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**The Journal of Robotics,  
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# What 2021 Has in Store for Stablecoin

Robin Nunn, Sarah V. Riddell, and Steven Lightstone\*

*In this article, the authors review recent developments related to stablecoin and the possibilities for stablecoin, and its potential regulation, in 2021.*

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The year 2020 will not soon be forgotten. Despite the challenges that the COVID-19 pandemic presented on a global scale, 2020 ushered in new ways of thinking about stablecoin, a type of cryptocurrency that attempts to peg its market value to an external reference, such as a fiat currency (like the U.S. dollar) or the price of a commodity (like gold), and has garnered much attention from tech companies, financial services institutions, and policymakers.

As we reflect on the developments related to stablecoin over the last year, we also consider the possibilities for stablecoin and its potential regulation as of January 2021. In particular, this article discusses:

- Concerns driving policy and regulatory efforts;
- U.S. legislative and regulatory developments;
- EU and UK policy developments; and
- Thoughts on future developments that may occur in 2021.

## Overarching Concerns Shaping Policy Efforts

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Stablecoin regulation is a little like Goldilocks, in search of a framework that is not too hot or too cold, but is just right. Although stablecoin generally is not considered a security in the United States if it fails the *Howey* test,<sup>1</sup> stablecoin is “other value that substitutes for currency” under the U.S. Treasury Department Financial Crimes Enforcement Network (“FinCEN”) money transmitter rules, and it may be a commodity<sup>2</sup> under the U.S. Commodity Exchange Act (“CEA”) and regulations promulgated thereunder by the U.S. Commodity Futures Trading Commission (“CFTC”). Stablecoin issuers present similar definitional issues: they are not securities issuers, they are not broker-dealers, and they are not banks. Therein lies

the problem: Can entities launch a global stablecoin for anyone to have access to and use for payments, without a specific regulatory framework applicable to the issuer or the stablecoin?

Moreover, the potential cross-border reach of stablecoin networks means that a coordinated global approach to any future regulation may be necessary. As a result, various organizations issued reports or statements on stablecoin during 2020. The FinTech Network of the International Organization of Securities Commissions (“IOSCO”) prepared a report on stablecoin as part of IOSCO’s efforts to help coordinate a global approach to stablecoin-related regulatory issues.<sup>3</sup> The Financial Stability Board also issued a report on stablecoin with high-level recommendations for global regulatory coordination.<sup>4</sup> Subsequently, the Financial Action Task Force (“FATF”) issued a report that addresses the characteristics of stablecoin, risks of money laundering and terrorist financing that stablecoin may cause, and how FATF standards apply to stablecoin and the different businesses involved in stablecoin, as well as the ways in which FATF plans to enhance the global ATM and counterterrorist financing (“CTF”) framework for virtual assets and stablecoin.<sup>5</sup> In the same statement, European Central Bank President Christine Lagarde advocated for a digital euro “to ensure that the euro remains fit for the digital era,” but cautioned against private issuers out of concerns regarding monetary sovereignty and financial stability.<sup>6</sup>

As one may expect, the global standard-setters’ view on stablecoin is important for shaping any future regulatory framework. In many of these reports and public statements, regulators have identified concerns about stablecoin that could form the basis for policy efforts going forward. Some concerns related to stablecoin include the following:

- *Consumer risk.* Stablecoin could pose an increased risk of scams, involving fake presale tokens or fake ads, accounts, pages, and groups.<sup>7</sup> The risks of cryptocurrency, such as fraud and theft, could cause consumers to bear the losses that arise from such risks.<sup>8</sup> Without an applicable regulatory framework, the lack of anti-money laundering (“AML”), CTF, and know-your-customer (“KYC”) requirements could pose a risk that stablecoin may be used to launder money or finance terrorist activity because of the anonymous nature of the transactions.<sup>9</sup>

- *Financial stability risk.* According to Governor Lael Brainard, if a widely used stablecoin is not managed effectively, risks including liquidity, credit, market, or operational risks could trigger a loss of confidence and run-like behavior.<sup>10</sup> Moreover, the lack of a clear regulatory authority could heighten the financial stability risk of stablecoin.
- *Monetary policy risk.* Potential implications for monetary policy could be prevalent in smaller economies, with material effects on monetary policy from private sector digital currencies as well as foreign central bank digital currencies.<sup>11</sup>
- *Regulatory risk.* Without a regulatory framework directly applicable to stablecoin or its issuers, anyone involved in the stablecoin system faces regulatory uncertainty. The types of risks other regulatory frameworks are designed to prevent or mitigate, described above, may be addressed by a hodgepodge of other regulatory frameworks. The adoption of a clear regulatory framework may benefit stablecoin companies and consumers alike.
- *Systemic risk.* A stablecoin that is readily scalable to a large global base “could increase the potential severity and velocity of systemic risks.”<sup>12</sup> A rise in the prevalence of stablecoin could make countries’ monetary policies less effective. Through reserve fund structures, stablecoin could become sizeable owners of sovereign bonds, posing a risk to stable economies.<sup>13</sup>
- *Other risks.* Markets that are relatively new, are illiquid, and have certain informational asymmetries, such as stablecoin, pose market integrity, and resilience risks.<sup>14</sup> There is a concern that inadequate cybersecurity protection could cause a breach in a stablecoin system, especially if the system becomes the target of a hack.<sup>15</sup>

## Stablecoin Developments in the United States

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In the United States, stablecoin companies must monitor regulatory developments across several institutions: Congress has proposed legislation to regulate stablecoin; the Office of the Comptroller of the Currency (“OCC”) continues to issue interpretive guidance and rulemakings focused on digital assets such as

stablecoin; the U.S. Securities and Exchange Commission (“SEC”) established FinHub as a standalone office to engage with market participants as technologies develop; FinCEN periodically provides updates on the application of money services business registration and AML requirements to cryptocurrency companies (such as stablecoin issuers), and has proposed AML rules applicable to wallet companies and other cryptocurrency companies; and the CFTC has demonstrated an interest in stablecoin.

## Legislative Developments

### *Crypto-Currency Act of 2020*

In 2020, the U.S. House of Representatives introduced two bills related to stablecoin. First, Representative Paul Gosar (R-AZ) sponsored the Crypto-Currency Act of 2020, which assigns a regulator to each type of cryptoasset, as defined in the legislation, identified below. Each federal cryptoregulator would be required to make available to the public and keep current a list of all federal licenses, certifications, or registrations required to create or trade in digital assets. Under the bill, the U.S. Secretary of the Treasury, through FinCEN, would be required to establish rules similar to financial institutions on the ability to trace cryptocurrency transactions and persons engaging in such transactions.

The legislation assigns the CFTC the authority to regulate “crypto-commodities,” defined as “economic goods or services that (a) have full or substantial fungibility, (b) the markets treat with no regard for who produced the goods or services, and (c) rest on a blockchain or decentralized cryptographic ledger.” The SEC would have authority to regulate “crypto-securities,” defined under the bill as “all debt, equity, and derivative instruments that rest on a blockchain or decentralized cryptographic ledger,” with exceptions for a synthetic derivative that is (1) operated and registered with the Department of the Treasury as a money services business, and (2) operated in compliance with the Bank Secrecy Act and all other federal AML, antiterrorism, and screening requirements of the Office of Foreign Assets Control and FinCEN.

The bill gives the OCC and FinCEN authority over “cryptocurrencies,” defined as “representations of United States currency or synthetic derivatives resting on a blockchain or decentralized cryptographic ledger, including: such representations or synthetic

derivatives that are reserve-backed digital assets that are fully collateralized in a correspondent banking account, such as stablecoins; and synthetic derivatives that are determined by decentralized oracles or smart contracts; and collateralized by crypto-commodities, other crypto-currencies, or crypto-securities.”<sup>16</sup>

### *STABLE Act*

Second, the Stablecoin Tethering and Bank Licensing Enforcement Act (“STABLE Act”) specifically addresses stablecoin rather than identifying and regulating various types of cryptocurrencies. Under the STABLE Act, stablecoin issuers would be required to obtain a bank charter, be a member of the Federal Reserve System, and be an insured depository institution. In addition, a stablecoin issuer would be subject to the following requirements:

- Notify the appropriate federal banking agency, the Federal Deposit Insurance Corporation (“FDIC”), and the Board of Governors of the Federal Reserve System (“Federal Reserve Board”) of its intent to issue stablecoin at least six months in advance of issuance and receive from each such regulator written approval to issue stablecoin prior to issuance.
- Provide “ongoing analysis” to the Federal Reserve Board, Financial Stability Oversight Council, and Office of Financial Research on potential systemic impacts or monetary policy implications of the stablecoin.
- Immediately redeem all outstanding stablecoin upon demand in U.S. dollars.
- Maintain collateral for all outstanding stablecoin, excluding the value of outstanding collateral known to the issuer to be insured deposits.

That being said, the proposed legislation goes on to provide that, with regard to a depositor and for purposes of determining whether a deposit is an insured deposit, the FDIC “shall first include deposits that are not stablecoins.” While prioritizing deposits in this manner affects consumers, many other aspects of the banking regulations to which stablecoin issuers would be subject under this legislation provide consumers with added protections. For example, under this legislation stablecoin issuers would become subject to the Bank Secrecy Act and attendant AML requirements, antifraud

requirements, privacy laws and regulations, financial integrity standards, and other consumer protection laws.

The appropriate federal banking agency would have authority to impose penalties on stablecoin issuers for failing to immediately redeem an outstanding stablecoin, upon demand, in U.S. dollars, or for the inability to do so as determined by the appropriate federal banking agency, and may revoke the issuer's deposit insurance provided under the Federal Deposit Insurance Act, revoke its membership in the Federal Reserve System, revoke its federal charter, or impose a lesser penalty as the agency determines appropriate.

Under the STABLE Act, stablecoin issuers and nonissuers that offer or provide a product or service with respect to stablecoin would be required to clearly disclose whether the person is the original issuer of the stablecoin.<sup>17</sup> If so, the issuer would need to further disclose whether the stablecoin is held as an insured deposit or fully collateralized by reserves maintained at a federal reserve bank. To the extent the issuer wishes to use the term "dollar" to refer to stablecoin balances, the issuer must seek approval from the FDIC or the Federal Reserve Board.

## OCC Interpretive Letters and Rulemakings

The OCC issued interpretive letters that provide guidance on the custody of cryptocurrency and stablecoin, announced special purpose national bank charters for cryptocurrency companies, and adopted final True Lender rules. These regulatory developments are discussed in further detail below.

### *Interpretive Letters*

In the summer and fall of 2020, the OCC issued two interpretive letters regarding the custody of cryptocurrency, including stablecoin. In the first letter, the OCC confirmed that the provision of custody services for cryptoassets is consistent with the long-standing authority of a national bank or federal savings association ("bank") to provide safekeeping and custody services for physical assets. For example, the OCC already permits banks to escrow encryption keys used for digital certificates because such escrow service is functionally equivalent to physical safekeeping. The OCC

advises banks to consult with OCC supervisors prior to engaging in cryptocurrency custody activities.

The OCC interpretive letter provides guidance to banks that provide cryptocurrency custody services, explaining that to provide these services in a safe and sound manner, banks must establish and maintain adequate systems to identify, measure, monitor, and control the risks of their custody services. A bank should have policies, procedures, internal controls, and information systems that govern its custody services. The OCC specifies the types of areas that policies and procedures should cover, generally consistent with the requirements for providing typical custody services. A bank should have procedures for verifying that it maintains access controls for a cryptographic key (which will differ from the procedures applicable to physical assets) and accounting records and internal controls to ensure that assets of each custody account are kept separate from the assets of the custodian and maintained under joint control to prevent an asset from becoming lost, destroyed, or misappropriated by internal or external parties.

Two months later, the OCC issued another interpretive letter clarifying that banks are authorized to hold stablecoin reserves. The interpretive letter only addresses stablecoin that is:

- Stored in a hosted wallet, defined by the OCC to mean “an account-based software program for storing cryptographic keys controlled by an identifiable third party” that receives, stores, and transmits cryptocurrency transactions on behalf of accountholders, which generally do not have access to such keys themselves;
- Backed on a 1:1 basis by a single fiat currency; and
- Verified by the bank at least daily to confirm that reserve account balances are always equal to or greater than the number of the issuer’s outstanding stablecoins.

In this subsequent letter, the OCC clarified that banks may receive deposits from stablecoin issuers, including any deposits that are considered stablecoin reserves (associated with hosted wallets), and may engage in activities that are incidental to accepting deposits from stablecoin issuers. If a bank wishes to accept deposits that are stablecoin reserves, the OCC recommends that the bank take into account deposit insurance, AML, and risk management (including liquidity risk, issuer identification, and audit) requirements. With

regard to deposit insurance considerations, a bank may structure stablecoin reserve accounts as deposits of the stablecoin issuer or as deposits of the individual stablecoin holder if the requirements for pass-through insurance are met, and must provide accurate and appropriate disclosures regarding deposit insurance coverage. A bank that accepts stablecoin reserve deposits should be able to verify the outstanding stablecoins on a regular basis to confirm that the reserve deposits are always equal to or greater than the number of outstanding stablecoins that the issuer has issued.

### *OCC Special Purpose Charter*

Last summer, then-Acting Comptroller of the Currency Brian Brooks discussed the OCC's plans to introduce another special purpose national bank ("SPNB") charter specifically geared toward payments companies. This "payments charter" could be especially appealing for those companies looking for a national licensing platform for their payments business because it would provide federal preemption of state money transmitter licensing and related laws, which would eliminate the need to obtain a license to operate in each state.

At that time, Brooks was considering a two-phase rollout of the new charter. The first phase would consist of Payments Charter 1.0, which Brooks characterized as a basic national money transmitter license. The second phase, Payments Charter 2.0, would follow about 18 months later and include the additional feature of direct access to the Federal Reserve's payments system. Such direct access gives the chartered company the ability to clear payments through the Federal Reserve System directly rather than through a correspondent bank, clearinghouse, or financial institution.

The proposed payments charter, as articulated by Brooks, would be narrower in scope than the OCC's previously proposed SPNB charter for nondepository fintechs, and would not include nationwide lending authority (which means the payments charter would not raise the issue of interest rate exportation). Further, this charter presumptively would be configured to place the chartered institution beyond the jurisdiction of the Bank Holding Company Act and the Federal Reserve Board. Thus, this initiative may be especially appealing to companies that are involved in payment processing but also engage in activities not permitted for bank holding companies.

### *OCC True Lender Rule*

In October 2020, the OCC issued a final rule that determines when a bank makes a loan and is the “true lender” in the context of a partnership between a bank and a third party, such as a marketplace lender.<sup>18</sup> The final rule provides that a bank makes a loan when, as of the date of origination, it is named as the lender in the loan agreement, or it funds the loan. The OCC recognizes the concerns raised that this rulemaking may facilitate inappropriate “rent a charter” lending schemes—arrangements in which a bank receives a fee to “rent” its charter and unique legal status to a third party in order to enable the third party to evade state and local laws, including some state consumer protection laws, and to allow the bank to disclaim any compliance responsibility for the loans. In response, the OCC stated, “These arrangements have absolutely no place in the federal banking system and are addressed by this rulemaking, which holds banks accountable for all loans they make, including those made in the context of marketplace lending partnerships or other loan sale arrangements.” To the extent that stablecoin companies are involved in lending activities pursuant to a partnership with a bank, the True Lender rule could implicate these activities or cause banks to no longer engage in these arrangements.

## **Other U.S. Regulatory Agencies’ Activity in the Stablecoin Space**

### *SEC FinHub Activities*

During 2020, the SEC’s “Strategic Hub for Innovation and Financial Technology,” or FinHub, became a standalone office no longer housed within the SEC’s Division of Corporate Finance. In the press release announcing the new office, the SEC explained that FinHub would continue to lead the SEC’s work “to identify and analyze emerging financial technologies affecting the future of the securities industry, and engage with market participants, as technologies develop.”<sup>19</sup> FinHub issued a statement related to the OCC’s interpretive letter and, through the Division of Corporate Finance, took a no-action position on securities registration for a coin designed to function similar to a stablecoin.

Concurrent with the OCC’s issuance of its second interpretive letter regarding cryptocurrency (specifically, the guidance that is exclusive to stablecoin), the SEC’s FinHub staff issued a statement

on the interpretive letter to reiterate that whether a stablecoin is a security under the federal securities laws is “inherently a facts and circumstances determination . . . [that] requires a careful analysis of the nature of the instrument, including the rights it purports to convey, and how it is offered and sold.”<sup>20</sup> FinHub staff encouraged market participants to contact them with questions they have to help ensure that they structure, market, and operate digital assets in compliance with federal securities laws, stating that FinHub staff “stands ready” to engage with market participants and provide no-action relief if appropriate.<sup>21</sup>

FinHub staff also provided a no-action position that provided relief from registration under the Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended, for the “VCOIN,” a coin issued by a software development company and online community developer (the issuer) using the Ethereum blockchain.<sup>22</sup> Although the VCOIN is not a traditional stablecoin that is pegged to one or more assets, the VCOIN is designed to function similar to a stablecoin because the issuer has promised to buy and sell VCOIN for a fixed price (\$0.004). The SEC provided the issuer relief from securities registration requirements, provided that certain conditions are satisfied. These conditions largely mirror *Howey* considerations enumerated by the SEC staff in the 2019 no-action relief granted to Pocketful of Quarters Inc. and, separately, to TurnKey Jet Inc. For example, the SEC requires that:

- VCOIN will be unlimited in supply and sold at a fixed price, with no prospect of appreciation resulting from the issuer’s efforts;
- The issuer will market and sell VCOIN solely for consumptive use as a means of exchange value on or in connection with the virtual world platform;
- VCOIN will be immediately usable for the intended consumptive purpose (but not speculative purposes) at the time it is sold on a fully functioning platform;
- VCOIN will be subject to restrictions on purchases, conversions, transfers, and secondary market trading; and
- The issuer will maintain AML and KYC precautions in accordance with Bank Secrecy Act and AML regulations.<sup>23</sup>

At the end of 2020, the SEC’s Enforcement Division made headlines after filing an action against Ripple Labs Inc. and two of its executives. The complaint alleges that the company raised funds

through the sale of digital assets known as XRP in an unregistered securities offering, among other allegations.<sup>24</sup>

### *FinCEN Rule Proposal*

FinCEN proposed rules to require banks and money service businesses to submit reports, maintain records, and verify the identities of customers in relation to transactions involving convertible virtual currency or digital assets with legal tender status held in wallets, whether unhosted or hosted in a jurisdiction identified by FinCEN.<sup>25</sup> Although FinCEN did not propose to revise the definition of “Monetary instruments,” the proposal prescribes by regulation that convertible virtual currency and digital assets with legal tender status are monetary instruments for purposes of the Bank Secrecy Act.

The proposed reporting requirement is similar to the existing currency transaction reporting requirement, while the proposed recordkeeping requirement is similar to the recordkeeping and travel rule regulations pertaining to fund transfers and transmittals of funds. The proposal, for which FinCEN offers a mere 15-day comment period that has already concluded, would expand certain AML regulations to cover stablecoin companies in a way not previously required.

### *CFTC Technology Advisory Committee Meetings on Stablecoin*

Despite issuing no rulemakings or other guidance about stablecoin during 2020, the CFTC’s Technology Advisory Committee (“TAC”) continued to demonstrate its interest in stablecoin. Following an October 2019 TAC meeting where panelists provided an overview of stablecoin and the law regarding stablecoin, the TAC met again in February 2020 to further discuss stablecoin and other cryptocurrency-related topics.

## **Stablecoin Developments in the United Kingdom and European Union**

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### **Cryptoassets AML/CTF Regime**

The Fifth EU Money Laundering Directive<sup>26</sup> (“MLD 5”), which introduced requirements for cryptoasset exchanges and custodian

wallet providers for the first time, had to be implemented in the United Kingdom and European Economic Area (“EEA”) states by January 10, 2020. As the FATF standards on regulating cryptoassets and cryptoasset service providers go further than the MLD 5 requirements, the UK government transposed MLD 5 alongside the latest FATF standards. Since January 10, 2020, existing businesses carrying on cryptoasset activity in the United Kingdom have needed to be compliant with the UK Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, as amended, including the requirement to be registered with the UK Financial Conduct Authority (“FCA”) by January 9, 2021. Since January 10, 2020, new cryptoasset businesses have needed to be registered with the FCA before they begin conducting business.

### **European Union: Markets in Cryptoassets**

On September 24, 2020, as part of its digital finance package, the European Commission published its highly anticipated draft regulation on markets in cryptoassets (“MiCA”), which introduced a new regulatory framework for cryptoassets (including stablecoins) that are not covered by existing EU regulation. The proposed regulation was driven in part by the Commission’s concern that while the cryptoasset market remains modest in size and does not currently pose a threat to financial stability, this may change with the advent of global stablecoins. Proposed EU-level requirements under the regulation include transparency and disclosure requirements for the issuance and admission to trading of cryptoassets (such as the obligation to publish a white paper that describes the offering or admission to trading); authorization requirements for cryptoasset services providers and issuers; operational, organizational, and governance requirements for certain cryptoasset service providers and issuers; and measures to prevent market abuse.

Different stablecoins are subject to different requirements and the proposed regulation distinguishes among “asset-referenced tokens” (i.e., cryptoassets that purport to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities, or one or several cryptoassets, or a combination of such assets), “electronic money tokens” (i.e., cryptoassets the main purpose of which is to be used as a means of exchange and that purport to maintain a stable value by referring

to the value of a single fiat currency that is legal tender), and “algorithmic stablecoins” (i.e., cryptoassets that aim at maintaining a stable value via protocols that provide for the increase or decrease of the supply of such cryptoassets in response to changes in demand). Issuers offering asset-referenced tokens classed as “significant” are subject to more onerous requirements.

## **Extending UK Financial Promotion Regime to Cryptoassets**

HM Treasury consulted in the second half of 2020 on proposals to bring the promotion of certain types of unregulated cryptoassets within the scope of the UK financial promotion regime. As it considers that many types of unregulated cryptoassets expose consumers to unacceptable levels of risk and give rise to market integrity and financial crime risks, it proposes amendments to the financial promotion regime to cover certain unregulated cryptoassets and related activities. Cryptoassets proposed to be covered are identified as any cryptographically secured digital representations of value or contractual rights that use a form of distributed ledger technology and that, broadly, are fungible, transferable, and not investments already covered by the financial promotion regime, electronic money under the Electronic Money Regulations, or central bank-issued currency. These would cover stablecoins that are not already in the scope of the financial promotion regime.

## **UK Regulatory Approach to Cryptoassets and Stablecoins**

At the start of 2021 HM Treasury published its long-awaited consultation paper on the broader regulatory approach to cryptoassets and stablecoins. While it proposes to initially leave unregulated tokens that are used primarily for speculative investment purposes and utility tokens used to access a service outside the regulatory perimeter, it plans to bring stablecoins (other than algorithmic stablecoins that are not backed by assets) firmly within the regulatory perimeter. The government considers that risks and opportunities relating to stablecoins are most urgent, particularly in light of their broad use for payment and concerns over their ability to provide stable value and redeemability.

Accordingly, the government proposes a new category of regulated tokens, “stable tokens,” to refer to cryptoassets that stabilize their value by referencing one or more assets (regardless of whether those cryptoassets rely on distributed ledger technology), and the consultation paper focuses on establishing a sound regulatory framework for stable tokens that are used as a means of payment. This would cover firms issuing stable tokens and firms providing services relating to them. If appropriate standards and regulation can be met, HM Treasury believes that certain stable tokens have the potential to play an important role in retail and cross-border payments, including settlement.

The consultation will close on March 21, 2021, and HM Treasury plans to take a proportionate approach to regulation that is responsive to new market developments and sensitive to risks posed, as well as an incremental, phased approach to regulatory adjustments.

## What to Expect in 2021

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Based on the flurry of regulatory developments in the past 12 months, we expect further proposals from policymakers and regulators relating to the development of new regulatory frameworks for stablecoin and the issuance of further guidance in the interim while new frameworks are considered. The need to capture unregulated stablecoins continues to be a focus for legislators and regulators at both global and national levels. Our predictions for the coming months are below.

### United States

President Joseph Biden should be able to move his policy agenda forward with relative ease. He has a Democratic-controlled House of Representatives and Senate (the Senate will be split 50-50 between Republicans and Democrats, and Vice President Kamala Harris has the tiebreaker vote as president of the Senate). In addition, if Democrats re-propose the STABLE Act, this legislation could have legs. President Biden has nominated for chair of the SEC Gary Gensler, a former Goldman Sachs executive and a past chairman of the CFTC. Gensler is familiar with cryptocurrency, and this background may be relevant when he takes the helm of the SEC. We expect the SEC to become more active in its oversight

of initial coin offerings and cryptocurrency in general. The Biden administration is expected to take a more favorable approach to cryptocurrency policy than former President Trump, who made his disfavor of cryptocurrency known in a series of tweets in July 2019.

Agencies such as the Consumer Financial Protection Bureau and Department of Justice have been thinking about fintech and cryptocurrency for some time, and there likely will be new enforcement actions from many federal agencies and state attorneys general irrespective of the administration's politics. It also would not be surprising to see more regulatory proposals this year, from a variety of agencies. Stablecoin companies will become subject to AML requirements at some point, perhaps in 2021—it is a matter of when, not if, these requirements will apply to stablecoin and other cryptocurrency companies.

Further, we expect the OCC to continue to focus its regulatory efforts on stablecoin companies and other cryptocurrency companies. In fact, the OCC issued another interpretive letter on its first business day after the New Year holiday. The most recent interpretive letter allows banks to use stablecoin to facilitate payment transactions for customers on independent node verification networks, including by issuing stablecoin and by exchanging stablecoin for fiat currency.<sup>27</sup>

The OCC took additional action in January when it provisionally approved a national trust bank charter for a digital bank, Anchorage Digital Bank, National Association. Anchorage Digital Bank had sought conversion to a national bank from a South Dakota-chartered nondepository public trust company, and was already permitted to offer custody services to investors that transact in digital assets and cryptocurrencies, such as tokenized securities and cryptocurrencies like Bitcoin and Ethereum, among others. In addition, it may provide on-chain governance services such that its clients can participate in the governance of the protocols on which their assets operate, operate validator nodes and provide staking as a service, perform settlement services with third-party brokers and with clients themselves, and custody fiat currency using a sub-custodian. In announcing this development, the OCC's press release noted that the conversion from a nondepository public trust company to a national bank was "not in contravention of applicable law." The landmark Anchorage Digital Bank charter demonstrates the OCC's comfort under the Trump administration in permitting national banks to engage in certain cryptocurrency activities and

paves the way for other banks to become chartered to engage in cryptocurrency activities. Two other fintech companies have outstanding applications for bank charters with the OCC. The Biden administration's action or inaction on these applications will be illustrative on how the OCC will act on cryptocurrency matters under the new administration.

If Brooks' SPNB rulemaking moves forward, this would be an important development in 2021 and a boondoggle for stablecoin companies. This is especially true if the STABLE Act is repropoed and adopted, forcing stablecoin issuers to be banks. But there could be some friction between the new administration and any SPNB effort. Moreover, banks that decide to rely on the OCC's interpretive guidance should expect their stablecoin and other cryptocurrency custody services to be scrutinized by OCC examination staff. These banks should ensure that they have established all appropriate policies and procedures, and that these policies and procedures are effective.

With three no-action letters to stablecoin companies under its belt, the SEC likely will continue to provide no-action relief applicable only to the company seeking relief, consistent with the facts-and-circumstances approach the agency takes when analyzing a coin's regulatory status. However, the SEC's enforcement case against Ripple Labs Inc. will be worth monitoring for regulatory insight as the case proceeds. The SEC's Enforcement Division may consider additional actions against other cryptocurrency firms. In such a scenario, a flood of stablecoin issuers may seek relief from FinHub staff in an attempt to avoid enforcement action. Alternatively, stablecoin issuers may attempt to redesign their coins to the extent possible or enter into strategic partnerships with banks or other stablecoin companies to avoid any regulatory liability.

## European Union

The proposed new MiCA is a significant step in building a unified approach to stablecoins and stablecoin-related services and activities across the European Union, but it remains to be seen how the proposal will develop. The European Parliament and the EU Council are now considering the proposed regulation. In its communication outlining its work program for 2021, the European Commission included the MiCA in a list of priority proposals for

which it wants the Parliament and Council to take swift action, and so we await to see what, if any, amendments the Parliament and Council propose. According to the European Central Bank's October 2020 report on a digital euro, the Eurosystem will also decide whether to pursue a formal central bank digital currency project by mid-2021. However, in that report, the European Central Bank differentiates the digital euro (which would be a central bank liability) from cryptoassets (which are not the liability of any entity) and stablecoins (the stable value of which it says could only be guaranteed by a digital euro).

## United Kingdom

HM Treasury's response to its consultation to bring certain cryptoassets within the UK financial promotion regime is expected early this year. Its response to its consultation on the broader regulatory approach to cryptoassets and stablecoins should then come later in 2021, following the end of the consultation in March. If the government decides to adopt the proposals to bring stablecoins within the regulatory perimeter, further consultations and guidance issued by HM Treasury and the relevant regulators on the implementation of those proposals would be expected, including formal legislative proposals and specific rules for firms. Further, we await a Bank of England discussion paper on the potential effects on financial stability if stablecoins were to be adopted widely and on issues that may arise in relation to a central bank digital currency, which the Bank of England stated that it intends to publish in its last financial stability report.

## Notes

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1. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); *see also* U.S. Securities and Exchange Commission Division of Corporate Finance, Framework for “Investment Contract” Analysis of Digital Assets (Apr. 3, 2019), *available at* [https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#\\_edn5](https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn5).

2. *See, e.g., CFTC v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018).

3. The Board of the International Organization of Securities Commissions, Global Stablecoin Initiatives (Mar. 2020) 21 (IOSCO Report), *available at* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD650.pdf>. The IOSCO Report describes a hypothetical case study that examines a stablecoin that allows users to make payments using the stablecoin, which is comparable to a “payment system,” or a “set of instruments, procedures, and rules for the transfer of funds between or among participants; the system includes the participants and the entity operating the arrangement.” IOSCO identifies several of its prior reports and recommendations that could be applicable to a stablecoin’s reserve fund and stablecoin generally, depending on the particular structure.

4. Financial Stability Board, Regulation, Supervision and Oversight of “Global Stablecoin” Arrangements, Final Report and High-Level Recommendations (Oct. 13, 2020), *available at* <https://www.fsb.org/wp-content/uploads/P131020-3.pdf>.

5. Financial Action Task Force, FATF Report to the G20 Finance Ministers and Central Bank Governors on So-called Stablecoins (June 2020), *available at* <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Virtual-Assets-FATF-Report-G20-So-Called-Stablecoins.pdf>.

6. Christine Lagarde, The Future of Money—Innovating While Retaining Trust (Nov. 30, 2020), *available at* <https://www.ecb.europa.eu/press/inter/date/2020/html/ecb.in201130~ce64cb35a3.en.html>.

7. IOSCO Report at 21.

8. *See, e.g.,* Governor Lael Brainard, Federal Reserve Board of Governors, Update on Digital Currencies, Stablecoins, and the Challenges Ahead (Dec. 18, 2019) (“Brainard Speech”), *available at* <https://www.federalreserve.gov/newsevents/speech/brainard20191218a.htm>.

9. Brainard Speech and IOSCO Report.

10. *See* Brainard Speech. Any loss of confidence and run-like behavior could be worsened by a failure to clearly identify the management of reserves and the role of market participants within the stablecoin network. It is important to note that financial stability risks may differ depending on whether the stablecoin is tied to an asset or a basket of currencies or assets, is built on a permissioned network, or is used solely by commercial banks.

11. *See* Brainard Speech.

12. IOSCO Report at 17.

13. *Id.* at 18.

14. *Id.*

15. *Id.* at 21-22.

16. The bill divides stablecoin into two categories: (1) *Reserve-Backed Stablecoin*. A reserve-backed stablecoin is defined as a representation of currency issued by the United States or a foreign government that rests on a blockchain or decentralized cryptographic ledger, and is fully backed by such currency on a one-to-one basis and fully collateralized in a correspondent banking account. (2) *Synthetic Stablecoin*. A synthetic stablecoin is a digital asset, other than a reserve-backed stablecoin, that is stabilized against the value of a currency or other asset and rests on a blockchain or decentralized cryptographic ledger.

17. The proposed legislation also requires nonissuers to obtain from each of the appropriate federal banking agency, the FDIC, and the Federal Reserve Board advance written approval and approval on an ongoing basis before engaging in stablecoin activity. These persons would be subject to the same disclosure requirements as issuers.

18. National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020).

19. SEC Announces Office Focused on Innovation and Financial Technology (Dec. 3, 2020), *available at* <https://www.sec.gov/news/press-release/2020-303>.

20. SEC FinHub Statement on OCC Interpretation (Sept. 21, 2020), *available at* [https://www.sec.gov/news/public-statement/sec-finhub-statement-occ-interpretation#\\_ftn2](https://www.sec.gov/news/public-statement/sec-finhub-statement-occ-interpretation#_ftn2).

21. *Id.*

22. *IMVU, Inc.*, Response of the Division of Corporation Finance (Nov. 19, 2020), *available at* <https://www.sec.gov/corpfin/imvu-111920-2a1>. The issuer in the no-action letter provided a platform where users in an online virtual world can acquire goods and services using digital credits that, prior to the relief, could only be used on the platform, and thus could not be transferred or used outside of the platform. The issuer's virtual world participants requested the ability to use the digital credits for platform uses that they would need to address off of the platform, i.e., conversion of digital credits to fiat currency to compensate off-platform contributors to the virtual economy.

23. *Id.*

24. *SEC v. Ripple Labs, Inc., et al.*, 20 Civ. 10832 (Dec. 22, 2020), *available at* <https://www.sec.gov/litigation/complaints/2020/comp-pr2020-338.pdf>.

25. Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 Fed. Reg. 83,840 (Dec. 23, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-12-23/pdf/2020-28437.pdf>.

26. Directive (EU) 2018/843.

27. OCC Interpretive Letter 1174 (Jan. 4, 2021), *available at* <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2a.pdf> (The guidance describes an independent node verification network to consist of a

shared electronic database where copies of the same information are stored on multiple computers. The guidance identifies a distributed ledger as a common form of an independent node verification network and goes on to explain that cryptocurrency transactions are recorded on these ledgers. Participants of an independent node verification network are known as nodes; the nodes may validate transactions, store transaction history, and broadcast data to other nodes.).