

Regulatory Hotline

January 28, 2019

NDA PRESENTS REGULATORY APPROACHES ON CRYPTO-ASSETS TO THE GOVERNMENT OF INDIA

We are pleased to announce that Nishith Desai Associates (NDA) has made an independent submission to the Government of India, suggesting detailed regulatory approaches that the government may take towards crypto-assets. The submission has been made to the Central Government committee chaired by Mr. Subhash Garg, which is examining a legal framework to govern virtual currencies / crypto-assets.

NDA has been at the forefront of the crypto-asset and blockchain space in India since 2013. Its submission is a paper titled, '*Building a Successful Blockchain Ecosystem for India: Regulatory Approaches to Crypto-Assets*', and is authored by Mr. Nishith M. Desai, Mr. Vaibhav Parikh, and Mr. Jaideep Reddy, lawyers at the firm. The detailed paper is available [here](#). It draws from the firm's expertise in the subject as well as international best practices. The submission is made in an independent capacity and purely in public interest. The authors believe the solutions proposed in the paper are a win-win for both consumers and businesses, and are also practically implementable by the government.

To summarize, the paper makes the following suggestions:

- 1. Regulation not prohibition:** An outright ban on crypto-asset activity should not be considered for several reasons. Crypto-assets are essential to blockchain technology, which is a new and disruptive technology that presents both benefits and risks. History has taught us that such technologies should be regulated and not banned, since banning is likely to be counter-productive and may also suffer from legal infirmities. Rather, in line with international consensus, a balanced regulatory approach should be taken to promote the various benefits of the technology and mitigate the risks.
- 2. Three types of crypto-assets:** For the purpose of legal analysis, all crypto-assets are not alike, and the implications of each should be assessed on a case-by-case basis. Broadly, crypto-assets can be considered to be of three types: payment tokens, security tokens, and utility tokens. Those security tokens which amount to 'securities' will be regulated by the Securities and Exchange Board of India (SEBI) and under the Companies Act. Trading activity with regard to all other crypto-assets falls in something of a regulatory vacuum, although existing laws like the Consumer Protection Act continue to apply to a significant extent.
- 3. Regulatory approaches:** This vacuum should be addressed by introducing: (a) a Know Your Customer / Anti-Money-Laundering (KYC/AML) regime, and (b) a licensing regime, for crypto-asset business activity.
 - a. As regards KYC/AML, businesses dealing with crypto-assets, i.e., providing custody or trading services, can be included within the framework of the Prevention of Money Laundering Act by Central Government notification.
 - b. As regards licensing, a new licensing regime for crypto-asset business activity can be evolved by
 - I. New legislative provisions, such as under the newly proposed regimes on commodity spot trading and payment systems;
 - II. Administrative regulation under various laws such as the Consumer Protection Act, Payment and Settlement Systems Act, Non-Banking Financial Company (NBFC) regime, and/or Securities Contracts (Regulation) Act; and/or,
 - III. Statute-backed self-regulation.

Administrative regulation under existing laws will be limited by the current scope of the parent statutes, while new legislative provisions may be able to better address the unique nature of crypto-asset activity. In either case, responsibility for such licensing or oversight should be clearly assigned to a given regulatory body to avoid jurisdictional ambiguity. Since SEBI has competence as regards investor protection, it is one option that can be considered in this connection.
- 4. Enforcing existing laws:** Meanwhile, existing laws such as the Consumer Protection Act, Foreign Exchange Management Act, Indian Penal Code, Information Technology Act, Payment and Settlement Systems Act, Prevention of Money Laundering Act, Prize Chits and Money Circulation Schemes (Banning) Act, deposits-related laws, securities laws, and tax laws should be actively enforced with regard to crypto-asset business activity, since much of such activity is already covered by these laws. The applicability of some of these laws may also be further clarified or fine-tuned with respect to crypto-assets.

Disclosure and independence: NDA represents the Internet and Mobile Association of India in its writ petition in the Supreme Court against the Reserve Bank of India circular on virtual currencies. However, the said petition does not involve the Government of India. As mentioned above, the paper has been prepared in an independent capacity and

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– **Nishith M. Desai, Vaibhav Parikh & Jaideep Reddy**
You can direct your queries or comments to the authors

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