



**Legal and Market Update on Challenges for
Digital Assets in Thailand and Beyond**

July 29, 2022

Jirapong Sriwat, Apinya Sarntikasem, Soraviya Chasombat, Jeanne Elisabeth Donauw, Andhika Indrapraja, Akihiro Shiba, Melissa Tan, Peter Armstrong, Hudson Hamilton, Ha Hoang Loc

Legal and Market Update on Challenges for Digital Assets in Thailand and Beyond

1 Current Market Trend in Thailand

In response to the growing interest in owning cryptocurrencies in recent years, many companies in Thailand are now choosing to invest in or facilitate the rapidly growing cryptocurrency market. Just last year, SCBx Group (established under Siam Commercial Bank) announced its plan to acquire a 51% stake in Bitkub, a Thai-based cryptocurrency exchange, in a transaction worth approximately Baht 18 billion.¹ Despite the recent rumor that SCBx Group will back away from the Bitkub deal, should the deal eventually push through, Bitkub will officially become Thailand's second unicorn. Furthermore, a market survey indicated that as of February 2022, Tether ranked first (approximately 24.3%) as the most traded cryptocurrency in the entire Thai cryptocurrency market, followed by Kub (approximately 11.7%), Bitcoin (approximately 10.2%), Ethereum (approximately 7.7%), and the remaining percentage comprising of a mixture of lesser known cryptocurrencies.² Recent market predictions by independent advisors also placed Bitcoin, Ethereum, and Tether as the top three cryptocurrencies to invest in based on their market capitalization as of June 2022.³

Despite the heightened popularity of cryptocurrencies, the rules and regulations governing cryptocurrency in Thailand do not appear to facilitate the growth of the cryptocurrency market as the relevant authorities, namely the Securities and Exchange Commission (the “SEC”) and the Bank of Thailand (the “BOT”) seem to have adopted a rather critical stance towards cryptocurrency and have imposed legal obstacles which arguably hinder the development of the cryptocurrency market.

Before examining the recently introduced legal obstacles set in place by the Thai authorities, an introduction to the general framework governing cryptocurrencies in Thailand must first be laid out.

2 Regulation of Digital Assets under Thai Law

The first thing to note is that cryptocurrencies are deemed as “digital assets” under Thai law and are subject to the Emergency Decree on Digital Asset Business B.E. 2561 (2018) (the “**Digital Asset Decree**”) which entered into force on 14 May 2018. The main objective of the Digital Asset Decree is to control and regulate digital assets which include both cryptocurrencies and digital tokens.⁴

¹ “SCB’s Acquisition of Bitkub”, November 2021, <<https://www.scb.co.th/en/about-us/news/nov-2021/scbs-bitkub-online.html>>.

² “Market Share of the Most Traded Cryptocurrencies in Thailand as of February 2022”, March 3 2022, <<https://www.statista.com/statistics/1261964/thailand-leading-cryptocurrency-market-share/>>.

³ “10 Best Cryptocurrencies of June 2022”, June 6 2022, ”<<https://www.forbes.com/advisor/investing/cryptocurrency/top-10-cryptocurrencies/>>.

⁴ Section 3 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

Under the Digital Asset Decree, “cryptocurrency” is defined as a unit of electronic data created on an electronic system or network for use as a medium of exchange for the acquisition of goods, services, or any other rights or exchanging digital assets, and shall also include any other data units prescribed by the SEC.⁵ On the other hand, a “digital token” is defined as a unit of electronic data created on an electronic system or network for the purpose of specifying the right of a person to participate in an investment in any project or business or specifying the right of a person to acquire specific goods, specific service, or any other specific right under an agreement between the issuer and the holder, and shall include any other electronic data units of right prescribed by the SEC.⁶

The Digital Asset Decree further regulates digital asset businesses relating to: (1) digital asset exchange (i.e. a center or network established for trading or exchanging digital assets); (2) digital asset brokers (i.e. a person providing services as a broker or an agent for any person with respect to the trading or exchange of digital assets in return for remuneration); (3) digital asset dealers (i.e. a person providing services with respect to the trading or exchange of digital assets for its own account outside the digital asset exchange); and (4) any other prescribed activities related to digital assets.⁷ In 2020, the scope of “digital asset business” was subsequently expanded to include digital asset fund manager and digital asset advisory service.⁸

Some key points to take note is that a digital asset business operator must be a company incorporated under Thai law,⁹ and meet the prescribed minimum capital requirements.¹⁰ Before commencing business operations, a digital asset business operator must be granted a license from the Minister of Finance on the recommendation of the SEC.¹¹ If any digital asset business operator wishes to cease operation of its business after a license has been granted, it must obtain consent from the SEC to do so.¹²

In order to conduct an initial public offering of digital tokens (i.e. an initial coin offering or “ICO”), the issuer of digital tokens must first obtain permission from the SEC Office,¹³ as well as satisfy certain pre-requisites which include being a juristic person in the category of a limited company or a public limited company,¹⁴ and submit the registration statement and draft prospectus to the SEC

⁵ Section 3 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

⁶ Section 3 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

⁷ Section 3 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

⁸ Clause 1 of the Notification of the Ministry of Finance re: Prescribing Other Types of Related Businesses as Digital Asset Businesses B.E. 2563 (2020).

⁹ Section 3 of the Notification of the Ministry of Finance re: Permission to Undertake Digital Asset Business B.E. 2561(2018).

¹⁰ Section 2 of the Notification of the Securities and Exchange Commission No. Kor Thor. 20/2561 re: Minimum Paid Capital Requirements of Digital Asset Business License Applicant.

¹¹ Section 26 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

¹² Section 32 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

¹³ Section 17 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

¹⁴ Section 17 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

Office.¹⁵ Upon the fulfilment of such conditions, the offering can be made through an approved ICO Portal.¹⁶

It should be noted that the SEC has recently held a public hearing to propose tightening existing regulations on ICO for ready-to-use utility tokens by imposing a requirement on ICO portals to seek SEC approval for the issuance and listing of such tokens in both the primary and secondary market.¹⁷ Nonetheless, it remains to be seen whether such proposed regulations will be implemented.

In addition to prescribing the rules on the licensing requirements, the Digital Asset Decree further sets out certain rules regarding the prevention of unfair conduct in relation to the purchase or sale of digital assets. Such rules include prohibitions against insider trading, dissemination of false information, front running (i.e. the practice of dealing on advance information) and market manipulation.¹⁸

3 Status of Cryptocurrency under Thai Law

Although cryptocurrencies are legally recognized in Thailand, they are not deemed as lawful currencies and are therefore not considered legal tender, meaning that they cannot be used as a means of payment for goods and services. Joint discussions held between the BOT and the SEC earlier this year to regulate the activities of digital asset operators have led to the issuance of a Notification to prohibit the use of digital assets as a means of payment for goods and services. This ban is effective from 1 April 2022 onwards,¹⁹ and sets back all previous attempts by the private sector to develop the digital asset business landscape in Thailand. Bitkub and executives of The Mall Group had previously announced a plan that would have allowed customers to use cryptocurrencies to pay for goods at the branches of the shopping mall. However, it appears that those plans have now been discarded following this recent ban set forth by the BOT and the SEC.

The Notification prescribes in detail that digital asset business operators of all types are prohibited from providing services or acting in any manners which support or promote the use of digital assets as a means of payment for goods and services, which shall include advertising, soliciting or presenting oneself as ready to provide payment services to shops or establishing a system or a tool for facilitating payment of goods and services, or opening a digital wallet for the purpose of using digital assets as a means of payment for goods and services. Furthermore, if a digital asset business operator discovers

¹⁵ Section 17 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

¹⁶ Section 19 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

¹⁷ “SEC Thailand’s Public Hearing on Proposed Changes to the Regulatory Approach on Ready-to-use Utility Tokens and Digital Asset Exchange Supervision”, May 30 2022, <https://www.sec.or.th/EN/Pages/PB_Detail.aspx?SECID=811>.

¹⁸ Sections 38 - 50 of Emergency Decree on Digital Asset Business B.E. 2561 (2018).

¹⁹ Notification of the Securities and Exchange Commission No. Kor Thor 5/2565 Prescribing the Criteria, Conditions and Procedures on the Provision of Services by Digital Asset Business Operators Which Do Not Facilitate the Use of Digital Assets as a Means of Payment for Goods and Services.

that a client uses the account opened for the purpose of trading digital assets as a means of payment for goods and services, the digital asset business operator is legally required to issue a warning regarding the misuse of the account for the wrong purpose, and to take action towards the client whereby such action may include temporary suspension, termination of service, or any other action in a similar manner.

4 Trading Ban on NFTs and Other Previous Setbacks

On 11 June 2021, the SEC issued a Notification prohibiting digital exchange platforms from trading meme tokens (defined as having no clear objective, substance or underlying value, and whose price is based on social media trends such as Dogecoin and Shiba Inu), fan tokens (defined as being tokenised by the fame of social media influencers), NFTs (defined as a digital creation declaring ownership or grant of right in an object or specific right), and other digital tokens utilized in a blockchain transaction and issued by digital asset exchanges or related persons.²⁰

Nonetheless, the ban on the listing or trading of NFTs and the other digital tokens mentioned above only applies to licensed Thai-based digital asset exchange platforms, meaning that the trading of such digital tokens may be conducted on exchange platforms that are located outside of Thailand.

Despite the trading ban of such tokens and other setbacks by the Thai authorities, interest in digital assets and investment in digital asset businesses have skyrocketed. In March 2022, the opening of the Thailand Digital Arts Festival 2022 (TDAF2022) marked the first ever digital art festival in Thailand which showcased various art works ranging from sculptures, graphic art, graphic design, street art, photographs, and fashion design, featured in NFT format. The sale and purchase of such art works between creators and customers were transacted through Coral, an NFT marketplace platform operated by KASIKORN X, an autonomous venture builder that will serve to produce new businesses in the decentralized finance (DeFi) world which is supported by both KASIKORNBANK (KBank) and KASIKORN Business-Technology Group (KBTG).²¹ Coral serves as a gateway in allowing Thai artists to sell their artwork globally,²² as the purchase and sale of NFTs through Coral is akin to general online shopping. Unlike most platforms, Coral allows customers to purchase NFT artwork directly with fiat money (such as Thai Baht or US Dollars) whereby customers are not required to convert their fiat money to cryptocurrency prior to purchasing the artwork.

²⁰ Notification of the Securities and Exchange Commission No. Kor Thor. 18/2564 Re: Rules, Conditions and Procedures for Undertaking Digital Asset Businesses (No. 11).

²¹ <https://www.kasikornbank.com/en/news/pages/kasikorn-x.aspx>

²² “KBTG Unveils KASIKORN X and Debuting Coral”, 18 October 2021, <<https://www.kasikornbank.com/en/News/Pages/KASIKORN-X.aspx>>.

5 A Glance at Cryptocurrency Regulation in Other Jurisdictions

5.1 Indonesia

The use of cryptocurrency as a legitimate means of payment remains explicitly prohibited by Central Bank of Indonesia since 9 November 2016. In May 2021, when speaking at a discussion forum, an official of Central Bank of Indonesia reportedly said it did not anticipate cryptocurrency to be recognized as a form of legal tender in the near future.

Notwithstanding, crypto-assets are recognized as commodities that can be traded on Indonesia futures exchanges. Details with respect to the trading of crypto assets, including, criteria of crypto-assets that can be traded in the market, as well as requirements that crypto-asset trading platforms must satisfy, are subject to regulations issued by BAPPEBTI, a supervisory agency under Ministry of Trade responsible for supervising future exchanges and trading.

5.2 Japan

Japan introduced cryptocurrency regulations for user protection and AML/CFT (anti-money laundering and combating the financing of terrorism) by statutory amendment in 2016, and has since developed such regulations under the initiative of the principal regulator, the Financial Services Agency (the “FSA”). Now, generally speaking, Bitcoin and other cryptocurrencies are categorized as “crypto-assets” (*ango shisan*) as defined in the Payment Services Act (the “PSA”),²³ which are distinguished from security tokens, i.e., digital tokens representing a security under the Financial Instruments and Exchange Act (the “FIEA”), and stablecoins denominated or redeemed in fiat currency (and, in the future, any stablecoins categorized as “electronic payment instruments” (*denshi kessai shudan*) as defined in the PSA as amended by statutory amendments in 2022).

Operators of crypto-asset exchanges and operators of custodial crypto-asset wallets are required to be registered and regulated as “crypto-asset exchange service providers” under the PSA (except for crypto-asset custodians registered or licensed as a trust company).²⁴ Issuers of crypto-assets are also required to be registered and regulated as such unless their selling activities are fully entrusted to a “crypto-asset exchange service provider”. A broker or dealer for crypto-asset-based derivative transactions is required to be registered and regulated as a “financial instruments business operator” under the FIEA. These regulated service providers are also subject to the AML/CFT and sanction-related requirements under the Act on Prevention of Transfer of Criminal Proceeds and the Foreign

²³ “Crypto-assets” were called “virtual currencies” (*kasō tsuka*) in the regulations introduced by the 2016 statutory amendment and were renamed to “crypto-assets” by statutory amendment in 2019.

²⁴ In this regard, on June 30, 2022, the FSA proposed to remove a ban on crypto-asset custodial service by banks engaged in trust business.

Exchange and Foreign Trade Act as well as the rules of a self-regulatory organization named the “Japan Virtual and Crypto assets Exchange Association”.

Furthermore, the FIEA prohibits engaging in market abuse, such as market manipulation, involving the trade of crypto-assets or crypto-asset-based derivatives.

5.3 Singapore

The Monetary Authority of Singapore (the “MAS”), which serves as the central bank and financial regulatory authority of Singapore, adopts a two-part approach towards dealing with digital tokens and cryptocurrencies.²⁵ First, MAS strives to foster a conducive environment for activities in respect of digital tokens and cryptocurrencies to flourish in Singapore by, amongst others, encouraging talent development, providing grants for innovation,²⁶ and anchoring within Singapore strategic players at the forefront of digital asset innovation.²⁷ Second, MAS exercises caution by closely monitoring four identified risks in the crypto ecosystem, being money laundering and terrorism financing risks, technology and cyber risks, consumer protection and potentially, financial stability. MAS mitigates these risks and regulates providers of services in respect of digital tokens and cryptocurrencies on an activity basis; depending on the particular characteristics of the digital token or cryptocurrency, the Securities and Futures Act 2001 (the “SFA”) or Payment Services Act 2019 (the “PSA”) may apply.²⁸

Under the SFA, a person may not generally²⁹ carry on business in any regulated activity (including, amongst others, the dealing in capital markets products) unless the person is the holder of a capital markets services license for that regulated activity.³⁰ Part 2 of the Second Schedule of the SFA defines “dealing in capital markets products” to mean (whether as principal or agent) the making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to

²⁵ Please see “MAS’ Approach to the Crypto Ecosystem” - Summary of Keynote Interview by Mr Ravi Menon, Managing Director, Monetary Authority of Singapore, at the Financial Times’ Crypto & Digital Assets Summit on 27 April 2022 <<https://www.mas.gov.sg/news/speeches/2022/mas-approach-to-the-crypto-ecosystem>>.

²⁶ For the list of grants for innovation offered by MAS, please see <<https://www.mas.gov.sg/development/fintech/grants-for-innovation>>.

²⁷ For example, JP Morgan has partnered with DBS Bank and Temasek to establish Partior, which is a multi-currency, cross-border settlement platform, leveraging blockchain technology. Furthermore, R3, a global distributed ledger technology provider with roots as a banking consortium, has grown its innovation hub in Singapore to be the regional headquarters for Asia.

²⁸ Please note that under paragraph 2(i) of Part 2 of the First Schedule of the PSA, MAS has carved out from regulation under the PSA any payment service mentioned in Part 1 of the First Schedule of the PSA that is provided by any person licensed, approved, registered, regulated or exempted under, amongst others, the SFA, in any case where the payment service is solely incidental to or necessary solely for that person to carry on that person’s business in any regulated activity for which that person is so licensed, approved, registered, regulated or exempted under, amongst others, the SFA. This is to avoid double regulation and to facilitate the provision of financial services under, amongst others, the SFA. Please see MAS’ response to question 26 of the Frequently Asked Questions on the PSA issued by MAS (last updated on 7 March 2022).

²⁹ Please note that that no capital markets services license is required if the person is a person specified in the Third Schedule of the SFA or is exempted from the requirement to hold a capital markets services license under section 99 of the SFA.

³⁰ Please see section 82(1) of the SFA.

enter into any agreement for or with a view to acquiring, disposing of, entering into, effecting, arranging, subscribing for, or underwriting any capital markets products. Digital tokens or cryptocurrencies may potentially fall within the definition of “capital markets products” under section 2(1) of the SFA if, for example, they exhibit the features of (a) securities, as (i) shares, where the digital token or cryptocurrency confers or represents ownership interest in a corporation, represent liability of the holder in the corporation, and represents mutual covenants with other holders in the corporation as amongst themselves, or as (ii) units in a business trust, where the token or cryptocurrency confer or represent ownership interest in the trust property of a business trust; (b) units in a collective investment scheme (the “CIS”), where the digital token or cryptocurrency represents rights or interests in a CIS, or options to acquire rights or interests in a CIS; (c) debentures, where the digital token or cryptocurrency constitutes or evidences the indebtedness of the issuer of the digital token or cryptocurrency in respect of any money that is or may be lent to the issuer by the holder; and (d) securities-based derivatives contracts, which includes any derivatives contract of which, the underlying thing is a share, debenture or unit in a business trust.³¹ A capital markets services licensee is generally subject to, amongst others, requirements in respect of anti-money laundering and countering the financing of terrorism (the “AML/CFT”),³² risk disclosure,³³ business conduct³⁴ and cyber hygiene.³⁵

Under the PSA, a person must in general³⁶ not carry on a business of providing any type of payment service (including, amongst others, an “e-money issuance service” and “digital payment token service”) in Singapore, unless the person has in force a payment institution license³⁷ that entitles the person to carry on a business of providing that type of payment service.³⁸ An “e-money issuance service” is defined in Part 1 of the First Schedule of the PSA to mean the service of issuing e-money to any person for the purpose of allowing a person to make payment transactions.³⁹ A digital token or cryptocurrency may fall within the definition of “e-money” under section 2(1) of the PSA if it is an electronically stored monetary value that: (a) is denominated in any currency, or pegged by its issuer

³¹ Please see paragraph 2.3 of A Guide to Digital Token Offerings issued by MAS (updated 26 May 2020).

³² Please see the Notice SFA 04-N02 to Capital Markets Intermediaries on Prevention of Money Laundering and Countering the Financing of Terrorism and the Notice CMG-N01 on Reporting of Suspicious Activities and Incidents of Fraud.

³³ Please see regulation 47DA of the Securities and Futures (Licensing and Conduct of Business) Regulations (the “SF(LCB)R”).

³⁴ Please see the business conduct requirements set out in the SF(LCB)R.

³⁵ Please see the Notice CMG-N03 on Cyber Hygiene.

³⁶ Please note that no payment institution license is required if the person is an exempt payment service provider under section 13 of the PSA or if the payment service is not regulated under the PSA because it falls under Part 2 of the First Schedule of the PSA.

³⁷ Please note that the payment service provider may apply for either the standard payment institution license or major payment institution license pursuant to section 6 of the PSA. The payment service provider must apply for a major payment institution license if the average, over a calendar year, of the total value of all payment transactions that are accepted, processed or executed by the payment service provider in one month exceeds SGD3 million (or its equivalent in a foreign currency); if this threshold is not exceeded, then the standard payment institution license suffices.

³⁸ Please see section 5(1) of the PSA.

³⁹ Please see section 2(1) of the PSA for the definition of “payment transaction”.

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.⁴⁰ A “digital payment token service” is defined in Part 1 of the First Schedule of the PSA to mean, (a) any service of dealing in digital payment tokens, or (b) any service of facilitating the exchange of digital payment tokens.⁴¹ A digital token or cryptocurrency may fall within the definition of “digital payment token” under section 2(1) of the PSA if it is a digital representation of value (other than an excluded digital representation of value) 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 characteristics as MAS may prescribe. Like capital markets services licensees, licensees under the PSA are broadly required to comply with, amongst others, requirements in relation to AML/CFT,⁴² risk disclosure,⁴³ business conduct⁴⁴ and cyber hygiene.⁴⁵

Generally, MAS discourages the public from the trading of digital tokens given that they are highly risky and not suitable for the general public.⁴⁶ MAS has not endorsed or issued any digital tokens and cryptocurrencies for retail use,⁴⁷ and they are not recognized to be legal tender under Singapore law.⁴⁸

Most recently, on 5 April 2022, the Financial Services and Markets Bill (the “**FSM Bill**”) was passed by the Singapore Parliament which shall, amongst others, regulate digital token service providers created or operated in Singapore but conducts a business of providing digital token services purely outside of Singapore (the “**DTSPs**”), and require the DTSPs to be licensed.⁴⁹ In this regard, the FSM Bill serves to close the current regulatory lacuna as DTSPs are not presently regulated in Singapore.

⁴⁰ Please see section 2(1) of the PSA for, amongst others, the definitions of “currency” and “payment account”.

⁴¹ Please see paragraph 3 of Part 3 of the First Schedule of the PSA for the definitions of “dealing in”, in relation to any digital payment token, “facilitating the exchange of”, in relation to any type of digital payment token, “facilitating the exchange of digital payment tokens” and “digital payment token exchange”.

⁴² Please see the Notice PSN01 on Prevention of Money Laundering and Countering the Financing of Terrorism – Holders of Payments Services License (Specified Payment Services), Notice PSN02 on Prevention of Money Laundering and Countering the Financing of Terrorism – Holders of Payment Services License (Digital Payment Token Service) and Notice PSN03 on Reporting of Suspicious Activities & Incidents of Fraud.

⁴³ Please see the Notice PSN08 on Disclosures and Communications.

⁴⁴ Please see the Notice PSN07 on Conduct.

⁴⁵ Please see the Notice PSN06 on Cyber Hygiene.

⁴⁶ Please see the Guidelines on Provision of Digital Payment Token Services to the Public (Guideline No. PS-G02) issued by MAS on 17 January 2022.

⁴⁷ Please see footnote 25 above.

⁴⁸ Section 13 of the Currency Act 1967 of Singapore provides that MAS has the sole right to issue currency notes and coins in Singapore and only such notes and coins issued by MAS are legal tender in Singapore.

⁴⁹ Please see the “Financial Services and Markets Bill” – Second Reading Speech by Mr Alvin Tan, Minister of State, Ministry of Culture, Community and Youth & Ministry of Trade and Industry, and Board Member of MAS, on behalf of Mr Tharman Shanmugaratnam, Senior Minister and Minister-in-charge of the Monetary Authority of Singapore, on 4 April 2022 Second Reading of the Financial Services and Markets Bill of Singapore, <<https://www.mas.gov.sg/news/speeches/2022/financial-services-and-markets-bill-second-reading-speech-on-4-april-2022>>.

As a result of the FSM Bill, DTSPs will have to meet AML/CFT requirements that are aligned with the requirements imposed on digital payment token service providers regulated under the PSA. This move indicates that Singapore appears to have adopted a positive yet cautious approach towards digital tokens and cryptocurrencies.

5.4 Canada

In Canada, cryptocurrencies and digital tokens continue to garner great interest and popularity. Cryptocurrencies and digital tokens are not recognized as a form of legal tender in Canada, however, considering their continued popularity, as well as the broader shift away from the use of physical currencies, the Bank of Canada has announced its examination of the feasibility of token-based digital currencies⁵⁰.

Cryptocurrencies and digital tokens are primarily regulated under applicable securities laws. A “security” is broadly defined under Canadian securities laws and, notably, includes “investment contracts”. The Supreme Court of Canada identified the four key characteristics of an “investment contract” as: (i) an investment of money, (ii) in a common enterprise, (iii) with the expectation of profit, and (iv) this profit to be derived primarily from the efforts of others⁵¹ (the “**Investment Contract Test**”). Where a cryptocurrency or digital token meets these four attributes, it will be considered an investment contract and, therefore, a security under Canadian securities laws and subject to the regulations thereunder.

However, even where the elements of the Investment Contract Test are not satisfied, Canadian regulators may nonetheless determine a particular cryptocurrency or digital token should be characterized as an investment contract on policy grounds. The Canadian Securities Administrators (CSA) has announced that they will consider the substance of the relevant cryptocurrency or digital token over its form in considering whether securities laws will be applicable to same. The CSA continues to publish guidance as to the criteria that will be considered in determining whether a cryptocurrency will be characterized as an investment contract and subject to securities laws⁵², such as whether the relevant cryptocurrency is fungible, has a fixed value or is expected to be traded via a platform.

In an effort to support the growing cryptocurrency industry, Canadian securities regulators have also published guidance as to how securities legislation will be applied to cryptocurrency and digital token trading platforms (the “**Trading Platforms**”). On March 29, 2021 the CSA and the Investment

⁵⁰ Bank of Canada, *The Positive Case for a CBDC*, Staff Discussion Paper 2021-11, July 20, 2021.

⁵¹ *Pacific Coast Coin Exchange v. Ontario Securities Commission* [1978] 2 SCR 112.

⁵² Canadian Securities Administrators, Staff Notice 46-308 - Securities Law Implications for Offerings of Tokens (Canadian Securities Administrators, 2018).

Industry Regulatory Organization of Canada (the “IIROC”) published Staff Notice 21-329 *Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements* (the “Notice”) providing clarity as to the expectations of securities regulators with respect to the operation of Trading Platforms in Canada. It is hoped that a clear regulatory framework will encourage the further development of the cryptocurrency and digital token industry within Canada.

5.5 United States

Unlike Thailand, the U.S. maintains a generally positive outlook on the use of Bitcoin and other cryptocurrencies, despite the fact that few formal rules have been established. Interest in the regulatory framework surrounding cryptocurrency and blockchain can be seen among the various governmental agencies including the Department of Treasury, Internal Revenue Service (IRS), Financial Crimes Enforcement Network (FinCEN), Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC) and Department of Justice (DOJ). In March 2013, FinCEN stated that cryptocurrency exchanges are money services business on the basis that convertible virtual currencies are “other value that substitutes for currency”; as a result, cryptocurrency exchanges are subject to the Bank Secrecy Act and must register with FinCEN, implement anti-money laundering controls, and ensure ongoing compliance with recordkeeping and reporting requirements.⁵³ The IRS does not consider cryptocurrency to be legal tender but defines it as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value”, and deems it to be “property” for tax purposes.⁵⁴ In November 2021, the FRB, FDIC and OCC announced a “Crypto-Asset Policy Sprint Initiative” to identify areas where additional public clarity is warranted.⁵⁵ Further, in February 2022, DOJ announced the first Director of the National Cryptocurrency Enforcement Team, established “to ensure the department meets the challenge posed by the criminal misuse of cryptocurrencies and digital assets”.⁵⁶ These developments signal a cautious and measured approach towards cryptocurrency regulation.

At the moment, the federal government has not exercised its constitutional power to regulate blockchain and cryptocurrency to the exclusion of states and as there is currently no single law to regulate cryptocurrency at the federal level, the specific rules on cryptocurrency vary from state to state. However, on March 9, 2022, President Biden issued an Executive Order acknowledging the key role digital assets will play in global financial systems, and tasking numerous agencies with developing

⁵³ FinCEN 2012 Guidance issued on March 18 2013 Re: Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (FIN-2013-G001), <<https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>>.

⁵⁴ IRS Virtual Currency Guidance (IRS Notice 2014-21), <<https://www.irs.gov/pub/irs-drop/n-14-21.pdf>>.

⁵⁵ Crypto-Assets: Joint Statement on Crypto-Asset Policy Sprint Initiative and Next Steps (OCC Bulletin 2021-56), <<https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-56.html>>.

⁵⁶ <https://www.justice.gov/opa/pr/justice-department-announces-first-director-national-cryptocurrency-enforcement-team>

policies and regulatory frameworks to protect consumers, investors, and businesses in the crypto sphere.⁵⁷ The Executive Order further announced support for research and development of a central bank digital currency in the United States with “the highest urgency”. As a result, the regulatory landscape in the U.S. regarding digital assets is expected to change dramatically in the near future.

5.6 Vietnam

Contrary to Thailand, a comprehensive legal framework for cryptocurrencies and other digital assets has not yet been developed in Vietnam. In fact, the government has generally taken a prohibitive stance toward this industry since 2014, putting investors on notice that their cryptocurrency-related transactions may not be recognized or protected under the relevant laws. To date, the regulations governing this industry generally consist of directives issued by the prime minister and other competent authorities asserting that cryptocurrencies and other digital assets are neither recognized as legal tender nor legally acceptable assets or payment methods.

However, the prime minister issued a directive in 2017 approving an action plan to establish a legal framework for this industry, which remains in the preparatory stage. Furthermore, in the same year, the State Bank of Vietnam (the “**SBV**”), which plays a critical role in making recommendations on the issuance of new regulations regarding the management of digital currencies for the prime minister’s approval, expressly stated that cryptocurrency-related transactions (such as Bitcoin-related transactions and Litecoin-related transactions) are prohibited in Vietnam⁵⁸. As a result, a person (or legal entity) who commits any of these prohibited acts may be subject to both administrative sanctions and criminal liability, depending on the severity of the actual violation and its consequences⁵⁹. In an effort to reduce the risks of money laundering, terrorism financing, and tax evasion, the SBV’s latest directive published in 2018 urged credit institutions and intermediary payment service providers to cooperate with one another to prevent domestic and cross-border payments, card transactions, and money transfers involving virtual currencies⁶⁰. However, under Decision 942/QD-TTg, dated 15 June 2021, regarding the five-year Strategy for the Development of E-Government from 2021, the prime minister instructed the SBV to “research, develop, and pilot the use of virtual currencies based on blockchain technology⁶¹.” Although this appears to be a positive development for the cryptocurrency

⁵⁷ Executive Order on Ensuring Responsible Development of Digital Assets, <<https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>>.

⁵⁸ SBV’s official letter No. 5747/NHNN-PC dated 21 July 2017 in response to a proposal to mine Bitcoin, Litecoin and other virtual currencies in Vietnam.

⁵⁹ SBV’s official letter No. 5747/NHNN-PC dated 21 July 2017 in response to a proposal to mine Bitcoin, Litecoin and other virtual currencies in Vietnam.

⁶⁰ SBV’ directive No. 02/CT-NHNN dated 13 April 2018 on strengthening the management of virtual currencies in Vietnam.

⁶¹ The SBV has not clarified what “virtual currencies based on blockchain technology” mean from their standpoint. However, based on the responses of the SBV’s representative to the media, cryptocurrency appears to be included.

industry, at the time of this publication, there is no further indication from the SBV that it will follow through.

It is important, therefore, for investors to be aware of the possibility that their legitimate interests may not be protected under Vietnamese law in the event of a dispute involving cryptocurrency-related transactions given the absence of a legal framework and various prohibitions in place.

6 Conclusion

The future outlook on the regulatory landscape for cryptocurrency (or digital assets) in Thailand is uncertain as the Thai government's current attitude on this matter appears to be conservative and wary towards new technology. It may take a few years before the government completely warms up to cryptocurrency altogether and issues new rules to remove the current barriers that prevent the digital asset market in Thailand from fully developing. Until then, it is likely that Thai cryptocurrency investors and enthusiasts alike will seek out overseas cryptocurrency platforms which are subject to less restrictive rules.

NISHIMURA&ASAHI

SCL Nishimura & Asahi Limited
34th Floor, Athenee Tower, 63 Wireless Road
Lumpini, Pathumwan, Bangkok 10330, Thailand
Tel: +66-2-126-9100

<https://www.nishimura.com/en/>