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ARTICLES

The Importance of D&O Insurance for Companies in the Digital Asset Space

By Peter A. Halprin, Brian Sung, and Keeton Field – August 20, 2025

Although a broad ecosystem has long existed in the digital assets community (including crypto-native platforms such as centralized exchanges, liquidity providers, lending platforms, custodians and other service providers, and retail investors, high net worth "whales" acting as both venture/seed investors and platform founders, and (in recent years) exchange traded funds and digital asset hedge funds), the sector is now experiencing a rapid increase in new entrants, such as digital asset treasury companies and other traditional businesses holding bitcoin and other digital assets on their balance sheets. *See* Will Owens, The Rise of Digital Asset Treasury Companies (DATCOs), Galaxy, July 30, 2025.

Some of these holders have an explicit strategy or mandate to acquire and accumulate bitcoin or other digital assets as a primary objective (as well as crypto-adjacent firms such as bitcoin miners, exchanges, fintech payment processors and other service providers, whose holdings are naturally aligned with their businesses). However, a growing number of unrelated businesses are now also continuing to pursue their primary activities while adding bitcoin or other digital asset exposures, either to diversify corporate treasury assets or as an ancillary investment, hedging or other strategic initiative. This includes, for example, household names such as Tesla and GameStop, but also some lesser-known entities such as the coal producer Alliance Resource Partners, the video-sharing and cloud services platform Rumble, and the design software firm Figma.

These holders may also employ leverage, complex capital structure arbitrage, derivative instruments, private investments in public equity special purpose acquisition company (and other complex financing techniques) to facilitate and execute their digital asset accumulation strategies. Such entrants include both private and public listed companies with a range of stakeholders, such as preferred share, convertible debt, warrant and common equity holders. They interface with a variety of transactional partners, some of which are arms' length counterparties (or even those with no direct privity such as traders of options on the firms' securities), but some of which may be secured creditors holding liens on the firms' assets.

After an extended period of "crypto winter" following the digital assets market downturn in 2021–22, and a relatively challenging regulatory environment in the U.S. under the Biden administration, the outlook for the digital assets market and interest in platforms and tokens have seen a strong resurgence over the past year, aided in part by a more innovation-focused and constructive regulatory approach. The regulatory picture continues to evolve rapidly. For example, in July 2025, the GENIUS (Guiding and Establishing National Innovation for U.S. Stablecoins) Act was passed and signed into law, establishing a comprehensive federal framework for payment stablecoins. Additional proposed legislation addressing market structure and clear allocation of authority among regulators remains under consideration. The House

passed the Digital Asset Market Structure Clarity Act of 2025 in July 2025. The Senate is considering a draft of a Responsible Financial Innovation Act of 2025, intended to address oversight of digital asset securities, and a potential future bill to cover oversight of digital asset commodities. The Securities and Exchange Commission, the Commodity Futures Trading Commission and the White House also have expressed intent to move quickly to implement additional guidance and regulatory clarity.

Holding digital assets on corporate balance sheets has also become more tenable for public companies in light of updated accounting guidance that now permits the fair-value accounting and timely recognition of both gains and losses on digital assets. The previous "impairment" model required recognition of unrealized losses but not unrealized gains. *See* Financial Accounting Standards Board (FASB), Accounting Standards Update No. 2023-08 (December 2023) (Intangibles—Goodwill and Other—Crypto Assets (Subtopic 350-60)); Josef Rashty, FASB's New Guidance on Accounting for Crypto Assets, The CPA Journal (December 2024).

Against the backdrop of this regulatory thaw is an environment ripe for not only a new era of digital assets innovation, but also for high-profile and high-stakes litigation against companies in the digital asset space. While the crypto market has been no stranger to litigation, regulatory investigations or enforcement actions, it is foreseeable that the increased participation by more traditional types of corporate entities with new classes of investors and stakeholders may give rise to new types of potential claims or causes of action in the event of disputes or (alleged or actual) misfeasance. Plaintiffs may also find newly capitalized, high-profile crypto firms to be more attractive targets for existing claims they might not have pursued against the legacy businesses. At the same time, reduced emphasis on enforcement and oversight may open the door to more bad actors seizing the opportunity to engage in criminal, fraudulent or manipulative activity. According to one recent analysis, legal experts are forecasting a rise in civil litigation in crypto due to the "perfect storm" of increased investment and decreased enforcement. *See* Michael A. Mora, 'Perfect Storm:' Crypto Litigation Surging, Law.com (July 7, 2025).

Lawsuits Coming

The stage seems set for a wave of lawsuits, particularly around claims of fraud, misrepresentation, and asset recovery, or shareholder claims regarding securities law or other regulatory violations.

For example, just a few weeks before the passage of the GENIUS Act, a class action lawsuit was filed against Strategy Incorporated (formerly known as MicroStrategy Incorporated) and certain of its officers in the U.S. District Court for the Eastern District of Virginia. The complaint alleges that the company and its officers made materially false and misleading statements regarding the company's business, operations, and prospects, the anticipated profitability of its bitcoin-focused investment strategy and treasury operations, the various associated risks and the magnitude of potential losses, and the financial impact of adopting fair value accounting standards, and seeks recovery for losses to investors in the company's securities, allegedly caused by the company's violations of federal securities laws.

Strategy Incorporated and its board also face a second class action lawsuit alleging an invalid amendment to terms of its Perpetual Strike Preferred Stock without required authorization from common stockholders. Other companies have faced claims from investors seeking rescission or damages arising from alleged failures to comply with various registration, licensing or other compliance requirements, which pattern seems likely to continue.

While a number of lines of coverage can and will come into play to address risks arising in the digital assets space (see author's post on Considerations for Insuring Crypto Assets), the likelihood of focus on securities litigation and claims encourages consideration of directors' and officers' (D&O) insurance coverage.

D&O Insurance Can Help to Protect Companies in the Digital Asset Space

D&O insurance typically protects "directors and officers in the event they are accused of wrongdoing in the performance of their management duties." *See* Blockchain Technology and Digital Assets: Top 10 Reasons Why Insurance Matters, Marsh & McLennan Companies (2019). D&O insurance can also protect companies, including in connection with claims in relation to offerings or representations about securities. Although such coverage and awareness of such risks have been well established in other industries, the recent growing adoption of the digital asset treasury strategy has led to increased use of listed and private corporate entities with acquisition and holding of volatile digital assets as a primary or at least significant business objective. This has exposed a new set of directors and officers to such potential claims or actions, often from new classes of investors and stakeholders, who may in turn have access to remedies and causes of action that may not be as familiar to crypto-native investors, founders, or executives.

It is important to note that D&O coverage may contain hurdles to coverage for parties in the digital assets sector. As a threshold matter, since D&O coverage tends to be claims-made, it is important to ensure that the claims covered under a policy dovetail with and are tailored to each digital asset company's idiosyncratic mix of liability risks, whether they are primarily civil or regulatory in nature. Indeed, given potential regulatory scrutiny and the complexity of the subject matter, digital asset companies should consider seeking coverage that includes costs of requests for information, subpoenas, and, more broadly, investigations, and potentially significant costs of expert witnesses or financial or market analyses that may be required in the event of litigation or disputes.

Likewise, broad governmental or regulatory exclusions could be highly detrimental to the utility of D&O coverage to a digital asset company. In the same way, exclusions involving cyber risk, digital asset theft, initial coin or similar offerings, or fluctuations in the value of virtual currency should be narrowed or removed, as appropriate. In addition, as with all D&O offerings, including those outside of the digital asset space, it is important that criminal or fraudulent conduct exclusions be severable and limited to those instances where there has been a final, non-appealable adjudication against the insured.

Definitions should be closely scrutinized and matched up with the potential risks to the company. For example, companies should look for broad definitions of "loss" or "damages," depending on

the operative wording of the policy, to encompass all the potential remedies that plaintiffs' lawyers might seek.

Like definitions, conditions may also be particularly important for digital asset companies. As an example, albeit in a different risk area, when evaluating a crime policy for digital assets, we noticed that the operative valuation provision did not dovetail with the valuation provision in the client's customer contracts. Had it not been identified, such discrepancies and the gap in coverage could have resulted in the company's insurance covering substantially smaller "losses" than those actually suffered by the company.

Looking Ahead

As crypto litigation continues to surge and the market for such coverage continues to expand and mature, insurers will likely refine their offerings—and exclusions. Kevin M. LaCroix, Crypto-Verse D&O Opportunity | The D&O Diary (July 16, 2025). Policyholders should stay proactive, not only in managing risk but also in seeking out coverage that reflects the evolving realities of the digital assets economy and each company's particular risks and exposures.