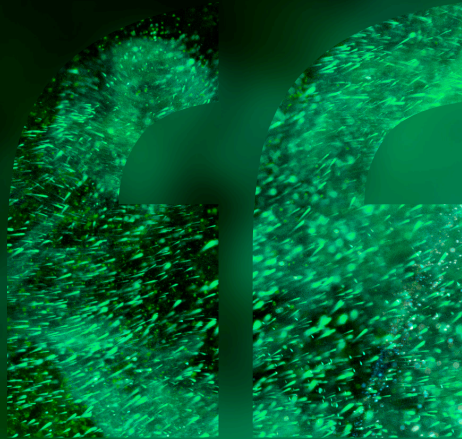
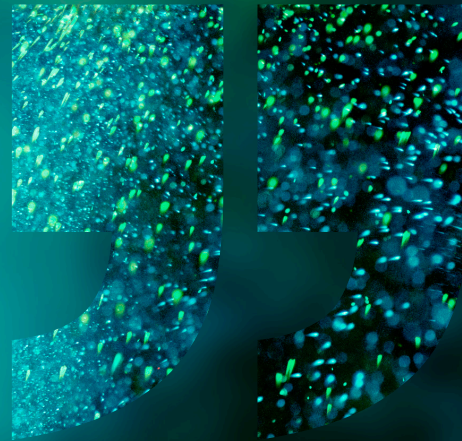


C L I F F O R D
C H A N C E



**STABLECOINS:
A GLOBAL OVERVIEW
OF REGULATORY
REQUIREMENTS IN
ASIA PACIFIC, EUROPE,
THE UAE AND THE US**



— THOUGHT LEADERSHIP

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STABLECOINS: A GLOBAL OVERVIEW OF REGULATORY REQUIREMENTS IN ASIA PACIFIC, EUROPE, THE UAE AND THE US

Facebook's proposed stablecoin, Libra, is dominating the headlines. However, growing interest means increased regulatory and political scrutiny around the globe. As digital assets transcend national borders, what does this mean for those interested in issuing or participating in a stablecoin project? What are the regulatory questions and other challenges that need to be considered? We take a look at the global picture in this comprehensive analysis.

What is a stablecoin?

A stablecoin is a type of virtual currency or cryptocurrency¹ for which mechanisms are established to minimize price fluctuations and 'stabilize' its value. Historically, stablecoins have been used to pay for purchases of other virtual currencies (e.g., Bitcoin) on cryptocurrency exchanges that did not accept cash, and as a safe-haven asset during periods when other virtual currencies experienced significant price declines. Companies like Facebook, with its recently proposed Libra stablecoin, are betting that they can overcome the regulatory and political challenges to achieve widespread adoption and change how people make cross-border remittances and payments for consumer goods and services.

To date, the main distinctions among stablecoins have been the mechanisms for maintaining stability (collateralized or uncollateralized) and of governance (centralized or decentralized). Collateralized stablecoins are often backed by fiat currency, commodities (e.g., gold) or other assets, or other virtual currencies held in a reserve. Uncollateralized stablecoins rely on computer algorithms to make monetary policy decisions (e.g., adjusting supply by "burning" or selling the coins) to maintain a stable value. In either case, governance

arrangements – including the role of the issuer or promoter – can vary.

This article, originally produced as a chapter in the Global Legal Insights publication 'Blockchain and Cryptocurrency Regulation 2020', describes some of the key legal and regulatory issues raised by the various forms of stablecoins internationally, with a focus on collateralized stablecoins. These issues are receiving greater scrutiny in leading international financial markets, particularly following the announcement of Facebook's Libra project.

Collateralized by fiat currency

Stablecoins collateralized by fiat currencies have predominantly taken one of two main forms to date: either with (1) a fixed redemption value, or (2) a variable redemption value.² A stablecoin promising a fixed redemption value (e.g., Tether) has a fixed face value in fiat currency at which it is initially sold (e.g., one U.S. dollar), and the holder can redeem the stablecoin on demand for that amount. Stablecoins offering variable value redemption do not have a fixed redemption amount, instead entitling holders to receive an allocable portion of the reserve's assets at the time of redemption. The allocable portion of the reserve's assets may differ from the amount initially paid due to fluctuations in the values of the reserve's assets. Facebook's Libra, for example, appears

1. The terms virtual currency, cryptocurrency and digital currency are often used synonymously or interchangeably. Use in this article varies depending on regulatory terminology and market practice in the relevant jurisdiction.

2. See Tobias Adrian and Tommaso Mancini-Griffoli, *The Rise of Digital Money*, IMF FINTECH NOTES: NOTE/19/01, (Jul. 2019), at 4.

to contemplate variable value redemption,³ with its reserve consisting of a basket of different fiat currencies and sovereign debt. While most current fiat-backed stablecoins are centralized, Libra aims to outgrow its early dependence on Facebook and other founding members and become governed communally by the projected 100+ members of the Libra Association over time.

Collateralized by commodities

Stablecoins collateralized by commodities or other assets also differ with respect to fixed or variable value redemption. In the former, upon redemption, the holder is entitled to either a fixed quantity of the commodity itself (e.g., an ounce of gold) or a fixed amount of the fiat currency's worth of the commodity (e.g., the amount of gold \$1 will buy); while in the latter, the holder receives their allocable portion of the issuer's total commodity reserves at the time of redemption.

Collateralized by cryptocurrency

Stablecoins collateralized by other virtual currencies are increasingly common. MakerDAO, for example, uses two coins, the Dai stablecoin and a MKR token which backs the value of Dai. To issue Dai, a user deposits Ether as collateral, creating a Collateralized Debt Position ("CDP"); to retrieve their Ether, users must pay back their Dai together with a variable interest-like fee in MKR tokens, the level of which is set by vote of MKR holders.

Non-collateralized, controlled by algorithm

Certain stablecoins are uncollateralized, with stability instead maintained by algorithm-controlled monetary policy. As proposed in Robert Sams' influential 2014 white paper,⁴ a two-coin system would be employed, involving a stablecoin and 'shares' in the monetary system as a whole, with dynamic

algorithmic adjustment of the supply of each coin relative to the other, keeping the stablecoin's value consistent.

Stablecoins – applicable regulatory regimes

Although regulation varies significantly between countries, stablecoins potentially raise at least four broad types of regulatory issues in a number of jurisdictions:

- Money movement issues (e.g., money laundering, money services business regulation).
- Investment and trading (e.g., regulation as securities or commodities).
- Banking issues (e.g., deposit-taking, bank registration).
- Virtual currency-specific regulation (e.g., New York's BitLicense, or outright prohibitions in some countries).

United States of America (USA)

While the U.S. legal and regulatory framework for virtual currencies continues to evolve, there are a number of existing laws and regulations that may govern a stablecoin issuance depending on the manner in which such an issuance is structured and the relevant facts and circumstances.

U.S. securities regulatory considerations

From a U.S. securities regulatory perspective, the key issue is whether a stablecoin might be deemed to be a 'security' within the meaning of that term under the federal securities laws.⁵ U.S. Securities and Exchange Commission ("SEC") officials have noted that labeling a digital asset a 'stablecoin' does not affect its regulatory status, which instead depends on a facts-and-circumstances analysis of economic reality.⁶

3. See The Libra Association, *Libra White Paper*, available online at <https://libra.org/en-US/white-paper/#introduction>, at Section 04: The Libra Currency and Reserve ("one Libra will not always be able to convert into the same amount of a given local currency (i.e., Libra is not a "peg" to a single currency). Rather, as the value of the underlying assets moves, the value of one Libra in any local currency may fluctuate") and Section 05: The Libra Association ("authorized resellers will always be able to sell Libra coins to the reserve at a price equal to the value of the basket").

4. See Robert Sams, *A Note on Cryptocurrency Stabilisation: Seigniorage Shares*, (updated April 28, 2015), available online at <https://github.com/rmsams/stablecoins/blob/master/paper.pdf>.

5. This section does not consider whether stablecoins would be securities under state law (e.g., the 'risk capital' test).

6. Valerie Sczeganik, Senior Advisor for Digital Assets, U.S. Securities and Exchange Commission, *Regulating Blockchain*, Panel at South by Southwest, (Mar. 15, 2019), at 24:35 *et seq.*, <https://schedule.sxsw.com/2019/events/PP92908?>

The analysis of whether any given stablecoin is a security⁷ would likely employ the so-called ‘Howey test’ which is derived from a 1946 U.S. Supreme Court case – *SEC v. W.J. Howey, Co.*⁸ – in which the U.S. Supreme Court defined an ‘investment contract’ as: (i) an investment of money; (ii) in a common enterprise; (iii) in which profits would be expected and derived from the entrepreneurial and managerial efforts of others.

While a stablecoin purchase generally should satisfy the ‘investment of money’ prong of the *Howey* test, not all stablecoin structures would necessarily satisfy the ‘common enterprise’ prong of the test. For example, in the case of MakerDAO’s Dai stablecoin, each individual user controls whether or not they lose their own ‘investment of money’ (i.e., their Ether) because they control whether they have deposited sufficient Ether in their CDP as collateral to avoid liquidation. A court might find that their fortunes are not linked to those of any other CDP user⁹ or dependent upon the MakerDAO protocol’s operator,¹⁰ although it would have to overlook several governance factors, and the fact that Ether collateral belonging to different users is pooled together.

The requirement that there be an ‘expectation of profits’ from the entrepreneurial or managerial ‘efforts of others’ may provide a good basis for an argument for stablecoins not being securities under *Howey*. In theory, because the value of a stablecoin is intended to remain ‘stable’, the absence of value fluctuations should eliminate the ability for a holder to profit from stablecoin ownership, making any ‘expectation of profits’ unreasonable, a fact the SEC’s *Framework for “Investment Contract” Analysis of Digital Assets*¹¹ (the “**Framework**”) explicitly acknowledges.¹² The SEC seems to have further recognized this argument by granting exemptive relief from the securities laws to issuers of stablecoin-like payment tokens that are unlikely to appreciate in value.¹³ Where a fixed redemption fiat-backed stablecoin is initially sold by the issuer at \$1 and entitles the holder to receive \$1 upon redemption,¹⁴ capital appreciation seems impossible, and holders are not typically entitled to distributions.

However, even when a stablecoin is issued at its redemption price, it may trade on cryptocurrency exchanges at a premium or discount, creating opportunities for speculative profit (e.g., if purchased at a discount and immediately redeemed for \$1.00, or if sold at a

7. A court might also analyze whether stablecoins are “evidences of indebtedness” or “notes” under the federal securities laws. The outcome would likely depend on the extent to which a fiat-collateralized stablecoin is a *bona fide* medium of exchange held for consumer or commercial purposes versus an investment giving rise to an expectation of profits. See, e.g., Robert H. Mundheim and Gordon D. Henderson, *Applicability of the Federal Securities Laws to Pension and Profit-Sharing Plans*, 29 *Law and Contemporary Problems* 795-841 (Summer 1964), at note 45 (noting that, in the context of traveler’s checks, trading stamps redeemable in cash or merchandise, and other common products, “not all things which technically might be analyzed as “evidences of indebtedness” are in fact considered “securities” within the meaning of the Securities Act [] *The dividing line in these areas between interests which are securities and those which are not might be described as one between media created primarily for exchange and media created primarily for savings or investment.*”) (emphasis added).

8. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

9. See, e.g., *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart Inc.*, 465 F.Supp. 585, 589 (M.D.La. 1979).

10. MakerDAO might argue that it is decentralized and there is no promoter to rely on. See *Framework*, Part II.C.1.

11. Strategic Hub For Innovation and Financial Technology, U.S. Securities and Exchange Commission, *Framework for “Investment Contract” Analysis of Digital Assets*, (Apr. 3, 2019) available online at https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn1.

12. See *Framework*, Part II.C.3 (“[T]he stronger [the] presence [of the following], the less likely the *Howey* test is met [] Prospects for appreciation in the value of the digital asset are limited. For example, *the design of the digital asset provides that its value will remain constant [] over time, and, therefore, a reasonable purchaser would not be expected to hold the digital asset for extended periods as an investment.*”) (emphasis added).

13. See *Turnkey Jet, Inc.*, SEC No-Action Letter, (Apr. 3, 2019), available online at <https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm>.

14. See *Framework*, Part II.C.3.

premium without redeeming). A New York court recently stated that Tether's ability to fluctuate in price, notwithstanding its purported stable value, could suggest that it functions as a security.¹⁶ Stablecoin issuers could attempt to eliminate such profit opportunities through selling the stablecoin in unlimited quantities at face value and imposing transfer restrictions, as SEC exemptive relief recently granted to issuers of payment tokens has required.¹⁶ Alternatively, issuers could argue – as in *Noa v. Key Futures* – that any profits from stablecoin trading are due to market fluctuations rather than a promoter's managerial efforts.¹⁷

The Supreme Court has stated that no profits are expected “when a purchaser is motivated by a desire to use or consume the item purchased.”¹⁸ The Framework acknowledges *Howey* is less likely to be met where a ‘virtual currency’ can immediately be used to make payments in a wide variety of contexts without first being converted to another digital asset or real currency, and substitutes for fiat currency in acting as a store of value that can be saved, retrieved, and exchanged for something of value later.¹⁹ To the extent that a holder's motive is to use stablecoins to make consumer payments, these criteria appear satisfied. In fact, fixed-redemption fiat-collateralized stablecoins in some instances seem analogous to traveler's checks, functioning as a negotiable medium of exchange and payment mechanism circulating among the general public that

can be redeemed for a fixed cash value. Courts have held that American Express traveler's checks are not securities.²⁰ Furthermore, even though such stablecoin issuers typically maintain cash reserves to back the stablecoin in a bank account, in guidance involving trading stamps redeemable for cash²¹ and safekeeping certificates redeemable for gold,²² the SEC has seemingly not viewed the mere deposit by an issuer/promoter of cash or gold with a bank or other depository for the purpose of meeting customer redemption requests as a ‘managerial or entrepreneurial effort’ giving rise to an ‘expectation of profits’.

However, variable-redemption fiat-collateralized stablecoins and stablecoins relying on stabilization mechanisms other than fiat currency collateral raise difficult issues under the *Howey* test. Redeemable stablecoins backed by a basket of different fiat currencies selected by the issuer, which are capable of appreciating in value, might satisfy the ‘expectation of profits from efforts of others’ prong unless – as the Framework notes – any value appreciation is truly incidental to the use of the stablecoin for its functionality,²³ or another path outside the securities laws – e.g., the lack of a promoter due to decentralization²⁴ – is available. As to algorithmic non-collateralized stablecoins, the Framework notes that issuer actions that support a market price for the digital asset, such as by limiting supply or ensuring scarcity, or engaging in token buybacks or ‘burning’

15. Decision and Order on Motion at 23, *In the Matter of the Inquiry of Letitia James, Attorney General of the State of New York, against iFINEX, INC., et al.*, No. 450545/2019 (Sup. Ct. N.Y. County Aug. 19, 2019) (“[T] ether “goes up and down in value,” “fluctuat[ing] in price seemingly several cents here and there,” a potentially significant variance in “dealing with an asset that is supposed to be, quote-unquote, worth a dollar.” [] That behavior might suggest that tether actually functions as a security, despite its billing as a “stablecoin.””).

16. See, e.g., *Turnkey Jet, supra*; see also *Pocketful of Quarters, Inc.*, SEC No-Action Letter, (Jul. 25, 2019), available online at <https://www.sec.gov/corpfin/pocketful-quarters-inc-072519-2a1>.

17. *Noa v. Key Futures, Inc.*, 638 F.2d 77, 79 (9th Cir. 1980); see also *Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Co.*, 179 F.Supp.2d 159, 164 (S.D.N.Y. 2001). *But see Balestra v. ATBCOIN, LLC*, 380 F.Supp.3d 340, 357 (S.D.N.Y. 2019).

18. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975).

19. See Framework, Part II.C.3.

20. *Leighton v. Securities and Exchange Commission*, 221 F.2d 91 (D.C.Cir. 1955).

21. See, e.g., *Trading Stamps*, SEC Release No. 3890, 1958 WL 2204 (Jan. 21, 1958); *CMP Corporation*, SEC No-Action Letter, 1978 WL 12200 (Dec. 4, 1978).

22. See, e.g., *No-Action Position Relating to Certain Offerings of Gold*, SEC Release No. 5552, 1974 WL 161724 (Dec. 26, 1974).

23. See Framework, Part II.C.3.

24. See Framework, Part II.C.1.

(removing from circulation) tokens, are likely to constitute ‘efforts of others.’²⁵ Accordingly, where the issuer actively manages monetary policy via algorithmic adjustment of supply, any resulting profits accruing to holders could fall on the wrong side of *Howey*. Further, where monetary policy is managed by distributing new tokens – such as ‘seigniorage shares’ – to existing stablecoin holders in exchange for stablecoins, not only might such distribution be considered to be a form of ‘profit’ under the *Howey* test, but – if the new token is a security – then the stablecoin could also be deemed a separate type of statutorily-enumerated security, *even if the stablecoin itself is not an investment contract* – namely, the stablecoin could be a “warrant or right to subscribe to or purchase” a security²⁶ (i.e., the seigniorage share).

U.S. bank regulatory considerations

Irrespective of the security status analysis, a fixed-redemption fiat-collateralized stablecoin that, for example, is issued in exchange for 1 U.S. dollar and is redeemable for 1 U.S. dollar could be characterized as a ‘deposit’ within the meaning of that term under U.S. federal and state law, and deposit-taking activities generally trigger bank regulatory licensing considerations. Bank regulatory licensing requirements are triggered in the first instance under the laws of the various states. In New York, for example, the term ‘deposit’ is not statutorily defined under the New York Banking Law (“**NYBL**”).²⁷ New York case law indicates, however, that a deposit, in the typical banking sense, is the placing of money with a bank to be withdrawn upon the depositor’s demand or under rules and regulations agreed upon.²⁸ Further, New York law generally defines a ‘certificate of

deposit’ as a written acknowledgment by a bank of the receipt of money with an engagement to repay it.²⁹ Further, despite the lack of a statutory definition of the term ‘deposit’ under the NYBL, Section 131 of the NYBL sets out “prohibitions against encroachment upon certain powers of banks and trust companies.” Among other things, Section 131 prohibits unauthorized persons from issuing notes or other evidences of debts to be loaned or put in circulation as money or receiving deposits.

There is a risk that a stablecoin may be deemed to be an evidence of debt that is put in circulation as money and, accordingly, an issuer of stablecoins in New York most likely needs to be licensed as a bank or trust company under the NYBL, given Section 131’s prohibitions against encroachment upon their powers, or hold the fiat funds received from stablecoin customers in segregated accounts at third party banks. In that regard, it is notable that the issuer of Paxos Standard (PAX), Paxos Trust Company, LLC (the “**Paxos Trust**”), and the issuer of Gemini Dollar (GUSD), Gemini Trust Company, LLC (the “**Gemini Trust**”), are both licensed as limited purpose trust companies under the NYBL. Furthermore, both the Paxos Trust and the Gemini Trust hold the dollar deposits of their customers in omnibus accounts at third-party banks with the intention that they be eligible for Federal Deposit Insurance Corporation (“**FDIC**”) ‘pass-through’ deposit insurance. Other well known stablecoin issuers operating in New York, such as Circle, are not banks or trust companies but have obtained a Bitlicense from the New York Department of Financial Services and maintain U.S. dollars in segregated accounts with third party banks, on behalf of, and for the

25. See Framework, Part II.C.1.

26. 15 U.S.C. 77b(a)(1).

27. The term “deposit” is defined broadly under the Federal Deposit Insurance Act (“**FDIA**”) to include, among other things, the unpaid balance of money or its equivalent received or held by a bank in the usual course of business and for which it has given or is obligated to give credit to an account, or which is evidenced by its certificate of deposit, investment certificate, certificate of indebtedness, or other similar name. The term “deposit” is also defined under Regulation D of the Federal Reserve as, among other things, the “unpaid balance of money or its equivalent received or held by a depository institution in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to an account, including interest credited, or which is evidenced by an instrument on which the depository institution is primarily liable.”

28. See, e.g., 9 N.Y. Jur. 2d, Banks and Financial Institutions § 219.

29. See, e.g., 9 N.Y. Jur. 2d, Banks and Financial Institutions § 266.

benefit of, the stablecoin holders. Outside New York, the bank regulatory licensing requirements of other states may vary.

A non-bank issuer of a stablecoin issued in exchange for 1 U.S. dollar and redeemable for 1 U.S. dollar would most likely need to segregate the U.S. dollars it receives in exchange for stablecoins to avoid having to be licensed as a bank. Non-bank financial services entities may hold credit balances on behalf of customers representing cash funds but, generally: (i) may only hold such cash funds for a special purpose; (ii) must obtain a financial services license (e.g., be licensed as a money transmitter, broker-dealer, etc.); and (iii) must segregate such cash funds from their own assets. For example, a U.S. broker-dealer may hold 'credit balances' representing 'customer funds,' but such funds are carried by the broker-dealer in connection with anticipated securities purchases and generally must be segregated from the broker-dealer's funds through deposits at a third-party bank in a 'Special Reserve Bank Account for the Exclusive Benefit of Customers'.³⁰

U.S. commodities regulatory considerations

Stablecoins, as virtual currencies, would likely constitute spot commodities subject to the anti-fraud and anti-manipulation authority of the Commodity Futures Trading Commission ("CFTC").³¹ Provided that they are initially sold at 100% of redemption value, there is no leverage and no periodic margin payments, and physical settlement by actual delivery of

fiat currency is always available on demand, typical fiat-collateralized stablecoins are unlikely to constitute derivatives. Accordingly, CFTC registration requirements would not apply to the stablecoins themselves, although derivatives referencing such stablecoins would be fully regulated products. Leveraged products marketed to retail investors would need to consider whether they fall within the ambit of the CFTC's leveraged retail commodity authority.³²

U.S. money transmission regulatory considerations

At the federal level, money services businesses ("MSBs") are subject to registration and regulation as such under FinCEN's regulations, unless an exemption applies.³³ FinCEN was one of the first U.S. federal regulators to assert jurisdiction over transfers of virtual currencies in 2013, when it released guidance identifying certain participants in the digital asset market as 'money transmitters' – a category of financial institution regulated by FinCEN as MSBs. The FinCEN guidance defines the term 'virtual currency' broadly as a "medium of exchange that can operate like currency, but does not have all the attributes of 'real' currency³⁴ ... including legal tender status."³⁵ Further, FinCEN guidance states that "convertible virtual currency" ("CVC") either has an equivalent value in real currency or acts as a substitute for real currency.³⁶ Thus, stablecoins generally should be presumed to be CVCs within the meaning of that term under FinCEN's guidance.

30. See Rule 15c3-3 under the U.S. Securities Exchange Act of 1934 (17 C.F.R. § 240.15c3-3).

31. See, e.g., *CFTC v. Patrick K. McDonnell, et al.*, 287 F.Supp.3d 213 (E.D.N.Y. Mar. 6, 2018).

32. See Commodity Exchange Act § 2(c)(2)(D).

33. FinCEN is primarily responsible for enforcing the Bank Secrecy Act of 1970, as amended, which generally requires financial institutions to assist U.S. government agencies in detecting and preventing money laundering.

34. FinCEN has defined the term "currency" (also referred to as "real" currency) as "the coin and paper money of the United States or of any other country that [i] is designated as legal tender and that [ii] circulates and [iii] is customarily used and accepted as a medium of exchange in the country of issuance."

35. See *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FIN-2019-G001 (May 9, 2019) (the "2019 FinCEN Guidance"); *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FIN-2013-G001 (Mar. 18, 2013) (the "2013 FinCEN Guidance").

36. *Id.*

An entity that acts as an ‘administrator’ or ‘exchanger’ of CVC must register with FinCEN as an MSB, unless it can rely on one of a handful of narrow exemptions.³⁷ An administrator is a person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency. FinCEN takes the position in its 2019 FinCEN Guidance that CVC issuers generally meet this definition, because at the time of issuance, the seller is the only person authorized to issue and redeem the new units of CVC. This remains true even where the issuer, through contract or otherwise, declines to exercise its authority.

An ‘exchanger’ is a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency. Virtual currency exchanges that maintain wallets for their users, or that execute user transactions on a principal or riskless principal basis, would generally meet the ‘exchanger’ definition. Platforms that merely provide a forum for CVC buyers and sellers to post bids and offers (with or without automatic matching of counterparties) likely would not qualify as ‘exchanges,’ so long as the users themselves settle any matched transactions through their individual wallets or other wallets not hosted by the trading platform.

The regulatory requirements imposed on MSBs by FinCEN are significant, but far less expansive than those imposed on broker-dealers and other financial institutions regulated by the SEC. In line with FinCEN’s statutory mission to combat money laundering, an MSB must: (i) incorporate policies, procedures and internal controls reasonably designed to assure ongoing compliance (including verifying customer identification, filing

suspicious activity and other reports, and responding to law enforcement requests); (ii) designate an individual responsible to assure day-to-day compliance with the program and anti-money laundering requirements; (iii) provide training for appropriate personnel, including training in the detection of suspicious transactions; (iv) provide for independent review to monitor and maintain an adequate program; and (v) maintain certain required books and records. FinCEN’s authority over MSBs is not comprehensive, however. Instead, its jurisdiction is largely limited to money laundering issues. Unlike the SEC and CFTC, for example, FinCEN does not regulate virtual currency markets, trading, or investment fraud.

At the state level, a stablecoin issuer or exchange may be required to obtain a money transmitter license in the states in which it operates. Money transmitters with a nationwide footprint may need licenses in, and could potentially be subject to examination by regulatory agencies from, all 50 states, although in practice, state authorities may coordinate with one another to reduce redundant examinations. Approximately 38 states participate in the Nationwide Multistate Licensing System, which helps streamline certain regulatory requirements. Notably, U.S. states define ‘money transmission’ in relation to virtual currencies inconsistently. Some states, like Texas, differentiate between fiat-collateralized stablecoins and those virtual currencies that do not entail ownership claims on fiat currency. While the former constitute ‘money’ or ‘monetary value’ for purposes of the Texas Money Services Act, triggering licensure requirements, the latter do not.³⁸ Other states, like New York, do not differentiate between fiat-collateralized stablecoins and other virtual currencies.³⁹

37. “Miners,” platform users/investors acting for their own accounts, and providers of the delivery, communication, network access, or other services necessary to support the money services business, are not generally subject to regulation as MSBs.

38. Texas Department of Banking, *Supervisory Memorandum 1037: Regulatory Treatment of Virtual Currencies Under the Texas Money Services Act* (rev. Apr. 1, 2019), <http://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf>.

39. 23 NYCRR § 200.2(p) (“Virtual Currency means any type of digital unit that is used as a medium of exchange or a form of digitally stored value. Virtual Currency shall be broadly construed to include digital units of exchange that (i) have a centralized repository or administrator; (ii) are decentralized and have no centralized repository or administrator; or (iii) may be created or obtained by computing or manufacturing effort.”)

Extraterritoriality of U.S. law: Implications for non-U.S. stablecoin issuers

U.S. laws and regulations relevant to transactions in stablecoins may have an extraterritorial impact, and U.S. regulators and enforcement agencies may seek to apply and enforce such laws where stablecoins are issued to U.S. persons or stablecoin transactions are effected through U.S. intermediaries or IT infrastructure. Thus, non-U.S. stablecoin issuers, brokers, exchanges, and other market participants must exercise caution if U.S. persons are permitted to transact in stablecoins on their platforms.

Asia Pacific

Australia

In Australia, a range of legislation administered by various regulators (including various license requirements) may apply depending on the characteristics, the legal classification and the related business activities proposed to be carried out in relation to any particular stablecoin.⁴⁰ Where a stablecoin falls within the definition of a “financial product”, regulations apply, including the requirement to hold an Australian financial services (“**AFS**”) license. Analysis will be required on a case-by-case basis, but a stablecoin would most likely constitute a financial product when it has the characteristics of a managed investment scheme, security, derivative and/or non-cash payment (NCP) facility.

If providing advice, dealing, or other intermediary services for a stablecoin deemed to be a financial product, a range of Australian laws apply (including the requirement to hold an AFS license). For example, where a platform deals in stablecoins that are deemed to be financial products, the platform will be considered to be operating a market and a range of Australian laws apply, including

the requirement to hold an Australian market license. If transaction processors are part of the clearing and settlement (“**CS**”) process for such stablecoins, then a CS facility license may be required. Ministerial exemptions from the applicable regimes may be available on a case-by-case basis.

The development and use of stablecoins in Australia has been limited so far, as has the supply of Australian dollar-linked stablecoins (examples include “AUDRamp”, which went live in September 2018 and “TrueAUD” launched in April 2019).⁴¹ Various government agencies including the Treasury, the Reserve Bank and the Australian Securities & Investment Commission (ASIC) continue to study the implications of stablecoins on the Australian economy; however, a tension remains between innovation in traditional centralized payment systems (such as Australia’s New Payments Platform) and the innovation of next generation cryptoassets such as stablecoins.⁴²

People’s Republic of China⁴³

Activities relating to virtual or cryptocurrencies⁴⁴ are strictly regulated and scrutinized under PRC law. From a PRC legal and regulatory perspective, cryptocurrencies and digital tokens are not currencies issued by competent authorities and therefore may not be circulated or used as currency on relevant markets. Relevant PRC regulations expressly ban licensed financial institutions as well as payment institutions in China from (i) trading virtual currencies, (ii) providing exchange services between any virtual currency and renminbi (RMB), and (iii) providing any financial services in relation to any virtual currency within China. In addition, digital token financing and trading platforms (including private websites and apps) are prohibited from (x) providing conversion services between

40. See Information sheet 225 from ASIC available online at <https://asic.gov.au/regulatory-resources/digital-transformation/initial-coin-offerings-and-crypto-assets/>.

41. See Cameron Dark, David Emery, June Ma and Clare Noone “Cryptocurrency: Ten Years On” 20 June 2019 available online at <https://www.rba.gov.au/publications/bulletin/2019/jun/cryptocurrency-ten-years-on.html>.

42. *Ibid.*

43. “China” or the “PRC”, for the purposes of this article only, excludes Taiwan, Hong Kong and Macau.

44. PRC regulators do not particularly distinguish between digital tokens, cryptocurrency and other concepts related to digital currency under the regulations, and those terms are often used synonymously from a regulatory perspective.

tokens and fiat money or between different virtual currencies, (y) selling or purchasing (as the central counterparty or otherwise) tokens or other virtual currencies, or (z) providing pricing or information or data intermediary services in relation to tokens.

This means that under the current regulatory environment, stablecoin issuance and usage, together with any other financial activity in relation to stablecoins in China, will be sensitive and subject to close regulatory scrutiny, and thus involve substantial regulatory risks and implications. This will apply whether or not the stablecoin is collateralized. For those who are considering products with a PRC link, various considerations could be relevant to the regulatory analysis; for example, whether the proposed stablecoin structure could be classed as a blockchain-based payment service rather than a virtual currency issuance, whether the stablecoin could be used within or outside China without any cross-border element, and the identity, licensing status and location of the issuer and other parties.

Hong Kong

The general stance of the Hong Kong Monetary Authority (the “HKMA”) is that cryptocurrencies, such as Bitcoin, are not ‘money’ or ‘currencies’ but ‘virtual commodities’. In a similar vein, cryptocurrencies and digital tokens have been, by default, categorized by the Hong Kong Securities and Futures Commission (the “SFC”) as a ‘virtual commodity’ or ‘virtual asset’, which is not a specifically regulated instrument. However, depending on their structure, terms and features, such cryptocurrencies or digital tokens may be considered a regulated instrument.

So far, regulators in Hong Kong have adopted a technology-neutral regulatory approach and are seeking to regulate cryptocurrencies, digital tokens and related activities based on the existing regulatory framework. There are currently neither stablecoin- or cryptocurrency-specific laws or regulations, nor expressed plans to develop new laws or regulations to regulate cryptocurrencies or digital tokens.

Despite this general stance of the HKMA and the SFC, the nature, functionality, rights and structure of stablecoins may not

sit neatly within the same classification as the more typical forms of cryptocurrencies and digital tokens. In this respect, a stablecoin issuance could trigger various additional regulatory considerations within Hong Kong, for example:

- (i) **Money, certificate of deposit, bill of exchange and/or promissory note** – will the stablecoin resemble the features of such instruments? For example, would there be unconditional orders or promises to pay the bearer of the stablecoin or a specified person the original deposited amount, and is the relevant instrument transferable?
- (ii) **Securities (e.g., debentures or collective investment schemes)** – will the stablecoin carry an entitlement or linkage to a certain share of profits, income streams or other returns or rights, options or interests in any shares, stock, debentures, funds, etc.? If not, does it involve participation in profits, income or return from the management of any property?
- (iii) **Structured product and/or regulated investment agreement** – will the stablecoin be an instrument with returns/amounts due or whose method of settlement is determined by reference to changes in the price, value or level of any thing or the (non-) occurrence of any specified events?

Moreover, depending on the nature of the stablecoin and the proposed role of the stablecoin issuer, service providers and participants, the following activities relating to the infrastructure, issuance, usage, maintenance and/or transfer of such stablecoin may trigger relevant regulatory licensing, registration or authorization requirements and/or other regulatory compliance considerations:

- (i) **Foreign exchange, money remittance and/or money changing services** – is there any element of fiat money exchange (spot or non-spot) or money remittance?
- (ii) **Deposit-taking business** – is there any element of taking a deposit (or receiving a loan) from another person?
- (iii) **Money broking** – is there any form of negotiation, arrangement or facilitation of currency trading and/or a deposit or loan involving a bank?
- (iv) **Stored value facilities/designated payment system** – does it resemble

the features of a stored value facility which may be used for storing the value of an amount of money in the context of making payments for goods or services involving the issuer? Could it be a clearing and settlement system or retail payment system that is of such materiality as to be designated for regulatory supervision?

- (v) **Moneylending activities** – is there any form of loan, credit or lending facility?

These questions provide an idea of the regulatory considerations but are by no means exhaustive or conclusive. While the relevant stablecoin may or may not fall within the ambit of any one or more of the regulatory areas discussed above (including consideration of various statutory exclusions and exemptions involved), undertaking a detailed factual and legal assessment is a necessary step for issuers to manage their regulatory position and potential risks.

Singapore

In Singapore, offers or issuances of stablecoins may be regulated if they constitute capital markets products (e.g., securities or units in a collective investment scheme) under the Securities and Futures Act (Cap. 289) (the “**SFA**”). The structure and characteristics of a stablecoin would need to be carefully considered to determine whether this is the case. Intermediaries who facilitate offers or issuances of such stablecoins (including operators of platforms on which the stablecoins may be offered, issued and/or traded and those providing financial advice in respect of the stablecoins) may therefore be subject to licensing and other regulatory requirements under the SFA and/or the Financial Advisers Act (Cap. 110) (the “**FAA**”).

Further, under the newly introduced Payment Services Act 2019 (the “**PS Act**”), persons who provide e-money issuance services and digital payment token services, among other payment activities, will be regulated. There is a risk that fiat-collateralized stablecoins which are pegged to the value of a currency could be considered as ‘e-money’ under the PS Act. Digital tokens that are not denominated in or pegged to any currency, such as an algorithm-controlled non-collateralized stablecoin, could potentially be regarded as ‘digital payment

tokens’ under the PS Act. Licensing and other regulatory requirements could apply under the PS Act in these cases. The PS Act is projected to come into operation in early 2020.

While the SFA, FAA and PS Act are key pieces of legislation for activities in respect of stablecoins in Singapore, they are not the only legislative regimes that could apply. Depending on the exact nature of the stablecoin and the related activities proposed to be carried out, other regulatory considerations (such as moneylending and deposit-taking) could also arise.

Japan

In Japan, cryptoasset-related regulations under the Payment Services Act and the Financial Instruments and Exchange Act have been amended to expand the regulations and bring regulatory clarity to those issuing or transacting around cryptoassets. However, as is the case in Hong Kong, stablecoins could, in terms of their legal nature, be different from more typical forms of cryptoassets. For example, fiat-collateralized stablecoins may not be characterized as cryptocurrencies or cryptoassets under Japanese law where their value is pegged to the price of a statutory currency. They may potentially be regarded as prepaid payment instruments, or the function of payment associated with stablecoins could be regarded as money transfer. The necessary license required to issue or otherwise deal with stablecoins will therefore vary and depend on the legal nature and characteristics of the particular stablecoin.

Various market participants, including banks and tech market players, have announced their intention to issue stablecoins whose value is pegged to the Japanese yen. Also, the Japanese Bankers Association has run a trial of interbank use of stablecoins.

Europe

European Union (EU)

Within the EU, there are no harmonized rules around stablecoins under the existing European legislative framework and most EU Member States do not specifically regulate stablecoins, or cryptoassets more broadly. However, the existence of other (non cryptoasset-specific) regulatory frameworks creates

legal risks and development hurdles for stablecoins within the EU.

Arguably, the EU legal framework that would intuitively apply to stablecoins is the electronic money (e-money) regime set out in the E-Money Directive,⁴⁶ given that the EU Commission describes e-money as “the digital alternative to cash, which enables users to store funds on a device (card or phone) or through the internet and to make payment transactions.” Under the E-Money Directive, e-money is formally defined as “[1] electronically, including magnetically, stored monetary value [2] as represented by a claim on the issuer [3] which is issued on receipt of funds [4] for the purpose of making payment transactions⁴⁶ [...] and [5] which is accepted by a natural or legal person other than the electronic money issuer.”

It is likely that any stablecoin would qualify in relation to points 1, 2 and 5 above as electronically stored monetary value which is issued for the purpose of making payment transactions and which is accepted by a natural or legal person other than the electronic money issuer. However, stablecoins do not necessarily represent a claim on the issuer and/or may not be issued on receipt of funds, which would both preclude an e-money classification.⁴⁷

If a stablecoin was created to comply with the definition of e-money, the issuer would have to be licensed under the regulations implementing the E-Money Directive in the EU Member State of the issuer’s incorporation. Such license would allow the stablecoin in question to be offered across the EU single market without risking a different categorization and without triggering any marketing restrictions. However, these benefits are quickly outweighed by certain specific requirements that apply to e-money

issuers and that may be unsuitable for most stablecoins.

For example, e-money issuers are required to comply with strict safeguarding requirements to protect customers. They must ensure that funds received in exchange for e-money (“**Relevant Funds**”) are either (i) placed in a separate account from the institution’s working capital and other funds, or (ii) are covered by an appropriate insurance policy or comparable guarantee.⁴⁸ When using the first method, it is permissible to invest the Relevant Funds in certain secure liquid assets as determined by the relevant regulatory authority, or retail investment funds licensed in the EU (undertakings for the collective investment in transferable securities or UCITS⁴⁹), but generally speaking there is little flexibility available to the issuer in respect of Relevant Funds. This requirement may be problematic for stablecoins collateralized by commodities or crypto-collateral.

Similarly, e-money holders have the right to redeem the monetary value of their e-money (i.e., the payment from the e-money issuer to the e-money holder of an amount equivalent to the remaining balance) at any time and at par value.⁵⁰ Depending on how local regulatory authorities apply this requirement, this may be problematic for any stablecoin with a variable redemption value calculated by reference to indices, baskets of currencies or any similar formula, but could more easily be complied with for a stablecoin pegged to a particular currency with a fixed redemption value.

The European payment services framework under the Payment Services Directive (the “**PSD**”) may also be relevant depending on how a particular stablecoin is used and the environment in which it operates. An example of this is where the stablecoin is used to make payments

45. Directive 2009/110/EC.

46. The term ‘payment transactions’ is defined by reference to Directive (EU) 2015/2366, the Payment Services Directive (PSD) and means “an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing [banknotes and coins, scriptural money or e-money], irrespective of any underlying obligations between the payer and the payee.”

47. The term ‘funds’ is not defined in the E-Money Directive. However, it is generally accepted that the definition of funds in the PSD applies and comprises “banknotes and coins, scriptural money or e-money.”

48. See Article 7 of the E-Money Directive.

49. Directive 2009/65/EC.

50. See Article 11 of the E-Money Directive.

more effective and efficient or, generally, to provide or facilitate the provision of payment services within the scope of the PSD. These include, among other things, services relating to the operation of payment accounts – for example, cash deposits and withdrawals from current accounts – execution of payment transactions, card issuing, merchant acquiring, and money remittance.⁵¹

The PSD regulates payment services relating to “funds,” which are defined as banknotes, coins, scriptural money and e-money.⁵² Therefore, payment services relating to stablecoins that meet the definition of e-money will generally fall within the scope of regulation under the PSD (subject to certain exclusions). Other types of stablecoins may also be used to facilitate the provision of regulated payment services relating to funds; for example, in the context of international money remittance. In this case, the parts of the payment service relating to “funds” (such as fiat currency) would continue to be regulated under PSD2, whilst the other parts of the service involving use of stablecoins may be unregulated, although, the provider would still have to obtain the requisite license for providing the service as a whole.

Where a stablecoin falls outside the scope of the E-Money Directive, there are other EU-wide regulatory frameworks that may apply.

In particular, stablecoins may qualify as units in an alternative investment fund (“AIF”) under the Alternative Investment Fund Managers Directive (“AIFMD”).⁵³ Under the AIFMD, subject to certain exclusions, an AIF is defined as “[1] any collective investment undertaking,⁵⁴ including investment compartments thereof, which [2] raises capital from a number of investors [3] with a view to investing it in accordance with a defined

investment policy [4] for the benefit of those investors and [5] which does not require authorisation pursuant to the UCITS Directive.”

A stablecoin with a redemption value which will vary depending on the performance of a group of underlying pooled assets (which could include fiat-collateralized coins such as Libra) could potentially be classified as an AIF, subject to meeting the various limbs of the definition of an AIF in practice. The effect of this is that the issuance, operation and marketing of such a stablecoin and its infrastructure would be regulated within a legal framework that applies to collective investment undertakings and has not been developed with stablecoins (or cryptoassets) in mind.

Outside the scope of the EU legislative framework, it is also necessary to consider regulatory constraints in each relevant individual EU Member State. While in some Member States, such as the UK and the Netherlands, the position is broadly consistent with the general position outlined above, this is not always the case. For example, in Germany,⁵⁵ the regulator has aligned its administrative practice to bring cryptocurrencies into its scope and existing financial services legislation will be extended to cover cryptocurrencies. In Italy, cryptoassets that are not financial instruments may still qualify as ‘financial products’ (triggering regulation broadly similar to that applicable to financial instruments). The Italian regulator recently launched a consultation proposing the introduction of a bespoke regime (on an opt-in basis) for cryptoassets that are not financial instruments. Subject to meeting certain requirements (including being offered through licensed platforms), such assets would be exempted from compliance with the ‘financial products’ framework.

51. See Annex I to the PSD.

52. See Article 4(25) of the PSD.

53. Directive 2011/61/EU.

54. The term ‘collective investment undertaking’ is not defined either in the AIFMD or under European law and is *per se* a very broad concept. The European Securities and Markets Authority has specified that it can take any legal form and that a key characteristic is that it “pools together capital raised from investors for the purpose of investment with a view to generating a pooled return for those investors.”

55. Germany’s Ministry of Finance has provided a draft law to implement Directive (EU) 2018/843 into German law which – among other things – will (i) define cryptoassets as financial instruments, thereby expanding the scope of licensable services under the German Banking Act in relation to cryptoassets, and (ii) implement a license requirement for custodian wallet providers.

Other jurisdictions, including Malta and Gibraltar, are one step ahead and have already developed bespoke cryptocurrency regimes. In France, the “loi Pacte,” enacted in May 2019, introduced a comprehensive new regulatory framework for digital assets. It covers tokens in the primary and secondary markets (i.e., initial coin offerings and digital assets service providers (DASP) respectively), establishing an optional licensing regime alongside a mandatory registration requirement with the French Autorité des marchés financiers (AMF) for providers of custody or fiat/cryptoasset exchange services. It is likely that stablecoins would fall within the scope of the definition of digital assets laid down by the “loi Pacte,” thus triggering either the mandatory or optional DASP registration provisions for relevant parties, depending on the type of services being provided in relation to the stablecoins. Bespoke legislation regimes may provide further flexibility than the standard EU position but will need to be considered carefully on a jurisdiction-by-jurisdiction basis.

Russia

For several years, Russia has been trying to adopt a balanced approach to digital assets. Two of the three bills proposed for the regulation of digital assets have recently been passed by the Russian Parliament and signed into law by the President.

The first law, which enters into force on October 1, 2019, introduces the general concept of “digital rights” into the Russian Civil Code but limits those rights to asset-backed and utility tokens, to be issued in an information system, such as a blockchain platform. Both the tokens and the blockchain platform or other information system will have to meet the requirements to be specified in further legislation. The second law regulates crowdfunding platforms, providing for the issuance of “digital utility rights” and enters into effect on January 1, 2020. The third law, which is yet to be adopted, is the key piece of legislation and is expected to introduce a detailed regulation of digital assets in Russia.

Neither the laws that have already been adopted nor the draft law on digital financial assets expressly regulate stablecoins. While it is reasonable to assume that collateralized stablecoins should fall into the category of asset-backed tokens under the Russian Civil

Code, they would have to either be expressly referred to, or otherwise satisfy eligibility criteria established by the law on digital financial assets or another specific law.

The attitude of Russian authorities to fiat-collateralized stablecoins may not be favourable as they have historically been negative about payment tokens on the basis that the Rouble must remain the only legal tender in Russia. At the same time, this is a fast-moving area and recently stated opinions of Russian authorities have ranged dramatically from proposing a complete ban on certain categories of digital tokens to giving their full endorsement and affording virtual currencies a status similar to foreign currencies.

Among other issues to be considered in connection with the issue and offering of any particular stablecoin in Russia are relevant regulatory matters (for example, in the case of a collateralized stablecoin, whether storing and managing such collateral is a regulated activity), money transfer and foreign exchange restrictions, as well as restrictions on offering of securities and derivatives established by Russian securities laws.

Middle East – United Arab Emirates (UAE)

In the UAE, there are financial free zones with specific licensing regimes for cryptoassets and payment services activities conducted in these free zones. Outside of such free zones, ‘onshore’ rules of the Central Bank of the UAE and the Securities and Commodities Authority apply.

The Dubai International Financial Centre (“**DIFC**”) and the Abu Dhabi Global Market (“**ADGM**”) apply UK-style financial regulations to activities conducted in or from their zones. Therefore, issuing stablecoins would generally be subject to e-money-type payment services licensing in the DIFC and ADGM as is described for the EU above. However, there are additional specific rules to consider in the ADGM.

ADGM financial free zone

The ADGM Financial Services Regulatory Authority (“**FSRA**”) published rules and accompanying guidance on June 25, 2018 (amended in May 2019) to create a comprehensive regime for operating a cryptoasset business (the “**OCAB**”

regime”).⁵⁶ The OCAB regime covers brokerage, custody, exchange and related activities in respect of specific ‘Accepted Crypto Assets’ which meet certain criteria (covered below) and are deemed acceptable to the FSRA. It provides a unique bespoke platform for the regulation of cryptoassets, and has been closely followed in approach by the Central Bank of Bahrain in its recent cryptoassets rulebook.

In connection with the OCAB regime, the FSRA has recently issued detailed regulatory guidance specifically in relation to stablecoins, covering how they fit in between its payment services rules and specific cryptoassets rulebook. The FSRA’s position is as follows:

- (i) It permits only those stablecoins which are fully collateralized 1:1 with fiat, and backed only by the same fiat currency it purports to be tokenizing – therefore other types of stablecoins (such as commodity or crypto-collateralized or non-collateralized stablecoins) may not be permitted.
- (ii) Such ‘fiat tokens’ are to be treated as a mechanism for issuing stored value (e.g., e-money) – similar to the DIFC (see below).
- (iii) Issuers of fiat tokens for the purposes of facilitating or effecting payments are treated as money services businesses (i.e., a payment services-type license is required) and will also have to satisfy various cryptoasset-specific rules of the FSRA, including detailed technology standards and acceptance criteria in respect of the stablecoins (see below).
- (iv) FSRA license holders must (a) consider which additional FSRA requirements may specially apply to the use of stablecoins, including, for example, what particular risk disclosures may be relevant to investors, and (b) apply the client money rules in the FSRA conduct of business rulebook in respect of fiat tokens.

Of interest, the FSRA also sets out in its guidance various scenarios and how its cryptoasset rules apply on top of traditional payment services rules for stablecoins. In particular, the cryptoasset rules require that the stablecoins themselves must generally comply with a set of criteria for ‘Accepted Crypto

Assets,’ which includes maturity and market capitalisation, security, traceability, reliability of distributed ledger or blockchain network and exchange connectivity. In addition, it is clarified that where a license holder uses a stablecoin purely within its own platform or ecosystem, an additional payment services license will not be required to issue such stablecoin.

DIFC financial free zone

In September 2017, the Dubai Financial Services Authority (“**DFSA**”) issued a warning statement to investors that cryptocurrency investments should be treated as high risk. The DFSA clarified that it does not regulate cryptocurrencies, or related initial coin offerings (“**ICOs**”), and that it would not currently license firms undertaking such activities. However, interest from firms engaging in cryptocurrency business to become licensed in the financial free zones remains high. It is understood that the DFSA is currently considering a licensing regime for cryptoassets. However, it is yet to be determined whether a similar approach to the ADGM would be followed or if, alternatively, a regime tailored towards payments or security tokens (more in line with existing regulated activities within the DIFC) will be adopted.

With respect to stablecoins specifically, DFSA regulations would apply where the activity amounts to ‘providing money services,’ specifically, money transmission, which means “(a) selling or issuing payment instruments; (b) selling or issuing stored value; or (c) receiving money or monetary value for transmission, including electronic transmission, to a location within or outside the DIFC.”

It is likely that most forms of fiat-collateralized stablecoins will fit into the category of selling or issuing stored value. However, other forms of payment services regulation (as well as currency exchange) could apply, depending on the circumstances.

Until now, due to restrictions in its founding law, the DFSA has been restricted in issuing licenses specifically for money services providers (but has permitted existing licensed firms to conduct such activities on an ancillary basis). However, DFSA policy may be changing in this regard. Nonetheless, at



56. The ADGM states that it has produced the world’s first comprehensive cryptoasset regulatory framework.

present, persons wishing to conduct money services in the DIFC, such as issuing stablecoins to investors, are likely to need to do so as a service ancillary to other regulated activities, such as accepting deposits or arranging investments. This is not inconsistent with most use cases for stablecoins.

Outside the financial free zones

In January 2017, the Central Bank of the UAE established a new licensing framework for persons issuing stored value facilities, which is likely to cover many forms of stablecoin. Currently, the licensing scope is uncertain as implementing rules are awaited (and expected in the coming months) to clarify the rules and permit license applications to be made.

Further, it remains unclear whether the Central Bank intends to regulate virtual currencies. The 2017 Central Bank framework for stored value facilities states that “[a]ll Virtual Currencies (and transactions thereof) are prohibited.” Following some confusion in the market, the Governor of the Central Bank issued a statement in February 2017 that clarifying that the regulations “do not cover Virtual Currency” and “do not apply to Bitcoin or other cryptocurrencies, currency exchanges, or underlying technology such as blockchain.” Thus far, no public action has been taken in respect of subsequent cryptocurrency activities taking place in the UAE. However, statements from the Central Bank have warned of the risks of dealing with cryptocurrencies and that it may issue future regulations in this area.

In addition, the UAE Securities and Commodities Authority (“**SCA**”) regulates derivatives of commodities and, in some cases, ‘contracts in commodities’ as securities. The SCA has also announced plans to shortly issue a licensing regime for cryptoasset business, focused towards regulating ICOs in the UAE. Whilst most forms of stablecoin will not be covered by such a regime, those which are linked to a basket of reference assets rather than treated as a mechanism of stored value may fall within the remit of the SCA.

Overall, issuing fiat-collateralized stablecoins, as a form of stored value, in the UAE is likely to be regulated as a form of payment services. Where stablecoins fit into other types of cryptoassets, specific restrictions or licensing requirements would apply in the ADGM, but the position is currently unclear in the rest of the UAE. Therefore, in anticipation of additional

regulations, a cautious approach should be adopted in the UAE in the absence of engagement with the relevant regulator.

Conclusion

Issuers of stablecoins with a projected global reach (like Facebook’s Libra) clearly face a challenging future in navigating this patchwork of international frameworks.

What does this mean for those interested in issuing or marketing stablecoins today? There is no one-size-fits-all solution for designing a regulatory analysis framework for stablecoins. The regulatory analysis will be affected by the laws and regulations of the relevant jurisdictions, the nature and characteristics of the stablecoin, and the activities and/or services relating to such stablecoin. Undertaking a detailed factual and legal assessment is a necessary step for issuers to assess relevant regulatory requirements and potential risks.

Overall, stablecoin issuers must think broadly about what could impact their regulatory position and ask the right regulatory questions. In addition to their home jurisdiction for the initial issuance of the stablecoin, issuers should always consider potentially relevant regulations which have an extraterritorial effect – for example, the regulations of the potential subscribers’, users’, and other service providers’ jurisdictions may affect how an issuer may market to, or accept payments from, such jurisdictions. They should also assess the legal nature of the stablecoin being offered or used in each relevant jurisdiction – the stablecoin may be considered a regulated instrument in one jurisdiction but not another. The issuance, usage, maintenance and/or transfer of the stablecoin by any stakeholder may trigger different regulatory considerations. Furthermore, in light of the potential global operation and usage of successful stablecoins and the increasingly stringent regulatory scrutiny and sanctions around anti-money laundering and counter-financing of terrorism, issuers should also ensure that financial crime concerns are carefully analyzed to comply with applicable regulatory obligations as well as manage reputational risks.

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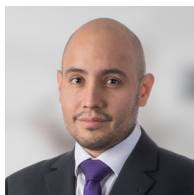
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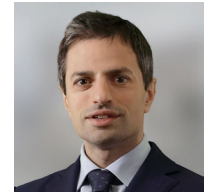


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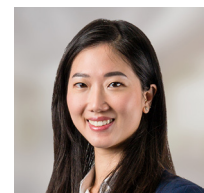
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