypto-assets”. However, the recitals to the regulation impose a number of caveats on how this exclusion is likely to be interpreted by European Courts.

Paragraph (6b) states:

This Regulation should not apply to crypto-assets that are unique and not fungible with other crypto-assets,

including digital art and collectibles, whose value is attributable to each cryptoasset's unique characteristics and the utility it gives to the token holder. Similarly, it also does not apply to crypto-assets representing services or physical assets that are unique and not fungible, such as product guarantees or real estate.

However, paragraph (6c) clarifies that fractional NFTs and large NFT collections which might be considered fungible will fall within the regulation. The relevant text leaves considerable scope for interpretation:

*The **fractional parts** of a unique and non-fungible crypto-asset should not be considered unique and not fungible. The issuance of crypto-assets as non-fungible tokens in a **large series or collection** should be considered as an indicator of their fungibility. The sole attribution of a unique identifier to a crypto-asset is not sufficient to classify it as a unique or not fungible. **The assets or rights represented should also be unique and not fungible for the crypto-asset to be considered unique and not fungible.** The exclusion of crypto-assets that are unique and not fungible from this Regulation is without prejudice to qualification of such crypto-assets as financial instruments. (emphasis added)*

It appears that the EU will adopt an approach of substance over form which will require a detailed assessment of each NFT's features to determine whether an NFT is in fact unique and not-fungible and therefore excluded from the regulation:

***This Regulation should also apply to crypto-assets that appear unique and not fungible, but whose de facto features or features linked to de facto uses would make them either fungible or not unique.** In this regard, when assessing and classifying crypto-assets, competent authorities should adopt a **substance over form approach**, under which the features of the asset in question should determine the qualification, not its designation by the issuer. (emphasis added)*

This nuanced approach will add considerable complexity for NFT issuers and those who deal in them in applying the regulation.

Travelling across the North Atlantic, [the White House is similarly making strides to regulate stablecoins and crypto-markets](#) generally by releasing the first framework for regulating crypto assets following President Biden's Executive Order. The EU has also placed bitcoin and cryptocurrencies as a [priority on its agenda for the upcoming International Monetary Fund \(IMF\) annual meeting](#), signalling that there may be a separate and dedicated response by the EU to cryptocurrencies and NFTs.

The EU Commissioner for Financial Services, Mairead McGuinness, [has said](#):

"We have a crowded agenda for the US next week, and one of the items that won't be at the bottom of the list, it will be in there right around the top is crypto... [Regulation], a little bit like climate change, addressing crypto alone in the EU is not enough, we need to have global engagement and sharing of experience."

The global regulatory environment for cryptocurrencies and digital assets continues to evolve at a rapid pace. We will further break down the full MiCA text in further posts in the coming weeks.

Square joins Circle on USDC remittance project

Last week TBD, the bitcoin-focused subsidiary of payment services firm Block (the parent entity of Square) [confirmed its partnership with Circle](#), issuer of the USDC stablecoin, to bring cross-border USDC transfers and savings to investors globally. Block is lead by Twitter Co-founder and former CEO Jack Dorsey. Its subsidiary, TBD, is an open-sourced developer platform that has been working on a so-called [Web5 decentralized identity platform](#) and a [decentralized exchange called tbDEX](#).

The collaboration between TBD and Circle plans to establish standards and open-source technologies aimed at enabling global-scale, mainstream adoption of digital currency in payments and financial applications. This includes building accessible fiat on and off ramps and self custody wallets to allow users in developing countries to access stablecoins for global remittances. The project plans to focus on US-Mexico remittances initially.

Emily Chiu, TBD's chief operating officer [said](#):

The U.S. dollar is the reserve currency today, and we think bitcoin might be the reserve currency of tomorrow. Stablecoins are the bridge in between.

According to TBD, the partnership aims to make a significant impact on peoples' everyday financial lives. It offers the potential for crypto to emerge as a mainstream payments system while establishing decentralized identity as the model for building trust in a scalable and privacy-preserving way.

Circle's USDC, is the second largest stablecoin with a reported \$49 billion in circulating supply. Its initiative with TBD seeks to tackle the traditionally inefficient and expensive global remittance market and follows [reports that MoneyGram](#) are also looking to incorporate stablecoins into their remittance offering. The news represents a positive step in seeking to lower the cost and enhance transparency in global remittances by enabling new payment rails based on blockchain technology.