HOW INITIAL COIN OFFERINGS ("ICOS") ARE REGARDED OR REGULATED IN VARIOUS COUNTRIES

Posted on December 1, 2017

Category: CNPupdates

Date Published: 1 December 2017

Author: Quek Li Fei.

In previous articles in this on-going series of articles, we discussed crypto currencies; block chain, smart contracts and ICOs, including how the Monetary Authority in Singapore regard ICOs. This article provides a summary of how some countries around the world presently regard or regulate ICOs.

In a few jurisdictions, notably, in China and South Korea, the country's regulators have adopted a total ban approach whilst in other countries, there may still be no definitive statement on the regulatory treatment of an ICO. In quite a number of countries, the regulators seem to have taken a more conciliatory but strict approach of requiring ICOs which constitute "securities" under their domestic laws (eg. If they resemble offers of shares, debt (debentures) or units in a collective investment scheme or a managed investment scheme) to comply with existing laws on offers of securities. This article will cover the following countries, viz. Singapore, China, Hong Kong, the United States of America, the United Kingdom, Australia, Malaysia, Thailand, Philippines and South Korea.

SINGAPORE

On 14 November 2017, the Monetary Authority of Singapore ("**MAS**") issued A Guide to Digital Token Offerings ("**Guide**").

MAS defines "digital tokens that constitute capital market products" as digital tokens representing equity in a corporation, a debenture of the issuer, or a unit in a collective investment scheme ("**CIS**"). Any offer of digital tokens will be required to comply with the Securities and Futures Act (Cap. 289) ("**SFA**"), including the filing of a prospectus. The current exemptions under the SFA apply, including a "small offer" (personal offer not exceeding $5 million in any 12 month period); a private placement offer to a maximum 50 persons within any 12 month period; an offer to institutional investors only; and an offer to accredited investors. Also, as per the SFA, advertising restrictions apply except for an offer to institutional investors only.

Offers of units in a CIS are subject also to authorisation or recognition requirements and to compliance with investment restrictions and business conduct requirements set out in the SFA.
MAS observed that one or more of the following types of intermediaries typically facilitate offers or issues of digital tokens:

1. a person who operates a platform on which one or more offerors of digital tokens may make primary offers or issues of digital tokens ("primary platform");
2. a person who provides financial advice in respect of any digital tokens; and
3. a person who operates a platform at which digital tokens are traded ("trading platform"). A person who operates a primary platform in Singapore in relation to digital tokens which constitute any type of capital markets products, may be carrying on business in one or more regulated activities under the SFA. Where the person is carrying on business in any regulated activity, or holds himself out as carrying on such business, he has to obtain a capital markets services licence for that regulated activity under the SFA, unless otherwise exempted.

A person who provides any financial advice in Singapore in respect of any digital token that is an investment product, must be authorised to do so in respect of that type of financial advisory service by a financial adviser's licence, or be an exempt financial adviser, under the Financial Advisers Act (Cap.110)

A person who establishes or operates a trading platform in Singapore in relation to digital tokens which constitute securities or futures contracts, may be establishing or operating a market and a person who establishes or operates a market, or holds himself out as operating a market, must be approved by MAS as an approved exchange or recognised by MAS as a recognised market operator under the SFA new, unless otherwise exempted.

The MAS made it clear that MAS notices on anti-money laundering ("**AML**") and anti-terrorist financing ("**ATF**") apply to digital token offerings. Thus persons involved have to report suspicious transactions and ensure that they do not deal with or provide financial services to

persons who are designated individuals or entities under the Terrorism (Suppression of Financing) Act (Cap 325).
A new payments services framework will be developed with rules dealing with money laundering and terrorism financing risks in the exchange and dealing of crypto currencies for fiat or other virtual currencies. Intermediaries involved in the payment and remittance process will be obliged to implement appropriate policies and control measures to adequately address such risks. These include customer due diligence; keeping good records; monitoring and screening transactions and reporting suspicious transactions.

The Guide also provides 6 case studies to illustrate how the securities laws administered by MAS may apply. Please note that the case studies are for the purpose of illustration only; are not exhaustive and are not indicative or conclusive of how the securities laws will apply to a particular case involving an offer or issue of digital tokens. The illustrations in the case studies are also not exhaustive. MAS encourages persons who wish to offer digital tokens in Singapore or operate a platform involving digital tokens in Singapore to seek professional advice from qualified legal practitioners to ensure that their proposed activities are in compliance with all applicable laws, rules and regulations in Singapore.

CHINA

On 4 September 2017, China imposed an outright ban on ICOs with financial regulators in China calling a stop to digital token trading, effectively closing down all crypto currency exchanges in the country.

In a joint statement issued by several of China's financial regulators (viz. the People's Bank of China, the Central Network Office, the Ministry of Industry and Information Technology, the State Administration for Industry and Commerce, the China Banking Regulatory Commission), it was stated (amongst other things) that: "ICO financing refers to the activity of an entity raising virtual currencies, such as bitcoin or ethereum, through illegally selling and distributing tokens. In essence, it is a kind of non-approved illegal open fund raising behaviour, suspected of illegal sale tokens, illegal securities issuance and illegal fund-raising, financial fraud, pyramid schemes and other criminal activities.".

Further, the statement went on to say that "as of the date of this announcement, all types of currency issuance financing activities shall cease immediately".

The statement also prohibited financial institutions like banks from doing business with ICO funding. Other provisions in the statement went as far as to require that those who completed their ICOs should refund their investors; protect their investors' rights and that persons who do not cease ICO activities or who do not refund their investors will be "investigated and severely punished according to the law.".

HONG KONG

On 5 September 2017, the Securities and Futures Commission ("**SFC**") issued a Statement on ICOS. The Statement states that, "depending on the facts and circumstances of an ICO, digital tokens that are offered or sold may be "securities" as defined in the Securities and Futures Ordinance (SFO), and subject to the securities laws of Hong Kong.".

Offering of securities

The Statement went on to say as follows: "ICOs typically involve the issuance of digital tokens, created and disseminated using distributed ledger or blockchain technology. ICO scheme operators may promise buyers of digital tokens that the proceeds of an ICO will be used to fund development of a digital platform or related software which the token holders can subsequently access. Some token holders expect to make a return on their investment by reselling on the cryptocurrency exchanges. Whilst digital tokens offered in typical ICOs are usually characterised as a "virtual commodity", the SFC has observed more recently that certain ICOs have terms and features that may mean that they are "securities".".

The SFC takes the position that where digital tokens offered in an ICO represent equity or ownership interests in a corporation, these tokens may be regarded as "shares". Thus, if a token holder is entitled to rights similar to a shareholder, including the right to receive dividends and the right to participate in the distribution of the corporation's surplus assets upon a winding up, then the token will likely be regarded as a share for regulatory purposes.

The Statement also states that: "where digital tokens are used to create or to acknowledge a debt or liability owed by the issuer, they may be considered as a "debenture".".

Further, the Statement also provides that: "If token proceeds are managed collectively by the ICO scheme operator to invest in projects with an aim to enable token holders to participate in a share of the returns provided by the project, the digital tokens may be regarded as an interest in a "collective investment scheme" (CIS).".

Under Hong Kong law, shares, debentures and interests in a CIS are regarded as "securities".

Engaging in regulated activities

Dealing in, advising on or marketing or managing digital tokens in an ICO which are considered "securities" will likely also be a "regulated activity" under Hong Kong law and parties involved in such activities must be duly licensed by the SFC in order to carry out any of the activities in Hong Kong or offer such securities or services to members of the public in Hong Kong.

In the Statement, it is made clear that where an ICO involves an offer to the Hong Kong

public to acquire "securities" or participate in a CIS registration or authorisation requirements under Hong Kong law may be triggered unless an exemption applies.

Finally, the Statement provides that parties engaging in the secondary trading of such tokens (eg, on cryptocurrency exchanges) may also be subject to the SFC's licensing and conduct requirements. Certain requirements relating to automated trading services and recognised exchange companies may be applicable to the business activities of cryptocurrency exchanges.

USA

The U.S. Securities and Exchange Commission ("**SEC**") has ruled that digital coins and tokens from ICOs are considered as securities and subject to federal securities laws. As such, it is not easy for U.S. companies to hold an ICO or for U.S. citizens to participate as they have to be registered and comply with applicable securities laws.

In its investigative report published on July 25, 2017, the SEC stated "that issuers of distributed ledger or blockchain technology-based securities must register offers and sales of such securities unless a valid exemption applies.". Whilst it should be noted that the report was predicated largely on the SEC's study and evaluation of a token offering facilitated by "The Dao" which was unfortunately hacked into and suffered from theft by the hackers, the findings and statements in the report are instructive of the SEC's approach to ICOs.

It seems clear from the SEC report that persons participating in unregistered offerings also may be liable for violations of the securities laws. Moreover, securities exchanges facilitating trading in digital tokens which are regarded as securities have to register unless they are exempt under current federal securities laws regulations. The registration provisions of the federal securities laws ensure that investors are sold investments that include all relevant disclosures and are made subject to regulatory overview to protect investors.

SEC Chairman Jay Clayton said: "*The SEC is studying the effects of distributed ledger and other innovative technologies and encourages market participants to engage with us..." and also: "We seek to foster innovative and beneficial ways to raise capital, while ensuring - first and foremost - that investors and our markets are protected.*".

Director of the Division of Corporation Finance, William Hinman said that: "Investors need the essential facts behind any investment opportunity so they can make fully informed decisions, and today's Report confirms that sponsors of offerings conducted through the use of distributed ledger or blockchain technology must comply with the securities laws.".

In the U.S. the Howey Test is used to help determine if an instrument would be considered

as a security under U.S. securities law. Briefly put, the Howey test describes an instrument as being an "investment contract" (for the purpose of the Securities Act of 1933: "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.".

In the U.S., issuers cognisant of U.S. securities laws may rely on a common exemption to the requirement that issuances of new securities be registered under the securities laws (which would require issuers of ICOs to comply with a considerable number of regulations and incur not inconsiderable expense in doing so). This is Regulation D, Rule 506(c), which provides a safe-harbor exemption from federal securities law registration if the only investors who participate in a private placement are "accredited investors". The definition of "accredited investor" includes anyone with a "net worth" of over $1 million.

A common option presently used in order to bring token sales within the compliance framework under U.S. securities laws and for investors to participate in upcoming token sales in the U.S. is by utilising SAFT, which stands for a "simple agreement for future tokens".

The SAFT agreement helps address the concerns of the SEC in respect of ICOs and assists digital token issuers to participate in the crypto capital markets in a more regulated context and provides potential investors with more legal protection. Companies with blockchain technology use SAFTs to approach accredited investors to invest in their venture in exchange for future tokens. The SAFT would normally be registrable with the SEC as a security offering.

UNITED KINGDOM

In the United Kingdom, the Financial Conduct Authority ("**FCA**") has stated that: "Whether an ICO falls within the FCA's regulatory boundaries or not can only be decided case by case. Many ICOs will fall outside the regulated space. However, depending on how they are structured, some ICOs may involve regulated investments and firms involved in an ICO may be conducting regulated activities. Some ICOs feature parallels with Initial Public Offerings (IPOs), private placement of securities, crowdfunding or even collective investment schemes. Some tokens may also constitute transferable securities and therefore may fall within the prospectus regime.".

The regulatory approach taken by the FCA is similar to that adopted by the SEC in the U.S., the ASIC in Australia and the MAS in Singapore. Basically, whilst not all ICOs would necessarily be regarded as securities (or in the language used by the FCA, "transferable securities"); insofar as any ICOs contain features consistent with that of securities or collective investment schemes; the issuers will have to comply with applicable UK laws relating to the offer of securities.

In the UK, the applicable securities legislation is the Financial Services and Markets Act 2000 ("**FSMA**") and related legislation. Three particular relevant areas mentioned in the FSMA are:

1. The prohibition in dealing in transferable securities for which no prospectus has been published (section 85 FSMA);
2. The "General Prohibition" on engaging in regulated activities (section 19 FSMA); and
3. The prohibition on communicating investment promotions in the course of business (section 21 FSMA).

A prospectus will be required to be filed for an offer of "transferable securities" to the public. The definition of "transferable securities" leads to the statutory definition which in turn refers to a directive of the European Parliament.

"Securities" means (except in section 74(2) and the expression "transferable securities") anything which has been, or may be, admitted to the official list.

"Transferable securities" means anything which is a transferable security for the purposes of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments, other than money-market instruments for the purposes of that directive which have a maturity of less than 12 months.

And that Directive states:
18) "Transferable securities" means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

1. shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
2. bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
3. any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measure

"Financial instrument" has (except in section 89F) the meaning given in Article 1.3 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (as modified by Article 69 of Directive 2004/39/EC on markets in financial instruments).

With regard to "financial instruments," which are also considered "securities", Section 102A defines these as

- transferable securities as defined in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field,

- units in collective investment undertakings,
- money-market instruments,
- financial-futures contracts, including equivalent cash-settled instruments,
- forward interest-rate agreements,
- interest-rate, currency and equity swaps,
- options to acquire or dispose of any instrument falling into these categories, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates,
- derivatives on commodities,
- any other instrument admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such a market has been made.

Unlike in the US, where the Howey Test (see section above on USA) provides a fairly flexible, common law like definition of what constitutes a "security", the statutory definition(s) in the UK are prescriptive in nature and therefore, if any ICO offers tokens which contain characteristics identifiable as being "transferable securities", then such ICO will likely be governed by UK securities laws.

AUSTRALIA

The Australian regulatory authorities have taken a similar position as that taken by the MAS in Singapore. The Australian Securities and Investments Commission ("**ASIC**"). In a statement available on their website, ASIC said that "*An ICO must be conducted in a manner that promotes investor trust and confidence, and complies with the relevant laws. Whether the Corporations Act applies to an ICO will depend on the type of ICO offering and what rights attach to the coins from the ICO itself, underlying coins or tokens used in the ICO...*".

The ASIC has said that: "*In Australia, the legal status of an ICO is dependent of the circumstances of the ICO, such as how the ICO is structured and operated, and the rights attached to the coin (or token) offered through the ICO.*

In some cases, the ICO will only be subject to the general law and the Australian consumer laws regarding the offer of services or products. In other cases, the ICO may be subject to the Corporations Act.".

An ICO may be considered a managed investment scheme:

An issue of an ICO would have to comply with the requirements of the Corporations Act if it constitutes a managed investment scheme ("**MIS**"). To determine this, an assessment of the rights attached to a coin (or token) to be issued under an ICO is the key consideration. In addition, ASIC elaborates that what is a right is to be interpreted broadly and includes rights

that may arise in the future or on a contingency (viz. upon the occurrence of a specified event), and rights that may not be legally enforceable. If the value of the coin is related to the management of such an arrangement, the issuer of the ICO is likely to be considered as offering an MIS.

In some cases, ICO issuers may frame the entitlements received by contributors as a receipt of a purchased service. However, if the value of the digital coins acquired is affected by the pooling of funds from contributors or use of those funds under the arrangement, then the ICO is likely to fall within the requirements relating to MIS. Where what is being offered possesses the attributes of an investment, this is likely to be the case. If an MIS is being used there are a range of disclosure, registration and licensing obligations under the Corporations Act.

When could an ICO be an offer of shares?

When an ICO is created in order to fund a company (or to fund an undertaking that appears to be a company) then the rights attached to the coins issued by the ICO may constitute an offer of shares. If the rights attached to the coin (which are generally found in the ICO's 'white paper', a document issued by an ICO which may appear to be similar to a prospectus) are similar to rights commonly attached to a share-such as if there appears to be ownership of the body, voting rights in decisions of the body or some right to participate in profits of the body shown in the white paper-then the coins may fall within the definition of shares.

Where it appears that an issuer of an ICO is actually making an offer of shares, the issuer will need to prepare a prospectus similar to that required for initial public offers (IPOs). Note however, that whilst an ICO may appear to be similar to an IPO, the ICO may not offer the same protections to the investors. Where a prospectus for an IPO does not contain all the required information, or includes misleading or deceptive statements, investors may be able to withdraw their investment before the shares are issued. No such protection exists for ICOs made without a prospectus.

Australian market licence:

A financial market is a facility through which offers to acquire or dispose of financial products are regularly made. Anyone who operates a financial market in Australia must obtain a licence to do so or otherwise be exempted by the Minister.

In the event that the ICO (or underlying) coin is found to be a financial product (whether it is a managed investment scheme, share or derivative), then any platform that enables investors to buy (or be issued) or sell these coins may involve the operation of a financial market and the platform operator will be required to hold an Australian market licence

unless covered by an exemption.

MALAYSIA

The Securities Commission of Malaysia ("**SC**"), issued a statement on ICOs on 7 September 2017. The Statement warned consumers on participating in ICOs. Relevant portions of the Statement are reproduced below: Investors should be mindful of the potential risks involved in ICOs schemes, and take note that:

- Scheme operators may not have presence in Malaysia and it would be difficult to verify the authenticity of the scheme and the recovery of invested monies may be subject to foreign laws or regulations
- Some ICO schemes and the parties involved operate online and may not be regulated, investors may be exposed to heightened risks of fraud, money laundering and terrorism financing
- Digital tokens traded on a secondary market may give rise to risks of insufficient liquidity or volatile and opaque pricing
- The structure of these ICO schemes might limit the legal protection and recourse for investors against scheme operators.

However, the position taken by the regulatory authorities in Malaysia has not yet been settled and there is even a possibility (although this would a remote possibility) of a blanket ban (like that imposed in China and in South Korea). The position in Malaysia should be clearer by the end of this year, 2017. Mr. Muhammad bin Ibrahim (Governor, Bank Negara Malaysia {"BNM"}) speaking to reporters on the sidelines of the 9th International Conference on Financial Crime and Terrorism Financing in Kuala Lumpur held on 4 & 5 October 2017 mentioned upcoming regulations for the cryptocurrency sector. As reported by The Malaysian Insight, he did not rule out a complete ban on cryptocurrencies: "This (ban on cryptocurrencies is something that we will decide on by the end of the year... The guidelines that BNM is set to announce by the end of the year would reveal the country's approach to cryptocurrencies.". The BNM guidelines (including guidelines on anti-money laundering and anti-terrorist financing) are expected to be issued by this year end.

THAILAND

In Thailand, the Securities and Exchange Commission ("**SEC**") appears to have taken a positive approach to ICOs. The SEC's statement on ICOs issued on 14 September 2017 is reproduced here:
"The Securities and Exchange Commission, Thailand (SEC Thailand) has been following the development and the growing popularity of initial coin offerings (ICO). ICO refers to a digital

way of raising funds from the public. In an ICO process, ICO issuer will offer digital tokens in exchange for cryptocurrency, such as Bitcoin or Ether. Since the digital tokens can diverge widely in design and representation, some may resemble financial returns, rights and obligations in similar ways to securities under the Securities and Exchange Act.

ICO has gained popularity among tech startups as a convenient and timely way to access funding. In the past few months, ICO has grown exponentially and has surpassed early stage venture capital funding. As a result, financial regulators, including the SEC Thailand, are concerned that in some cases ICO may be deliberately used as a tool for fraud or scam.

The SEC Thailand encourages access to funding for businesses, including high potential tech startups, and realizes the potential of ICO in answering startups' funding needs. In cases where an ICO constitutes offering of securities, the issuer will need to comply with applicable regulatory requirements under the SEC Thailand's purview.

Nevertheless, the SEC Thailand understands the unique environment in which tech startups operate and realizes that ICO may not yet fit neatly with SEC Thailand's current regulatory framework. Therefore, to strike the balance between supporting digital innovation and protecting investors from potential ICO scams, the SEC Thailand is considering appropriate approaches on ICO and welcomes comments and suggestions from the private sector.

The SEC Thailand would like to advise any investor interested in investing in an ICO to seek to understand the benefits and risks associated with the ICO. In addition to general risks faced by startups, investors are exposed to heightened risks of price volatility, inadequate liquidity, cyber security, as well as potential fraud and scam. Given ICO's cross-border nature, legal protection and recourse for investors may be limited or not applicable in most cases.".

Therefore, we may expect to see further statements from the SEC and in time, possibly new laws or revisions of current laws and regulations to govern ICOs.

PHILIPPINES

The Securities and Exchange Commission ("**SEC**") of the Philippines has also taken a tentative and supportive approach towards cryptocurrency and ICOs. Reported in a Manila Times report: Speaking at a news conference on 21 November 2017, SEC commissioner Emilio Aquino said that his agency could class ICO offerings as "possible securities" under the Securities Regulation Code.
According to Aquino, the SEC's move is in line with regulations passed by the U.S. SEC, and other regulators in Malaysia, Hong Kong and Thailand. Recognizing the growing popularity of the blockchain funding use case, Aquino said regulators were eyeing rules to protect consumers.

The commissioner also revealed the SEC is currently in talks with the Bangko Sentral ng Pilipinas (BSP), the country's central bank, with regard to the licensing of cryptocurrency exchanges. He also said that some companies have already been "registered and endorsed" by the BSP, to conduct money services businesses working in remittances.

BSP's Governor, Nestor Espenilla Jr. said: "*The change could see other cryptocurrency exchanges allowed to function as money changers, ...*". To date, BSP has registered two exchanges with additional ones under consideration.

SOUTH KOREA

South Korea's Financial Services Commission ("**FSC**") on 29 September 2017 banned the raising of money through virtual currencies. The FSC stated that all kind of ICOs would be banned as trading of virtual currencies require tight control and monitoring. Mention was made of "stern penalties" on any parties (including financial institutions) involved in issuing ICOs.

CONCLUSION

The manner in which government regulators in different countries around the world treat ICOs ranges from there being no official statements on how ICOs are presently regarded from a regulatory standpoint including whether any, existing legislation apply to ICOs to a total ban on ICOs and coin exchanges-(China and South Korea) and somewhere in between in countries where the financial regulatory authorities have issued statements on how tokens offered in ICOs which possess the legal attributes of securities will be regarded as securities and subject to compliance with existing legal and regulatory requirements for offers of securities.

The tough(er) approach by regulators in some countries has positive effects on the industry as a whole. A nuanced regulatory approach with clear policy statements and directions on applicable statutory and regulatory compliance should motivate blockchain startups to provide more fleshed out concepts and solidify their intended offerings, including demonstrating likely market viability first before being able to get public money. However, on the flip side, startups without a war chest or access to other viable funding sources may find it difficult to get their projects off the ground.
A sustainable approach would be to implement applicable existing legislation when appropriate or where necessary or between ICO issuers and ICO investors. The legislation and regulations should ultimately weed out fly-by-night operators; offer adequate legal safeguards and protection for consumers, allow consumers to choose to participate in funding projects which interest them and not stifle (or at least not actively discourage) entrepreneurial persons with sound projects from obtaining collaborative funding.