

## Opinion

### As Federal Agencies Organize, US States Continue to Lead in Regulating Digital Assets

The Biden administration’s “whole of government” approach to crypto may not be an improvement to the current patchwork of rules.

By [Kara A. Kuchar](#), [Steven T. Cummings](#)

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On March 9, 2022, the Biden administration issued a much anticipated [executive order](#) regarding digital assets, which called for “the first-ever, whole-of-government approach to addressing the risks and harnessing the potential benefits of digital assets and their [underlying technology](#).”

While its reception has been [mixed](#), one comment – from New York State Department of Financial Services (NYDFS) Deputy Superintendent Dan Sangeap on LinkedIn – raised an interesting question: After almost eight years of letting states craft their own crypto policies, [“what’s the rush” at the federal level?](#)

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An NYDFS deputy superintendent highlighting New York’s virtual currency framework is not in itself surprising. What is surprising is how it mirrored congressional republicans pointing to New York cryptocurrency regulation as an example of how the federal government is lagging behind the states.

Specifically, during the U.S. House of Representatives’ hearing on the [president’s Working Group’s Report on Stablecoins](#), Rep. Warren Davidson, a Republican congressman from Ohio, referenced that the NYDFS had already been regulating stablecoins for years, and that the federal government was [“seven years late.”](#)

Indeed, many of the state money transmission laws provide a regulatory [licensing framework](#) for stablecoins. Although the Biden administration is attempting a “whole-of government” approach, it’s likely that states, in both the short and long term, will continue to play an active role in regulating the global crypto industry.

Even with the March 9, 2022, executive order, several crypto industry leaders still believe congressional action, perhaps needed, “won’t be [happening soon](#).” This pessimism also extends to the recently unveiled Responsible Financial Innovation Act, which is already considered merely “a starting point for a dialogue.”

*See also: [Biden’s Executive Order on Crypto Receives Bipartisan Praise](#)*

While anecdotal, these comments underscore the vital role the states play in regulating the cryptocurrency space. The importance of state regulation has grown not only due perceived policy reversals at the federal level (e.g., a top national banking regulator putting the brakes on new crypto charters for a period of time), but also a general lack of cohesive federal action.

This is not to say that federal agencies have been inactive in the cryptocurrency space, and in fact some agencies – such as the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) – were early pioneers in applying anti-money laundering requirements to digital asset service providers.

However, the lack of coordination among federal regulatory agencies has contributed to the increased importance of state prudential regulation, and innovation is happening below the federal level. For example, California Governor Gavin Newsom recently issued an executive order for state agencies to establish regulations tailored to digital assets, and the California Department of Financial Protection and Innovation followed shortly thereafter with an invitation for public and stakeholder comments regarding a regulatory regime in development.

With this in mind, those interested in innovation should look not only to federal efforts but also to the states, primarily New York, Wyoming and Florida.

## New York

New York is arguably the most prolific crypto regulator, if for [longevity](#) alone. The NYDFS has been overseeing New York’s cryptocurrency market for seven years, having been tasked with regulating virtual currency in 2015. In addition, the NYDFS has been credited with being the first to have a comprehensive licensing and regulatory regime in the U.S. [tailored to virtual currency activity](#) – often called the “BitLicense.”

In these seven years, the BitLicense has drawn more than its fair share of criticism, with some crypto entities even fleeing New York to [in protest](#). With that said, others have [touted NYDFS](#) as being “pivotal in bringing fresh money into the crypto space through regulatory approvals.”

Independent of its supporters and detractors, the BitLicense regime has stood firm and appears to be stronger than ever.

In fact, not only has the New York State legislature recently authorized NYDFS to “assess” virtual currency firms – which should aid NYDFS in further growing the [virtual currency unit](#) – but “more

money and jobs are still flowing into New York than any other city, making it the [de facto crypto capital](#) of the U.S.”

See also: [Kill the BitLicense](#) | *Opinion*

Moreover, NYDFS Superintendent Adrienne Harris has stated that improving the BitLicense is one of her top priorities, and she has not only already hired additional staff this year to help [streamline the process](#), but she also plans to triple the size of the virtual currency unit by the [end of the year](#).

## Wyoming

While New York may have longevity and institutional prestige, Wyoming has been trying to establish itself as a leader in the crypto space.

The Wyoming State legislature has enacted multiple [blockchain-related laws](#), including a [legal framework for recognizing](#) decentralized autonomous organizations (DAO). Most notably, Wyoming created a new type of charter, the [Special Purpose Depository Institution](#) (SPDI), to “focus on digital assets, such as virtual currencies, digital securities and digital consumer assets.” According to Wyoming, four SPDI charters have already been approved.

It is unclear, however, if these four SPDIs have begun operating. Specifically, there have been reports that none of the four approved SPDIs have yet received the necessary certificates of authority to operate. It would appear that this is still the case, based on information from each entity’s website.

## Florida

Like Wyoming, Florida has been trying to position itself as the next cryptocurrency – and financial – capital of the U.S. So much so that, in a not-so-subtle jab at the iconic Wall Street Bull, Miami Mayor Francis X. Suarez unveiled [“The Miami Bull” at Bitcoin 2022](#). While much has been said about the Miami Bull, more should be said about the steps Florida is taking to make itself more crypto friendly, most noticeably legislation to [remedy the Espinoza problem](#).

For reference, the Espinoza problem refers to State v. Espinoza, a 2019 Florida court ruling which held that any two-party transaction involving cryptocurrency in Florida would require the seller to have a [money transmitter license](#).

Some have painted efforts to reform Espinoza as being sponsored by the industry, but such criticisms minimize the inconsistencies that Espinoza created. The Espinoza holding rendered Florida an outlier, with most states requiring licensure where a third party intermediary is also present.

It is for this reason that Espinoza has been [panned by the industry](#), as well as by the commissioner of the very agency responsible for enforcing Espinoza, Florida’s Office of Financial Regulation. In response to industry concerns, legislation was recently passed by the Florida State legislature, and signed by the governor, which creates a legal distinction between two parties [buying, selling or trading](#) cryptocurrencies versus transactions [facilitated through an intermediary](#). The changes will become effective on Jan. 1, 2023.

## States-led is good

The push by states to fill the regulatory vacuum has not been without criticism. A common refrain is that the patchwork of state regulation makes compliance efforts cumbersome. A more recent complaint is that states have become unknowing, or willful, stooges for the crypto industry. What these criticisms miss are the potential benefits that state regulation brings.

State regulation can bring further clarity and on a large scale, can even provide some measure of uniformity. With each additional state that issues guidance or no-action letters stating when virtual currency activity is – or is not – regulated as money transmission, industry participants are provided further clarity.

Moreover, as certain approaches to regulation gain traction among the states, an organic type of uniformity can develop across the patchwork, ultimately bringing certain outliers back into the fold (e.g., Florida joining other states in regulating crypto activity as money transmission only when there is a third party intermediary present).

The patchwork of state regulation can also serve as a source of [“healthy and protective regulatory redundancy.”](#) While redundancy is not often viewed in a positive light, one can posit that the presence of numerous regulators can better absorb the shocks posed by partisan administration changes when compared with their federal counterparts.

## Here to stay

Furthermore, there are several signs suggesting that state regulators will continue to play a key role in cryptocurrency regulation. While the federal government has tended to neglect state regulation in the past, in its April 7, 2022 alert, the Federal Deposit Insurance Corporation urged its regulated entities to also [notify state regulators of their crypto-related activity.](#)

**See also:** [Why the Crypto Executive Order Is a Historical Milestone](#)

Sen. Pat Toomey’s [Stablecoin TRUST Act](#) also mentions state regulators and “[p]reserves the state-registered money transmitter status for most existing stablecoin issuers.” And from the private sector, Paxos – one of three entities granted a National Trust Bank charter by the OCC for cryptocurrency-related activities – has publicly stated that it has [no intention of abandoning its New York charter.](#)

Only time will tell if the Biden administration’s “whole of government” approach to virtual currency regulation is successful. But consumers, industry and other interested parties should take comfort in knowing that the patchwork of state virtual currency regulation is still going strong, particularly in New York, Wyoming and Florida.

**UPDATE (JUNE 9 2022 – 19:07 UTC):** Adds additional commentary about California.



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