THE VIRTUAL CURRENCY REGULATION REVIEW

Third Edition

Editors
Michael S Sackheim and Nathan A Howell

THE LAWREVIEWS

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PREFACE

We are pleased to introduce the third edition of *The Virtual Currency Regulation Review* (the *Review*). The increased acceptance and use of virtual currencies by businesses and the exponential growth of investment opportunities for speculators marked late 2019 and early 2020. In 2019, it was reported that several of the largest global banks were developing a digital cash equivalent of central bank-backed currencies that would be operated via blockchain technology, and that Facebook was developing its own virtual currency pegged to the US dollar – Libra – to be used to make payments by people without bank accounts and for currency conversions. In 2019, the US House of Representatives' Committee on Financial Services held a hearing on the potential impact of Libra in which one witness testified that Libra posed a fundamental threat to the ability of sovereign nations to maintain distinct monetary policies and respond to currency crises.

The *Review* is a country-by-country analysis of developing regulatory initiatives aimed at fostering innovation, while at the same time protecting the public and mitigating systemic risk concerning trading and transacting in virtual currencies. In February 2020, the International Organizations of Securities Commissions (IOSCO) published a final report titled 'Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms'. The final report describes issues and risks identified to date that are associated with the trading of cryptoassets on cryptoasset trading platforms (CTPs). In relation to the issues and risks identified, the report describes key considerations and provides related toolkits that are useful for each consideration. The key considerations relate to: (1) access to CTPs; (2) safeguarding participant assets; (3) conflicts of interest; (4) operations of CTPs; (5) market integrity; (6) price discovery; and (7) technology. IOSCO advised that these seven key considerations (and the related toolkits described in the report) represent specific areas that IOSCO believes jurisdictions could consider in the context of the regulation of CTPs.

Fortunes have been made and lost in the trading of virtual currencies since Satoshi Nakamoto published a white paper in 2008 describing what he referred to as a system for peer-to-peer payments, using a public decentralised ledger known as a blockchain and cryptography as a source of trust to verify transactions. That paper, released in the dark days of a growing global financial market crisis, laid the foundations for Bitcoin, which would become operational in early 2009. Satoshi has never been identified, but his white paper represented a watershed moment in the evolution of virtual currency. Bitcoin was an obscure asset in 2009, but it is far from obscure today, and there are now many other virtual currencies and related assets. In 2013, a new type of blockchain that came to be known as Ethereum was proposed. Ethereum's native virtual currency, Ether, went live in 2015 and opened up a new phase in the evolution of virtual currency. Ethereum provided a broader platform, or protocol, for the development of all sorts of other virtual currencies and related assets.

In 2020, the global outbreak of the novel coronavirus (or covid-19) impacted virtually every person on the planet and had severe and sudden effects on every major economy. At the time of writing, the pandemic is ongoing and, while some locations are pushing past their respective 'peaks' of infection, cities that are central to the global financial markets, such as New York City, remain under strict lockdown orders, with many workers in the financial services sector working remotely. It is unclear when these cities will return to a version of 'normal'. In the midst of all this chaos, there is a natural experiment under way in the cryptocurrency markets. We are perhaps learning what happens when our governments are strained and their competence is questioned. Since mid-March 2020, when the pandemic hit the United States in earnest (it had already been raging in China, Italy, Iran, etc.), the price of Bitcoin has gone up in essentially a straight line – from approximately US$5,000 to almost US$10,000 as at mid-May. Now, to be fair, this follows a significant price decline preceding March, but it is at least interesting to observe that the most widely held cryptocurrency is weathering a significant economic storm with apparent ease.

When we first launched the *Review* three years ago, we were optimistic but sceptical about whether virtual currencies would be widely and consistently in commercial use. However, the virtual currency revolution has come a long way and has endured a sufficient number of events that could or should have been fatal for the asset class. Our confidence in the long-term viability of virtual currency has only increased over the previous year. Virtual currencies and the blockchain and other distributed ledger technology on which they are based are groundbreaking, and are being deployed right now in many markets and for many purposes. As lawyers, we must now endeavour to understand what that means for our clients.

Virtual currencies are borderless: they exist on global and interconnected computer systems. They are generally decentralised, meaning that the records relating to a virtual currency and transactions therein may be maintained in a number of separate jurisdictions simultaneously. The borderless nature of this technology was the core inspiration for the *Review*. As practitioners, we cannot afford to focus solely on our own jurisdictional silos. For example, a US banking lawyer advising clients on matters related to virtual currency must not only have a working understanding of US securities and derivatives regulation; he or she must also have a broad view of the regulatory treatment of virtual currency in other major commercial jurisdictions.

Global regulators have taken a range of approaches to responding to virtual currencies. Some regulators have attempted to stamp out the use of virtual currencies out of a fear that virtual currencies such as Bitcoin allow capital to flow freely and without the usual checks that are designed to prevent money laundering and the illicit use of funds. Others have attempted to write specific laws and regulations tailored to virtual currencies. Still others – the United States included – have attempted to apply legacy regulatory structures to virtual currencies. Those regulatory structures attempt what is essentially 'regulation by analogy'. In some countries, a virtual currency, which is not a fiat currency, may be regulated in the same manner as money; in other countries, virtual currency may be regulated similarly to securities or commodities. We make one general observation at the outset: there is no consistency across jurisdictions in their approach to regulating virtual currencies. Perhaps the efforts of IOSCO will help to change that going forward, but there is currently no widely accepted global regulatory standard. That is what makes a publication such as the *Review* both so interesting and so challenging.

The lack of global standards has led to a great deal of regulatory arbitrage, as virtual currency innovators shop for jurisdictions with optimally calibrated regulatory structures that provide an acceptable amount of legal certainty and virtual currency scofflaws shop for jurisdictions with regulatory structures that provide no meaningful regulation. While some market participants are interested in finding the jurisdiction with the lightest touch (or no touch), most legitimate actors are not attempting to flee from regulation entirely. They appreciate that regulation is necessary to allow virtual currencies to achieve their potential, but they do need regulatory systems with an appropriate balance and a high degree of clarity. The technology underlying virtual currencies is complex enough without adding layers of regulatory complexity into the mix.

It is perhaps ironic that the principal source of strength of virtual currencies – decentralisation – is the same characteristic that the regulators themselves seem to be displaying. There is no central authority over virtual currencies, either within or across jurisdictions, and each regulator takes an approach that seems appropriate to that regulator based on its own narrow view of the markets and legacy regulations. Again, we are hopeful that IOSCO's efforts will help to encourage the emergence of optimal regulatory structures over time. Ultimately, the borderless nature of these markets allows market participants to 'vote with their feet', and they will gravitate towards jurisdictions that achieve the right regulatory balance of encouraging innovation and protecting the public and the financial system. It is much easier to do this in a primarily electronic and computerised business than it would be in a brick-and-mortar business. Computer servers are relatively easy to relocate; factories and workers are less so.

The third edition of the *Review* provides a practical analysis of recent legal and regulatory changes and developments, and of their effects, and looks forward to expected trends in the area of virtual currencies on a country-by-country basis. It is not intended to be an exhaustive guide to the regulation of virtual currencies globally or in any of the included jurisdictions. Instead, for each jurisdiction, the authors have endeavoured to provide a sufficient overview for the reader to understand the current legal and regulatory environment at a high level.

Virtual currency is the broad term that is used in the *Review* to refer to Bitcoin, Ether, Tethers and other stablecoins, cryptocurrencies, altcoins, ERC20 tokens, digital, virtual and crypto assets, and other digital and virtual tokens and coins, including coins issued in initial coin offerings. We recognise that in many instances the term 'virtual currency' will not be appropriate, and other related terms are used throughout as needed. In the law, the words we use matter a great deal, so, where necessary, the authors of each chapter provide clarity around the terminology used in their jurisdiction and the legal meaning given to that terminology.

Based on feedback on the first and second editions of the *Review* from members of the legal community throughout the world, we are confident that attorneys will find the updated third edition to be an excellent resource in their own practices. We are still in the early days of the virtual currency revolution, but it does not appear to be a passing fad. The many lawyers involved in this treatise have endeavoured to provide as much useful information as practicable concerning the global regulation of virtual currencies.

The editors would like to extend special thanks to Ivet Bell (New York) and Dan Applebaum (Chicago), both Sidley Austin LLP associates, for their invaluable assistance in organising and editing the third edition of the *Review*, and particularly the United States chapter. The assembly of this third edition is made all the more remarkable by the fact that

many of the authors and contributors are working from home, with dogs barking in the background and children at their feet. Special thanks go out to all those dogs and children for being as tolerant as possible as we try to conduct the work of busy lawyers and also produce this *Review*.

Michael S Sackheim and Nathan A Howell
Sidley Austin LLP
New York and Chicago
August 2020

Chapter 20

SINGAPORE

Han Ming Ho and Josephine Law[1]

I INTRODUCTION TO THE LEGAL AND REGULATORY FRAMEWORK

While there are a vast number of digital tokens available in the market, from a Singapore legal perspective, it is important to look beyond the labels and instead consider the structure and characteristics of each digital token, as different regulatory considerations may apply, depending on whether the structure and characteristics fall within the definition of a regulated product. Accordingly, a factual analysis of each digital token on a case-by-case basis would be necessary to ascertain how each digital token would be categorised from a legal perspective.

In this chapter, we will look at four common types of digital tokens currently in the market, namely security tokens, payment tokens, asset-backed tokens (which have recently been in the spotlight (discussed in Section XI)) and utility tokens. It should be noted that these terms are not specifically defined legal terms; rather, they are used only for ease of discussion.

i Security tokens

We use the term 'security tokens' generally to refer to digital tokens that constitute any capital markets product (CMP) under the Securities and Futures Act (SFA),[2] which includes securities, shares, debentures, units in a business trust, units in a collective investment scheme and derivative contracts.[3]

On 26 May 2020, the Monetary Authority of Singapore (MAS) released a revised guide titled 'A Guide to Digital Token Offerings' (the DT Guide).[4] MAS clarified[5] that offers or issues of digital tokens may be regulated should such digital tokens constitute CMPs under the SFA, which is the main legislation that governs the offering of and dealing in CMPs in Singapore.

To determine whether a digital token would be regulated under the SFA and accordingly trigger the relevant requirements under the SFA, MAS will consider the structure and characteristics of the digital token, as well as the rights attached to such token.[6]

---

1 Han Ming Ho is a partner and Josephine Law is a counsel at Sidley Austin LLP.

2 Securities and Futures Act (SFA), Chapter 289 of Singapore.

3 See Section 2 of the SFA read with Paragraph 1 of the Schedule to the Securities and Futures (Capital Markets Products) Regulations 2018.

4 This can be accessed at: https://www.mas.gov.sg/-/media/MAS/Sectors/Guidance/Guide-to-Digital-Token-Offerings-26-May-2020.pdf.

5 See Paragraph 2.1 of the DT Guide.

6 See Paragraph 2.2 of the DT Guide.

The DT Guide helpfully provides a list of non-exhaustive examples where digital tokens may constitute CMPs. Examples provided include shares, where such shares represent or confer ownership interest in a corporation, represent the liability of the token holder in the corporation and represent the token holder's mutual covenants with other token holders in the corporation. Another example includes debentures, where such debentures evidence or constitute the indebtedness of the digital token issuer in respect of any money that is or may be lent to such issuer by token holders.[7]

The relevant requirements are discussed in further detail in Section II.

ii Payment tokens

We use the term 'payment tokens' generally to refer to digital tokens that constitute either digital payment tokens or e-money under the Payment Services Act (PSA),[8] which came into effect on 28 January 2020.

The PSA is intended to (1) streamline payment services under a single piece of legislation by combining both the previous Money-Changing and Remittance Businesses Act[9] and the Payment Systems (Oversight) Act,[10] (2) enhance the scope of regulated activities to take into account developments in payment services (including services relating to digital payment tokens and e-money) and (3) calibrate regulations according to the risks such activities pose by adopting a modular regulatory regime.[11]

Under the PSA, the regulated activities that would require a payment service provider licence include account issuance services, domestic and cross-border transfer services, merchant acquisition services, digital payment token services and e-money issuance.

A digital token may be a digital payment token if, as defined under Section 2 of the PSA, it is a digital representation of value (other than those prescribed by the MAS to be excluded) that:

a is expressed as a unit;
b is not denominated in any currency and is not pegged by its issuer to any currency;
c is, or is intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt;
d can be transferred, stored or traded electronically; and
e satisfies such other characteristic as MAS may prescribe.

Some examples of digital payment tokens listed by the DT Guide include Bitcoin and Ether.

Currently, under the PSA, provision of digital payment token services includes the service of dealing in (buying or selling, or both, of) digital payment tokens or the service of facilitating the exchange of digital payment tokens through establishing or operating a digital payment token exchange. Any person who provides any of these foregoing services would trigger licensing requirements under the PSA.[12]

7 See Paragraph 2.3.1 and 2.3.2 of the DT Guide.

8 Payment Services Act 2019 (No. 2 of 2019) of Singapore.

9 Money-Changing and Remittance Businesses Act, Chapter 187 of Singapore, now repealed.

10 Payment Systems (Oversight) Act, Chapter 222A of Singapore, now repealed.

11 See Paragraph 1.2 of MAS, 'Consultation paper on Proposed Payment Services Bill' (the PSA Consultation Paper) (21 November 2017), https://www.mas.gov.sg/-/media/MAS/resource/publications/consult_papers/2017/Consultation-on-Proposed-Payment-Services-Bill-MAS-P0212017.pdf.

12 See Part 1 of the First Schedule to the PSA.

Some payment tokens may alternatively constitute e-money, which is defined under section 2 of the PSA to mean any electronically stored monetary value that:

a is denominated in any currency or pegged by its issuer to any currency;

b has been paid for in advance to enable the making of payment transactions through the use of a payment account;

c is accepted by a person other than its issuer; and

d represents a claim on its issuer, but does not include any deposit accepted in Singapore, from any person in Singapore.

An issuer of e-money would also trigger licensing requirements under the PSA.

It should be noted that money is defined under the PSA to include e-money but exclude any digital payment token and any excluded digital representation of value.

Digital payment tokens and e-money are discussed further in Section III.ii.

iii Asset-backed tokens

The advantages of blockchain technology is that it allows for most (if not all) assets to be tokenised, ownership rights for such assets to be held by multiple parties and the relative ease for digital tokens to be traded in any part of the world. There is, however, a need to carefully consider the specific asset being tokenised as this may lead to multiple legal issues arising.

Real estate is an example of an asset that can be tokenised. If the underlying real estate of a token is held through a special purpose company vehicle and the token represents shares in that vehicle, the token could be deemed a security token. Alternatively, should an issuer collect fiat currency from token holders and pool the contributions to acquire real property (which token holders have no day-to-day control over the management of) and the real property is managed by or on behalf of a manager, with the purported purpose or effect of this arrangement to enable token holders to participate in and receive profits or income arising from the real property, it may be deemed as a collective investment scheme.[13] This would then trigger the relevant offering requirements under the SFA. This is discussed in further detail in Section II.

Commodities (e.g., precious metals) is another example of an asset that is often tokenised. The trading of asset-backed tokens where the underlying asset is a precious metal may potentially give rise to the need to fulfil the relevant requirements under the Commodity Trading Act (CTA).[14]

iv Utility tokens

We use the terms utility tokens generally to refer to digital tokens that do not fall within the security token, payment token or any other regulated categorisations.

From a regulatory perspective, it is essential for market players to ensure that the utility tokens being offered in an initial coin offering (ICO) do not constitute CMPs based on their structure and characteristics such that they will also be characterised as security tokens, otherwise the offering and dealings will trigger the relevant requirements under the SFA as mentioned above in Section I.i and discussed in further detail in Section II.

13 See Section 2 of the SFA.

14 Commodity Trading Act, Chapter 48A of Singapore.

II SECURITIES AND INVESTMENT LAWS

i Securities and Futures Act

Offers of security tokens as well as asset-backed tokens with the relevant characteristics (such that they would constitute CMPs) are subject to the regulatory regime under Part XIII of the SFA.

An offer may only be made if it complies with the relevant requirements under Part XIII of the SFA, such as needing to be made in or accompanied by a prospectus that is prepared in accordance with the relevant requirements, lodged with and registered by the MAS (the Prospectus Requirements), unless otherwise exempt.[15]

In particular, offers of digital tokens with characteristics that would constitute collective investment schemes would be subject to the relevant authorisation or recognition requirements (A/R Requirements), and would also need to comply with business conduct requirements under the Code on Collective Investment Schemes and the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005, unless otherwise exempt.[16]

ii Exemptions from the Prospectus Requirements and the A/R Requirements

Offers may be exempted from the Prospectus Requirements and the A/R Requirements if made in compliance with the conditions of an applicable offering exemption or safe harbour. The exemptions of note would include:

a a small and personal offer,[17] where the total amount raised within any period of 12 months does not exceed S$5 million (or its equivalent in a foreign currency);

b a private placement offer[18] that is made to no more than 50 persons within a period of 12 months; and

c when the offer is made to accredited investors[19] or institutional investors[20] only.

iii SFA Licensing Requirements

A person who markets or deals in CMPs (which would include digital tokens that constitute CMPs) will be required to hold a capital markets services (CMS) licence for dealing in CMPs under the SFA, unless otherwise exempt.

Separately, a person who is the manager of digital tokens that constitute a collective investment scheme will be required to hold a CMS licence for fund management under the SFA, unless otherwise exempt.

15 Section 296 of the SFA.

16 See Paragraph 2.6 of the DT Guide.

17 See Sections 272A and 302B of the SFA.

18 See Sections 272B and 302C of the SFA.

19 See Sections 274 and 304 of the SFA.

20 See Sections 275 and 305 of the SFA.

iv Financial Advisers Act

Any person who advises others on digital tokens with characteristics that would constitute CMPs or advises others by issuing or promulgating research analyses or research reports on such tokens may be deemed to be providing financial advisory services,[21] and accordingly would need to be authorised to do so by obtaining a licence[22] under the Financial Advisers Act[23] (FAA) unless otherwise exempt.[24]

v Extraterritoriality of the SFA and FAA

The SFA and the FAA have extraterritorial applicability.[25]

Under the SFA, any acts (including offers and dealing activities) carried out partly in and partly outside Singapore by a person may be treated as being committed wholly in Singapore, and any acts carried out wholly outside Singapore by a person may be treated as being committed in Singapore should they have a substantial and reasonably foreseeable effect in Singapore.[26] The requirements under the SFA would accordingly apply to all of the foregoing acts.

Under the FAA, even if a person is based overseas, should that person engage in any activity or conduct that is intended to or likely to induce the public in Singapore or any section of the public to use any financial advisory service provided by that person, including advising others on security tokens, that person would be deemed to be acting as a financial adviser in Singapore irrespective of whether the activity or conduct is intended to or likely to have that effect outside Singapore.[27]

See Sections V and VII, which discuss the regulation of exchanges and regulation of issuers and sponsors respectively.

III BANKING AND MONEY TRANSMISSION

i Exception for banks, merchant banks and finance companies

Under the PSA, certain persons are exempt from the requirement[28] to hold a payment service provider licence in respect of providing digital payment token services and these include banks licensed under the Banking Act,[29] merchant banks approved under the MAS Act[30] and finance companies licensed under the Finance Companies Act (notwithstanding, they may still be subject to certain PSA ongoing compliance requirements).[31]

21 See Section 2 read with the Second Schedule to the FAA.
22 See Section 6 of the FAA.
23 Financial Advisers Act, Chapter 110 of Singapore.
24 See Paragraph 2.10 of the DT Guide.
25 See Paragraphs 2.12 and 2.13 of the DT Guide.
26 See Section 339 of the SFA.
27 Section 6(2) of the FAA.
28 See Section 13 of the PSA.
29 Banking Act, Chapter 19 of Singapore.
30 Monetary Authority of Singapore Act, Chapter 186 of Singapore.
31 Finance Companies Act, Chapter 108 of Singapore.

ii Money transmission

The provision of inbound and outbound money transfer services and local payer to local payee money transfer services in Singapore would be considered cross-border money transfer services and domestic money transfer services respectively under the PSA,[32] and would require a payment service provider licence,[33] if not otherwise exempted.

As the framework of the PSA helpfully differentiates between e-money and digital payment tokens, it is clear that any person who intends to provide the services of transferring fiat currency or e-money, or both, would require a payment service provider licence in respect of domestic money transfer services and cross-border money transfer services, as applicable.

On the other hand, as stated in Section I.ii, the service of dealing in (buying or selling, or both, of) digital payment tokens and the service of facilitating the exchange of digital payment tokens would be digital payment token services for which a licence is required for under the PSA.[34]

While the transfer of digital payment tokens at present is not a service for which a licence is required for under the PSA, in light of proposed amendments to the PSA, this may change going forward. This is discussed further in Section XI.

IV ANTI-MONEY LAUNDERING

i Anti-money laundering and counter-terrorist financing

The anti-money laundering and countering the financing of terrorism (AML/CFT) regime in Singapore largely follows the guidance issued by the Financial Action Task Force (FATF). Singapore is an active member of FATF and a founding member of the Asia/Pacific Group on Money Laundering.

The controls that MAS requires financial institutions to put in place in connection with AML/CFT generally include identifying and knowing customers (including beneficial owners), conducting regular account reviews, and monitoring and reporting any suspicious transactions.

MAS's supervisory expectations with respect to the requirements and expectations on financial institutions in relation to AML/CFT are set out in the notices, guidelines and other guidance issued by MAS.

On 21 November 2017, MAS issued the PSA Consultation Paper and with respect to seeking comments from the public on the approach of imposing specific risk mitigating measures, MAS commented that as digital payment token services carry higher money laundering and terrorism financing (ML/TF) risks owing to the ability to transmit money pseudonymously, there would accordingly be no subset of low-risk services, such that all digital payment token service providers would have to comply with AML/CFT measures nonetheless.[35]

On 5 December 2019, MAS issued its response to feedback received on a consultation paper in relation to AML/CFT with respect to payment services.[36] MAS commented that

32 See Section 5 read with the First Schedule of the PSA.

33 See Section 5 of the PSA.

34 See Section 5 of the PSA.

35 See Paragraph 5.14 of the PSA Consultation Paper.

36 MAS, 'Response to Feedback received on the proposed payment services notices on prevention of money laundering and countering the financing of terrorism' (AML/CFT Response), (6 June 2019),

there are higher risks associated with digital payment token transactions[37] as well as how the anonymity, speed and cross-border nature of digital payment token transactions means that there is a higher risk of abuse for illicit activity, including for ML/TF in respect of such transactions.[38]

ii AML/CFT laws with respect to digital payment token service

On 5 December 2019, MAS released a notice in relation to the provision of digital payment token services (the AML/CFT Notice).[39] Under the AML/CFT Notice, providers of digital payment token services are required to put in place robust controls to detect and deter the flow of illicit funds through Singapore's financial system.

As stated in Section I.ii, digital payment token services include the service of dealing in (buying or selling, or both, of) digital payment tokens or the service of facilitating the exchange of digital payment tokens through establishing or operating a digital payment token exchange.

Under the AML/CFT Notice, the AML/CFT requirements that digital payment token service providers are subject to include risk assessment and risk mitigation, customer due diligence, record-keeping, suspicious transaction reporting and internal policies, compliance, audit and training.[40]

V REGULATION OF EXCHANGES

i Primary platform

Persons establishing or operating a platform for offerors to make primary offers of digital tokens (primary platform) where such digital tokens include security tokens, may be deemed as dealing in CMPs under the SFA,[41] for which a CMS licence for dealing is required, unless otherwise exempted.[42]

Persons establishing or operating a primary platform with respect to digital payment tokens may be considered as establishing or operating a digital payment token exchange, which is a payment service under the PSA[43] requiring a payment service provider licence, unless otherwise exempted.[44]

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https://www.mas.gov.sg/publications/consultations/2019/proposed-payment-services-notices-on-prevention-money-laundering-countering-financing-terrorism.

37 See Paragraph 5.18 of the AML/CFT Response.

38 See Paragraph 5.7 of the AML/CFT Response.

39 MAS, 'PSN02 Prevention of Money Laundering and Countering the Financing of Terrorism – Digital Payment Token Service' (5 December 2019), https://www.mas.gov.sg/regulation/notices/psn02-aml-cft-notice---digital-payment-token-service.

40 See Paragraphs 4, 6, 7, 8, 14, 16, and 17 of the AML/CFT Notice.

41 See Section 82 read with the Second Schedule of the SFA.

42 See Paragraphs 2.9 of the DT Guide.

43 See Section 5 read with the First Schedule of the PSA.

44 See Section 13 of the PSA.

ii Exchange platform

Persons establishing or operating a platform for secondary trades of digital tokens (an exchange platform)[45] where such digital tokens include security tokens, may be seen as establishing or operating an organised market,[46] which requires such persons to be approved or recognised by MAS as an approved exchange or recognised market operator respectively, unless otherwise exempted.[47]

Persons establishing or operating an exchange platform that facilitates the exchange of digital payment tokens would be considered as providing a digital payment token service under the PSA. Such service provided would be a payment service under the PSA[48] for which a payment service provider licence is required, unless otherwise exempted.[49]

VI REGULATION OF MINERS

Mining of digital tokens is generally lawful under Singapore law.

There is no regulatory regime in Singapore specific to the mining of digital tokens and there is currently no published enforcement taken against the mining of digital tokens.

However, to the extent that the digital token being mined is a security token or an asset-backed token (namely a commodity token), and depending on the precise ambit of the specific mining arrangement, relevant regulatory or licensing considerations under the SFA and the CTA may apply.

For example, the running of a collective mining pool that aggregates and distributes returns as a result of running mining operations may be seen as operating a collective investment scheme or a commodities pool.

VII REGULATION OF ISSUERS AND SPONSORS

Generally, issuers of digital payment tokens and utilities tokens are not regulated in Singapore with respect to the issue of such tokens.

The service of issuing e-money to any person for the purpose of allowing a person to make payment transactions would also be a payment service under the PSA[50] for which a payment service provider licence is required, unless otherwise exempted.[51]

Also, issuers of securities tokens will be subject to the relevant offering requirements under Part XIII of the SFA, unless otherwise exempted, as discussed in Sections II.i and ii.

45 See Paragraph 2.8.3 of the DT Guide.

46 See Section 7 read with the First Schedule of the SFA.

47 See Paragraphs 2.11 of the DT Guide.

48 See Section 5 read with the First Schedule of the PSA.

49 See Section 13 of the PSA.

50 See Section 5 read with the First Schedule of the PSA.

51 See Section 13 of the PSA.

VIII CRIMINAL AND CIVIL FRAUD AND ENFORCEMENT

It is widely acknowledged that given the anonymity of digital tokens and the cross-border nature of digital token transactions, where entities that investors deal with have non-transparent backgrounds and operations disallowing the appropriate level of due diligence to be conducted, there is a heightened risk of fraud.[52]

Accordingly, it would be challenging to identify the wrongdoer in the case of a criminal prosecution or a counterparty in the case of civil suit, where significant resources and effort would be required as a starting point for assessment of any legal recourse.

Separately, MAS has issued a number of advisories on possible fraudulent investments in digital tokens, including those that solicit investments in certain digital payment tokens with fabricated comments attributed to high-profile individuals, including political leaders in Singapore.[53]

In fact, individuals were charged with promoting a fraudulent digital token through the use of a multilevel marketing scheme. Local investors had participated in the scheme through the purchase of certain courses that were bundled with promotion tokens.[54]

IX TAX

i Good and services tax

The Inland Revenue Authority of Singapore published an e-tax guide on goods and services tax (GST) with respect to digital payment tokens on 19 November 2019 (the GST Guide).[55]

The GST Guide clarified that with effect from 1 January 2020, the exchange of digital payment tokens for fiat currency or other digital payment tokens (e.g., the exchange of Bitcoin for Ether and the exchange of a digital payment token for Singapore dollars (i.e., an ICO)) will be considered exempt supplies and, accordingly, be exempt from GST.[56]

The GST Guide also clarified that the use or provision of digital payment tokens as payment for anything (other than for other digital payment tokens or fiat currency) is disregarded as a supply for GST purposes. GST is chargeable only on the supply of goods and services, regardless of whether digital payment tokens are used to purchase goods and services.[57]

The current rate for GST is 7 per cent.

52 MAS, 'MAS cautions against investments in cryptocurrencies' (20 December 2017), https://www.mas.gov.sg/news/media-releases/2017/mas-cautions-against-investments-in-cryptocurrencies.

53 MAS, 'Warning on Fraudulent Websites Soliciting 'Cryptocurrency' Investments' (29 January 2019), https://www.mas.gov.sg/news/media-releases/2019/warning-on-fraudulent-websites-soliciting-cryptocurrency-investments.

54 Singapore Police Force, 'Two Men Charged for Promoting A Multi-Level Marketing Scheme Involving Cryptocurrency' (10 April 2019), https://www.police.gov.sg/media-room/news/20190410_arrest_two_men_charged_for_promoting_a_mlm_cad.

55 This can be accessed at: https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/e-Tax_Guides/e-Tax%20Guide_GST_Digital%20Payment%20Tokens.pdf.

56 See Paragraph 6.4 of the GST Guide.

57 See Paragraphs 6.1 to 6.3 of the GST Guide.

ii Income tax

The Inland Revenue Authority of Singapore published an e-tax guide on the income tax treatment of digital tokens on 17 April 2020 (the Income Tax Guide).[58] The Income Tax Guide states that whether a person is taxed on the exchange of digital payment tokens for fiat currency or other digital payment tokens depends on whether the gain arising out of the disposal is capital or revenue in nature.[59] There is no capital gains tax or its equivalent in Singapore.

The Income Tax Guide also states that whether ICO proceeds should be taxed depends on the type of token (e.g., the proceeds from the issuance of security tokens is not taxable as it is capital in nature owing to it being akin to proceeds from the issuance of an equity or debt security).[60]

The current corporate income tax rate for companies is 17 per cent.

X OTHER ISSUES

Even if issuers of digital tokens are able to rely on an exemption to proceed with an offering, there is a need to ensure that all activities carried out in connection with the offering are in compliance with the relevant laws.

In 2019, a security token issuer had intended to rely on an exemption under the SFA, namely the accredited investor exemption, which would have allowed it to proceed with the offer without registering a prospectus. However, one of its advisers had called attention to the offer through a social media publication, breaching an exemption condition prohibiting advertising. This resulted in the issuer being warned by MAS that it would no longer be able to rely on the relevant exemption. The issuer thereafter suspended its global offering of the securities token.[61]

This was not the first time that MAS had issued such a warning. In 2018 it warned eight digital token exchanges in Singapore not to facilitate the trading of security tokens, and also warned and directed an issuer to stop the offering of its digital tokens in Singapore.[62]

XI LOOKING AHEAD

i Stablecoins

On 23 December 2019, MAS issued a consultation paper seeking views on the scope of money, e-money and digital payment tokens, as well as the regulation of payment services based on such forms of payment (the Stablecoin Consultation Paper).[63]

58 This can be accessed at: https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/e-Tax_Guides/etaxguide_CIT_Income%20Tax%20Treatment%20of%20Digital%20Tokens.pdf.

59 See rows B and C of Section 2 of Annex A to the Income Tax Guide.

60 See Paragraph 8.2 of the Income Tax Guide.

61 MAS, 'MAS halts Securities Token Offering for regulatory breach' (24 January 2019), https://www.mas.gov.sg/news/media-releases/2019/mas-halts-securities-token-offering-for-regulatory-breach.

62 MAS, 'MAS warns Digital Token Exchanges and ICO Issuer' (24 May 2018), https://www.mas.gov.sg/news/media-releases/2018/mas-warns-digital-token-exchanges-and-ico-issuer.

63 MAS, 'Consultation on the Payment Services Act 2019 - Scope of E-money and Digital Payment Tokens' (23 December 2019), https://www.mas.gov.sg/-/media/MAS/resource/publications/consult_papers/2019/

With a constantly evolving digital token landscape, further innovation has led to the emergence of new digital tokens, namely stablecoins that could potentially challenge the prevailing concept of money under the PSA.[64]

The current definitions of the terms, digital payment token and e-money are set out in Section I.ii.

The Stablecoin Consultation Paper states that the two defining characteristics that differentiate e-money and digital payment tokens are that e-money is a digital representation of a single fiat currency, whereas digital payment tokens are simply a representation of value, which may not have any reference to fiat currency. In addition, e-money must represent a claim on the issuer, whereas digital payment tokens do not need to.[65]

Stablecoins are a new class of digital tokens that are designed to maintain a stable value relative to another asset (such as fiat currency or commodity) or a basket of assets. Stablecoins may potentially perform the functions of money as they would not have the excessive price volatility of digital payment tokens that were issued earlier on the assumption that the stablecoins gain widespread acceptance. Stablecoins could also vary in terms of accessibility (whether to retail or wholesale customers) and ability to be traded on the secondary market.[66] MAS has stated that it would, therefore, be challenging to distinguish between e-money and digital payment tokens for regulatory purposes.[67]

In light of the above, MAS's decision on how it intends to regulate stablecoins and, in particular, determine which category stablecoins would fall into, if either, or whether a new category would emerge, is widely anticipated, especially since MAS has stated that it is not proposing to amend the definition of e-money or digital payment tokens.[68] The consultation closed on 28 January 2020 and the responses to feedback released on the Stablecoin Consultation Paper are due to be published.

ii Expanding the scope of digital payment token services

On 23 December 2019, MAS also issued a consultation paper seeking views on proposed amendments to the PSA (the PSA Amendment Consultation Paper), including expanding the scope of digital payment token service providers' activities to include the transfer of digital payment tokens, the provision of custodian wallets for or on behalf of customers and the brokering of digital payment token transactions (without possession of money or digital payment token by the service provider).[69]

MAS stated in the PSA Amendment Consultation Paper that its intention to amend the PSA is for the purposes of full alignment with the most recent enhancements to the FATF standards of June 2019 in relation to the regulation of virtual asset service providers.[70]

Consultation-on-the-Payment-Services-Act-2019---Scope-of-E-money-and-Digital-Payment-Tokens/Consultation-on-the-Payment-Services-Act-2019---Scope-of-Emoney-and-Digital-Payment-Tokens-MAS.pdf.

64 See Paragraph 1.2 of the Stablecoin Consultation Paper.

65 See Paragraph 3.4 of the Stablecoin Consultation Paper.

66 See Paragraph 3.6 of the Stablecoin Consultation Paper.

67 ibid.

68 See Paragraph 3.8 of the Stablecoin Consultation Paper.

69 MAS, 'Consultation on the Payment Services Act 2019 – Proposed Amendments to the Act' (23 December 2019), https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/2019-Consultation-Paper-on-Proposed-Amendments-to-PS-Act/Consultation-on-Proposed-Amendments-|to-Payment-Services-Actdocx.pdf.

70 See Paragraph 1.3 of the PSA Amendment Consultation Paper.

iii Conclusion

In a relatively short time frame, Singapore has dynamically addressed the need to develop a regulatory framework or 'repurposing' of the current regime to deal with the regulatory concerns arising out of the offer, trade and services relating to digital tokens.

Global market players and stakeholders have commented that the recently enacted PSA provides regulatory certainty and legislative compliance thresholds, which set apart industry participants that investors have confidence and trust to work with.[71]

All of these recent developments are a positive way forward, as it shows the growing willingness by the local regulator to bring digital tokens into the regulatory fold.

While there may always remain some uncertainty given the dynamic and ever-changing nature of digital tokens, what is resoundingly clear is MAS's willingness, agility and flexibility to work with and quickly address new developments in the characteristics of digital tokens.[72]

71 Bloomberg, 'New Singapore Laws Allows Global Crypto Firms to Expand Locally' (28 January 2020), https://www.bloomberg.com/news/articles/2020-01-27/singapore-launches-new-regime-for-cryptocurrency-payments-firms.

72 See Paragraph 3.9 of the PSA Amendment Consultation Paper.

Appendix 1

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