

## Financial

### China's Further Clampdown on Virtual Currency Business Activities

On September 24, 2021, the People's Bank of China (PBOC), jointly with the Supreme People's Court, the Supreme People's Procuratorate and other seven regulatory departments, officially released the *Circular on Further Preventing and Handling the Risks Concerning Speculation in Virtual Currency Trading* (Yin Fa [2021] No. 237) (the "Circular"), which immediately garnered the attention of the market. The attention focused mainly on China's regulatory trends and law enforcement of virtual currency business activities, as well as the extraterritorial applicability of relevant PRC laws in the context of major cryptocurrencies exchanges operating outside China but still targeting Chinese domestic residents. In this briefing, we offer market participants a closer look at some of the key points of the Circular and their implications.

#### **1. Cryptocurrency-Related Businesses Constitute Illegal Financial Activities**

The most noteworthy point is that the Circular deems cryptocurrency-related businesses to be "illegal financial activities" under the *Regulation on the Prevention and Handling of Illegal Fund-Raising Activities* (the "Regulation"), which was issued by the State Council and effective on May 1, 2021. Pursuant to the Regulation, apart from the "illegal financial activities" explicitly defined in the Regulation, other illegal financial activities

shall be determined by the financial regulatory department of the State Council, and if there are no explicit laws and regulations governing the prevention and handling of such "other illegal financial activities", relevant provisions of the Regulation shall apply thereto. This is the first time that a certain "other illegal financial activity" is determined by the PBOC and other financial regulatory authorities in such a normative document since the implementation of the Regulation.

The Circular is silent on the definition and scope of "cryptocurrency-related businesses", but explicitly sets out five types of cryptocurrency-related activity, namely, conducting exchanges between legal currencies and virtual currencies, or among different virtual currencies; buying and selling virtual currencies as a central counterparty; providing intermediary services or pricing services for virtual currency trading; token issuance for financing; and virtual currency derivatives trading, all of which shall be strictly banned and clamped down for being suspected of constituting a typical illegal financial activity, such as illegal sale of tokens, unauthorized public offering of securities, illegal futures business operations, or illegal fund-raising activities.

We understand that the "cryptocurrency-related businesses" listed in the Circular is not exhaustive.

Certain cryptocurrency-related business activity cannot be determined to be a typical illegal financial activity explicitly defined under the relevant laws and regulations. The financial regulatory authorities still have the discretion to determine the scope of “cryptocurrency-related businesses”, thereby deeming it illegal. In this regard, for example, the Chinese financial regulatory authorities may deem providing IT support for trading cryptocurrencies within China a “cryptocurrency-related business” pursuant to this provision.

Furthermore, we tend to believe that in the presentation of “cryptocurrency-related businesses”, the Circular actually targets activities taking place within the territory of China, as well as overseas activities that have nexuses in China (excluding Hong Kong, Macau, and Taiwan in the context of jurisdiction), instead of those activities completely taking place outside China and have no nexuses in China.

## **2. Overseas Cryptocurrencies Exchanges Offering Services to Chinese Domestic Residents via the Internet Constitutes Illegal Financial Activities**

Crucially, the Circular provides that overseas cryptocurrencies exchanges using the internet to offer services to Chinese domestic residents shall be considered illegal financial activity too. Superficially, this provision grants certain extraterritorial applicability, but delving a little deeper, we can see this provision mainly targets (1) domestic staff at relevant overseas cryptocurrencies exchanges and (2) any legal person, unincorporated organization and natural person who provides services such as marketing and promotion, payment and clearing, IT support to overseas cryptocurrencies exchanges even if they know or should have known that the overseas exchanges engage in cryptocurrency-related business. Taken literally, in exercise of extraterritorial jurisdiction and law enforcement, the Chinese regulatory authorities mainly aim at

banning overseas cryptocurrencies exchanges to solicit, promote or provide services to Chinese domestic residents.

## **3. Investing in Cryptocurrencies and Their Derivatives in Violation of Public Order and Good Customs Shall Render Relevant Civil Legal Acts Invalid**

It is worth noting that the Circular does not prohibit domestic legal persons, unincorporated organizations, and natural persons from investing in a cryptocurrency and its derivatives. However, if such investments violate public order and good customs, the relevant civil legal acts shall be rendered invalid. Furthermore, in the event that such investments are suspected of disturbing the financial order or endangering the financial security, these domestic legal persons, unincorporated organizations, and natural persons may still be subject to liabilities.

## **4. Financial Institutions Are Obligated to Report Clues of Suspected Violations to the Relevant Regulatory Authorities**

Pursuant to the Circular, financial institutions and non-bank payment institutions shall not provide services for cryptocurrency-related businesses, nor accept cryptocurrencies as pledges or mortgages, conduct insurance business related to cryptocurrencies or offer insurance liabilities coverage for cryptocurrency-related matters, and shall report to the relevant regulatory authorities in a timely manner if they find clues of any violation of laws and regulations.

## **Our Observations**

Early in 2017, Chinese regulator began to take action to ban the issuance of cryptocurrencies for financing. Based on this past experience and the considerations of financial risks currently facing China, “cryptocurrency-related businesses” are for the first time defined as illegal financial activities by the Circular, vowing unprecedentedly

harsh crackdown on practitioners' domestic cryptocurrency-related activities, imposing all-around restraints on cross-border solicitation and marketing activities by overseas cryptocurrencies exchanges, and rooting out domestic entities or persons' providing ancillary services for cryptocurrency trading.

From a legal perspective, the Circular has provided the legal basis for the law enforcement of clamping down on cryptocurrency-related businesses by determining cryptocurrency-related businesses as prohibited "other illegal financial activities", the declaration that Chinese financial regulatory authorities have the discretion to determine certain types of "other illegal financial activities" by issuing normative documents from time to time.

The Circular embodies China's priorities in financial regulatory and law enforcement practices by citing the purposes of maintaining the stability of financial order, curbing over-speculation, and safeguard ordinary investors' interests, while also highlighting the differences between China and other markets in terms of the prevention and handling of financial risks. The Chinese financial regulatory authorities hope to retain a significant degree of discretion to determine "other illegal financial activities" to better respond to a rapidly changing financial world.

We will continue to monitor the situation and keep our clients apprised of any important developments.

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## 金融法律热点问题

### 中国强势清理虚拟货币业务活动

2021年9月24日，央行牵头，联合最高法和最高检以及其他七个部委局，公开发布了《关于进一步防范和处置虚拟货币交易炒作风险的通知》（银发[2021]237号，下称“《通知》”），该通知一经公布即引发强烈关注。关注主要来自两方面，一方面是对中国虚拟货币监管趋势变化和执法行动的关注，另一方面则是对在全球主要虚拟货币交易所已位于中国境外的情形下仍跨境对中国境内居民提供服务所涉及的中国法及其域外适用问题的关注。下面我们试图解读《通知》中最为重要的几条规定以回应这些关注。

#### 1、“虚拟货币相关业务活动”属于非法金融活动

《通知》最引人注目的规定是将“虚拟货币相关业务活动”界定为“非法金融活动”。根据国务院颁布并自2021年5月1日起施行的《防范和处置非法集资条例》（下称“《条例》”），除《条例》明确界定的非法金融业务活动外，“其他非法金融业务活动”的具体类型由国务院金融管理部门确定，且法律、行政法规对“其他非法金融业务活动”的防范和处置没有明确规定的，参照《条例》的有关规定执行。这是《条例》颁布以来央行和其他金融监管者首次通过规范性文件“确定”某一类“其他非法金融业务活动”。

《通知》没有对“虚拟货币相关业务活动”的内涵和外延进行界定，但分别列举了五类应取缔的活动范围，即：(1)开展法定货币与虚拟货币兑换业务或虚拟货币之间的兑换业务；(2)作为中央对手方

买卖虚拟货币；(3)为虚拟货币交易提供信息中介和定价服务；(4)代币发行融资；(5)虚拟货币衍生品交易。《通知》指出了这五类行为涉嫌非法发售代币票券、擅自公开发行证券、非法经营期货业务、非法集资等传统非法金融活动，应予以禁止和取缔。

我们理解，《通知》列举上述五类活动并不意味着穷尽了“虚拟货币相关业务活动”的所有类型。某些活动无法落入法律法规明确列举的传统非法金融活动的范畴。金融监管部门可以根据实际情况确定“虚拟货币相关业务活动”的范围并认定其非法性。举例来说，在境内为虚拟货币交易提供各种技术支持的，有可能根据本条被金融监管部门认定为“虚拟货币相关业务活动”。

此外，我们倾向于认为，本条规定的“虚拟货币相关业务活动”应是指活动发生地位于或延伸至中华人民共和国境内（从司法管辖的角度不包括我国的香港、澳门、台湾地区）的情形，而不是指完全发生在境外没有中国连接点的业务活动。

#### 2、境外虚拟货币交易所通过互联网向我国境内居民提供服务同样属于非法金融活动

《通知》第二个引人注目的规定是将境外虚拟货币交易所通过互联网向我国境内居民提供服务亦认定为非法金融活动。从字面上看，本条规定产生了一定的域外适用效力，同时进一步指明相应执法行动针对的客体主要是(1)相关境外虚拟货币交易所的境内工作人员，以及(2)明知或应知其从事虚

拟货币相关业务，仍为其提供营销宣传、支付结算、技术支持等服务的法人、非法人组织和自然人。从上下文看，在行使域外管辖权和执法方面监管的着眼点主要在于禁止虚拟货币交易所招揽和向中国境内居民推广并提供服务。

### 3、投资虚拟货币及相关衍生品，违背公序良俗的，相关民事法律行为无效

值得注意的是，《通知》未禁止中国境内的法人、非法人组织、自然人投资虚拟货币及相关衍生品，仅规定任何法人、非法人组织和自然人投资虚拟货币及相关衍生品，违背公序良俗的，相关民事法律行为无效，但如该等投资行为涉嫌破坏金融秩序、危害金融安全的，仍有可能被查处。

### 4、金融机构有义务向有关部门报告违法违规的线索

根据《通知》，金融机构和非银行支付机构不但不得为虚拟货币相关业务活动提供服务，而且也不得将虚拟货币纳入抵质押品范围，不得开展与虚拟货币相关的保险业务或将虚拟货币纳入保险责任范围，此外，金融机构和非银行支付机构还有义务在发现违法违规问题线索及时向有关部门报告。

#### 我们的观察

尽管中国监管机构早在 2017 年就开始取缔通过发行虚拟货币进行融资的活动，但经过四年对虚拟货币的监管打击后，《通知》根据对现阶段中国面临的金融风险的判断，将“虚拟货币相关业务活动”界定为“非法金融活动”，由此，虚拟货币业者在中国境内的活动遭到前所未有的监管打击，虚拟货币交易所的跨境招揽和推广活动将受到全面抑制，境内机构和个人与虚拟货币交易有关的辅助服务活动也将面临严格清理。

从法律角度，《通知》明确了打击虚拟货币相关业务的执法行动的法律依据，央行首次通过《通知》这一规范性文件“确定”了某一类“其他非法金融业务活动”。这也意味着中国金融监管部门将有权通过颁布规范性文件的方式不时确定“其他非法金融业务活动”的具体类型。

《通知》体现了中国金融监管和执法的优先目标，即维护金融秩序的稳定，扼制过度投机和保护普通投资者的利益，但也凸显了中国与其他市场的不同之处，即金融监管部门在防范和处置金融风险时希望保有界定“其他非法金融活动”的较大自由裁量权以便根据实际情况灵活应对金融风险的变化。

我们将持续关注并及时与我们的客户分享最新的进展。

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