中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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20 January 2025

Ms Tanna CHONG
Acting Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)5
Financial Services and the Treasury Bureau
24/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms CHONG,

Stablecoins Bill

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the matters set out in the **Appendix**.

Please let us have your response in both Chinese and English before the second meeting of the Bills Committee.

Yours sincerely,

(Mark LAM)
Assistant Legal Adviser

Encl.

c.c. Hong Kong Monetary Authority
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Appendix

Clause 3 of the Bill

Under clause 3(1) of the Bill, "stablecoin" is proposed to mean, for the purposes of the Bill, a cryptographically secured digital representation of value that, among others, is operated on a distributed ledger or similar information repository. Pursuant to clause 3(3) of the Bill, "distributed ledger" is proposed to mean an information repository that uses a technology through which records of transactions are (a) held in a ledger; (b) shared across a network; (c) verified among network participants using a consensus mechanism; and (d) synchronized between network nodes.

2. Please clarify, for the purposes of the proposed definition of "distributed ledger", the meanings of "consensus mechanism" and "network node" and consider whether their definitions should be provided for in the Bill for the sake of clarity and certainty. It is noted that the relevant regulation of the European Union provides for the definitions of "consensus mechanism" (i.e. the rules and procedures by which an agreement is reached, among distributed ledger technology ("DLT") network nodes, that a transaction is validated) and "DLT network node" (i.e. a device or process that is a part of a network and that holds a complete or partial replica of records of all transactions on a distributed ledger) (see article 3(1), points (3) and (4), of the Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 ("EU Regulation")).

Clause 5(1)(a)(i) and (ii) of the Bill

3. Under clause 5(1)(a)(i) and (ii) of the Bill, a person would be regarded as, for the purposes of the Bill, carrying on a "regulated stablecoin activity" if the person issues a specified stablecoin in Hong Kong in the course of business, or the person issues a specified stablecoin in a place outside Hong Kong in the course of business and the specified stablecoin purports to maintain a stable value with reference (whether wholly or partly) to Hong Kong dollars.

4. We note that paragraph 3.1.6 of the Consultation Conclusions on the Legislative Proposal to Implement the Regulatory Regime for Stablecoin Issuers in Hong Kong issued by the Financial Services and the Treasury Bureau ("FSTB") and the Hong Kong Monetary Authority in July 2024 ("Consultation Conclusions") stated that "determining whether an fiat-referenced stablecoin ("FRS") is issued in Hong Kong will depend on the facts and circumstances of each case. We will consider factors such as the FRS issuer's place of incorporation, the location of its operations, provision of subsequent customer service to FRS users, and whether Hong Kong bank account is used to process issuance and redemption requests. We will provide further guidelines on this matter.".

5. Please clarify:

(a) the factors for determining whether a specified stablecoin would be regarded as issuing in Hong Kong, or in a place outside Hong Kong, in the course of business; and

(b) whether those factors would be provided for in the guidelines to be issued and published in the Gazette by the Monetary Authority ("MA") under clause 170 of the Bill.

Clauses 5(2) and 6(3) of the Bill

6. Under clauses 5(2) and 6(3) of the Bill, a person would be regarded as holding out as carrying on a regulated stablecoin activity or offering a specified stablecoin if the person actively markets, whether in Hong Kong or elsewhere, to the public (i.e. the public of Hong Kong, including a class of that public (see clause 2 of the Bill)) that the person carries on, or purports to carry on, a regulated stablecoin activity or the offering of a specified stablecoin.

7. We note that paragraph 3.1.3 of the Consultation Conclusions stated that multiple factors would be taken into account in determining whether a person is "actively marketing" an issuance of FRS to Hong Kong public. Referencing a similar approach adopted by the Securities and Futures Commission ("SFC"), such factors would include, but not be limited to, the language used in the marketing messages, whether the message is targeted at a group of people that resides in Hong Kong and whether a Hong Kong domain name is used for its website.

8. Please clarify:

(a) the factors for determining whether a person would be regarded as "actively marketing" to the public that the person carries on, or purports to carry on, a regulated stablecoin activity or the offering of a specified stablecoin; and

(b) whether those factors would be provided for in the guidelines to be issued and published in the Gazette by MA under clause 170 of the Bill.

Proposed new offences under the Bill

9. The Bill proposes to introduce a number of new offences. It is noted that except for the proposed new offences under clauses 11(1), 12(1), 49(4), 91(1) and (2), 112(7), 120(2), (3) and (4), 148(1), 149(2) and 152(1) of the Bill which would expressly require the elements of knowledge, intention and/or

recklessness in the commission of the offences, other offences under the Bill (some of which not provided with statutory defence) ("Other Offences") do not expressly contain similar mental elements.

10. Please clarify:

(a) according to the Administration's legislative intent, which of the Other Offences would be strict liability offences and which of them would be absolute liability offences (i.e. the prosecution needs not prove the existence of *mentes reae* (i.e. the mental elements) of committing the offences);

(b) for each of Other Offences intending to be a strict liability offence:

(i) whether it is the Administration's legislative intent that the implied common law defence of "honest and reasonable mistaken belief" would be available to a person charged with such an offence;

(ii) if so, whether the defendant would only bear an evidential burden (i.e. the second alternative referred to in *Kulemesin Yuriy and Another v HKSAR* (2013) 16 HKCFAR 195 ("*Kulemesin*")), or would be required to discharge a persuasive burden (i.e. the third alternative referred to in *Kulemesin*), as to the defendant's belief; and

(iii) if it is the Administration's legislative intent that the third alternative referred to in *Kulemesin* applies, how the derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and article 11(1) of the Hong Kong Bill of Rights could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd and Others v Town Planning Board* (2016) 19 HKCFAR 372; and

(c) for each of the Other Offences intending to be an absolute liability offence (i.e. the fifth alternative referred to in *Kulemesin*), please provide justification(s) for making it an absolute liability offence.

Clause 9 of the Bill

11. According to paragraph 10 of the Annex to the Administration's paper on development of financial technologies in Hong Kong and the proposed regulatory regime for stablecoin issuers (LC Paper No. CB(1)368/2024(03)) issued for the Legislative Council Panel on Financial Affairs meeting on 8 April

2024 by FSTB, when authorized institutions (e.g. banks), licensed corporations and licensed virtual asset trading platforms offer FRS issued by entities not licensed by MA, such stablecoins could only be offered to professional investors (as defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571)), and it must be indicated clearly that such FRS is not issued by a licensed FRS issuer. Please clarify whether, and if so, how such legislative intent has been reflected in the Bill (e.g. clause 9).

Clause 78 of, and the proposed Schedule 8 to, the Bill

12. Clause 78(1) and (2) of the Bill seeks to provide that MA could, under specified circumstances, require a licensee (not being an authorized institution) to take an immediate action relating to the licensee's affairs, business or property that MA considers necessary (including any requirement imposing restrictions on the licensee's business activities under its licence). A licensee who fails to comply with such requirement would commit an offence under clause 78(3) of the Bill. Such offence, on summary conviction, would be punishable with a fine at level 6 (HK$100,000) and imprisonment for six months (and in the case of a continuing offence, a further fine of HK$10,000 for every day during which the offence continues).[1]

13. Under section 52(1)(A) of the Banking Ordinance (Cap. 155) as proposed to be amended by section 2(3) of the proposed Schedule 8 to the Bill, MA has similar powers (i.e. to require the authorized institution forthwith to take any action or to do any act or thing whatsoever in relation to its affairs, business and property as MA may consider necessary, including any requirement imposing restrictions on the business of carrying on a regulated stablecoin activity under a stablecoin licence by an authorized institution). Failure to comply with such requirement is an offence under section 52(4) of Cap. 155. Such offence, on summary conviction, is punishable with a fine at tier 5 (HK$100,000) and imprisonment for two years (and in the case of a continuing offence, a further fine at tier 2 (HK$10,000) for every day during which the offence continues).[2]

14. Please clarify the reason(s) for setting different maximum terms of imprisonment on summary conviction for the proposed offence under clause 78(3) of the Bill (applicable to a licensee not being an authorized institution) and the offence under section 52(4) of Cap. 155 (applicable to an authorized institution).

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[1] Such offence, on conviction on indictment, would be punishable with a fine at HK$2,000,000 and imprisonment for five years (and in the case of a continuing offence, a further fine of HK$100,000 for every day during which the offence continues).

[2] Such offence, on conviction on indictment, is punishable with a fine at tier 9 (HK$2,000,000) and imprisonment for five years (and in the case of a continuing offence, a further fine at tier 5 (HK$100,000) for every day during which the offence continues).

Clause 117 of the Bill

15. Under clause 117(1) of the Bill, an investigator directed or appointed to conduct an investigation by MA would be empowered to, by written notice, require certain persons to, among others, produce a record or document specified in the notice.

16. The Court of First Instance held in *Cheung Ka Ho Cyril v Securities and Futures Commission* [2020] 1 HKLRD 859 (paras. 65-68) that "records" and "documents" in notices issued pursuant to section 183(1) of Cap. 571 (similar to clause 117 of the Bill in terms of empowering an investigator) were sufficiently wide in meaning to cover, among others, digital devices. Also, the notices requiring the persons under investigation to provide means of access (e.g. passwords) to their e-mail accounts and digital devices were held not to be ultra vires, unlawful or unconstitutional by the court.

17. Please clarify whether it is the Administration's legislative intent that an investigator would be empowered under clause 117 of the Bill to require the production of digital devices and means of access to the relevant e-mail accounts and digital devices. If so, please consider whether it is necessary to provide a note in the Bill as appropriate on examples of "records and documents" to assist reader's understanding.

Clause 124 of the Bill

18. Under clause 124(1) of the Bill, a magistrate may issue a warrant authorizing certain person(s) to, among others, search for certain record(s) or document(s) if the specified condition is met on information on oath laid by a specified person. Under clause 124(2) of the Bill, the specified person would be (a) an investigator; or (b) a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist MA.

19. As an investigator could be a person appointed under section 5A(3) of Cap. 66 (see clause 116(2)(a) of the Bill), please consider whether it is necessary to expressly provide that the specified person under clause 124(2)(b) of the Bill would not be an investigator (e.g. by adding "other than an investigator" after "Monetary Authority").

Clause 132 of the Bill

20. Under clause 132(2) of the Bill, if MA decides to impose a sanction on a regulated person under clause 131(1) of the Bill, MA must give a written notice to the regulated person ("Sanction Notice") stating (a) the sanction imposed; (b) the ground for imposing the sanction; and (c) the amount of the pecuniary penalty to be paid (if applicable).

21. We note that section 53ZSU(3) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) provides that, if SFC decides to impose a relevant sanction on a regulated person (e.g. a person licensed under Cap. 615 to operate a virtual assets exchange), SFC must inform the person of the decision by written notice and the notice must, among others, (a) specify the time at which the decision is to take effect; (b) for a decision to publicly reprimand, specify the terms in which the person is to be reprimand; and (c) include a statement that the person may apply to the Anti-Money Laundering and Counter-Terrorist Financing Review Tribunal ("AMLCTF Review Tribunal") for a review of the decision.

22. Please clarify whether it is the Administration's legislative intent that MA would also state in the Sanction Notice the date and time the sanction is to take effect, and the relevant terms of a caution, a warning or a reprimand (if applicable), pursuant to clause 132(2)(a) of the Bill. If so, please consider expressly providing so in the clause for the sake of clarity and certainty. Please also clarify why the Sanction Notice would not include a statement that the regulated person may refer the decision to the Stablecoin Review Tribunal for review.

Clause 140 of the Bill

23. Under clause 140(5) of the Bill, a referral made by a person who is aggrieved by a specified decision (e.g. a decision of MA to impose a sanction under clause 131(1) of the Bill) to the Stablecoin Review Tribunal for review would not suspend the specified decision. We note that section 69 of Cap. 615 and section 227 of Cap. 571 empower the AMLCTF Review Tribunal and the Securities and Futures Appeals Tribunal respectively to stay the execution of specified decisions on application from the party who applies for review. Please clarify why such a power and right would not be given to the Stablecoin Review Tribunal and the applicant under the Bill.

Clause 145 of the Bill

24. Please consider whether the reference to "section 142(3)" in clause 145(4)(a) and (5) of the Bill should be amended to "section 142(5)" as clause 142(5), not clause 142(3), of the Bill is the relevant offence provision. For instance, clause 143(2)(a) of the Bill refers to "an offence in respect of the evidence, answer or information under section 142(5)".

Proposed Schedule 2 to the Bill

Fit and proper person

25. Under clause 24 of the Bill, a licensee must ensure the fulfilment of the relevant minimum criteria as specified in Part 2 of the proposed Schedule 2 to the Bill. Such minimum criteria would include, among others, that each person who holds the position of chief executive, director, stablecoin manager or controller of a licensee must be a fit and proper person to hold the position (section 7(2) of the proposed Schedule 2 to the Bill).

26. We note that section 53ZRJ of Cap. 615 and section 129 of Cap. 571 provide for the relevant matters in determining whether a person is a fit and proper person for the purposes of Part 5B of Cap. 615 and Part V of Cap. 571 respectively. We also note that SFC has published a "Fit and Proper Guidelines" (updated in January 2022) to set out matters that SFC will take into consideration when determining whether a person is fit and proper for the purposes of certain applications under Cap. 571 and Cap. 155.

27. Please clarify:

(a) what matters would MA take into account in determining whether a person is a fit and proper person for the purpose of, among others, section 7(2) of the proposed Schedule 2 to the Bill; and

(b) why such matters are not provided for in the Bill for the sake of clarity and certainty, and whether such matters would be provided for in the guidelines to be issued and published in the Gazette by MA under clause 170 of the Bill.

Disclosures – issuance of the white paper

28. Under section 13(1) of the proposed Schedule 2 to the Bill, a licensee must in respect of each type of specified stablecoins issued by the licensee publish a white paper to provide comprehensive and transparent information about the type of specified stablecoins.

29. We note that paragraph 3.2.36 of the Consultation Conclusions stated that a white paper should include, among others, general information about the FRS issuers, and disclosures regarding risks associated with using the FRS, the technology employed, the mechanism and procedures for issuance, distribution and redemption, rights of potential FRS users, and also applicable conditions and fees for redemption.

30. Please clarify why such contents of the white paper should not be expressly provided for in the Bill for the purpose of clarity and certainty. Would such contents be provided for in the guidelines to be issued and published in the Gazette by MA under clause 170 of the Bill?

Non-interest bearing

31. Under section 15(1) of the proposed Schedule 2 to the Bill, a licensee must not pay, or permit to be paid, any interest in relation to specified stablecoins issued by the licensee. "Interest" is proposed to mean, pursuant to section 15(2) of the proposed Schedule 2 to the Bill, any profit, income or other return represented to arise or to be likely to arise from the holding of the specified stablecoin on one or more of the specified basis, for instance, the length of the period during which the holder holds the specified stablecoin.

32. We note that paragraph 3.2.23 of the Consultation Conclusions stated that the offering of marketing incentives would not be prohibited.

33. Please clarify the circumstances where the offering of marketing incentives would not be regarded as paying, or permitting to be paid, interest. We note that article 50(3) of the EU Regulation provides that, in relation to prohibition of granting interest by issuers of e-money tokens, interest includes net compensation or discounts, with an effect equivalent to that of interest received by the holder of the e-money token, directly from the issuer or from third parties, and directly associated to the e-money token or from the remuneration or pricing of other products. Would such net compensation or discounts be regarded as interest for the purposes of section 15(1) of the proposed Schedule 2 to the Bill? If so, please consider expressly providing so in the Bill for the sake of clarity and certainty.

Proposed Schedule 6 of the Bill

34. Under clause 140 of the Bill, a person who is aggrieved by a "specified decision" may refer the decision to the Stablecoin Review Tribunal for review. "Specified decision" is proposed to mean a decision specified in section 13 of the proposed Schedule 6 to the Bill. It is noted that "specified decision" would not include the following decisions of MA:

(a) a decision to direct that the specified shares in the licensee be subject to certain restrictions under clause 46(2) of the Bill;

(b) a decision to refuse an application to modify or waive the minimum criteria under clause 99(5) of the Bill;

(c) a decision to revoke the designation of a designated stablecoin entity under clause 106(1) of the Bill; and

(d) a decision to give a rejection notice under section 4(2) of the proposed Schedule 7 to the Bill.

35. Please clarify why such decisions are omitted from the proposed definition of "specified decision".

Proposed Schedule 7 to the Bill

36. Under section 3(2)(b) of the proposed Schedule 7 to the Bill, one of the conditions for MA to grant a provisional licence to authorize an entity to carry on the regulated stablecoin activity would be that MA is satisfied that the entity has a reasonable prospect of successfully showing MA that the entity is capable of complying with the regulatory requirements applicable to a licensee.

37. Please clarify what factor(s) would MA take into account in determining whether the entity has such a reasonable prospect, and why such factor(s) is/are not provided for in the Bill for the sake of clarity and certainty. Would such factors be provided for in the guidelines to be issued and published in the Gazette by MA under clause 170 of the Bill?