

**CHAIR**

Vicki O. Tucker  
Richmond, VA  
vtucker@huntonak.com

**CHAIR-ELECT**

Patrick T. Clendenen  
New Haven, CT  
ptc@clenlaw.com

**VICE-CHAIR**

Jeannie C. Frey  
Irving, TX  
jeannie.frey@christushealth.org

**SECRETARY**

Penelope L. Christophorou  
New York, NY  
pchristophorou@cgsh.com

**BUDGET OFFICER**

Linda J. Rusch  
Seattle, WA  
lrusch59@gmail.com

**CONTENT OFFICER**

Norman M. Powell  
Wilmington, DE  
npowell@ycst.com

**IMMEDIATE PAST CHAIR**

Christopher J. Rockers  
Kansas City, MO  
christopherrockers@huschblackwell.com

**SECTION DELEGATES TO THE  
ABA HOUSE OF DELEGATES**

Paul "Chip" L. Lion III  
Palo Alto, CA

Barbara M. Mayden  
Nashville, TN

Alvin W. Thompson  
Hartford, CT

Steven O. Weise  
Los Angeles, CA

**COUNCIL**

Kristen D. Adams  
Gulfport, FL

Cara Bradley  
Beverly, MA

Brian M. Castro  
Washington, D.C.

Sylvia Chin  
New York, NY

Theodore F. Claypoole  
Atlanta, GA

Catherine T. Dixon  
Great Falls, VA

Holly J. Gregory  
New York, NY

Anuradha Gwal  
Newark, DE

Neal J. Kling  
New Orleans, LA

Linda M. Leall  
Fort Lauderdale, FL

Lisa R. Lifshitz  
Toronto, ON, Canada

Jonathan C. Lipson  
Philadelphia, PA

Scott E. Ludwig  
Huntsville, AL

Mac R. McCoy  
Fort Myers, FL

Nicole F. Munro  
Hanover, MD

Peter V. Snell  
Vancouver, BC, Canada

John H. Stout  
Minneapolis, MN

Thomas J. Walsh  
Fairfield, CT

Ashley C. Walter  
Seattle, WA

Sharon Z. Weiss  
Santa Monica, CA

**BOARD OF  
GOVERNORS LIAISON**

Kevin L. Shepherd  
Baltimore, MD

**SECTION DIRECTOR**

Susan Daly Tobias  
Chicago, IL  
susan.tobias@americanbar.org

July 29, 2019

Giles Ward  
International Organization of Securities Commissions (IOSCO)  
Calle Oquena 12  
28006 Madrid, Spain

Re: IOSCO Consultation Report on "Issues, Risks, and Regulatory Considerations  
Relating to Crypto-Assets Trading Platforms"

Dear Mr. Ward:

The Board of IOSCO published a Consultation Report on Crypto-Assets Trading Platforms in May 2019,<sup>1</sup> prepared by Committee 2 on Regulation of Secondary Markets (Committee 2), and encouraged public comment on the identified issues, risks, key considerations, and related toolkits concerning the regulation of crypto-asset trading platforms (CTPs). Among other things, the report highlights that CTPs and the crypto-asset markets have unique features and are evolving rapidly:

*The crypto-asset market is evolving and the Consultation Report outlines risks and issues that have been identified thus far and sets out key considerations that may be relevant for regulatory authorities that are considering the potentially novel and unique issues related to the regulation of CTPs.<sup>2</sup>*

This comment letter is submitted by the Business Law Section of the American Bar Association (the Section), on behalf of the Section's Derivatives and Futures and Committee (the Derivatives Committee), and was prepared by a drafting group of members of the Derivatives Committee's Innovative Digital Products and Processes Subcommittee (ABA Subcommittee or IDPPS).<sup>3</sup> We appreciate the opportunity to comment on the Consultation Report.

<sup>1</sup> *Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms*, Board of IOSCO, May 2019, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD627.pdf> (Consultation Report).

<sup>2</sup> *Id.* at p.28.

<sup>3</sup> The ABA Subcommittee was established in March 2018 as a subcommittee of the Derivatives and Futures Law Committee (DFL Committee) of the Business Law Section of the American Bar Association (ABA). The ABA Subcommittee has over 80 members, comprised of attorneys who work extensively in the areas of derivatives and securities law, FinTech, and related areas. The ABA Subcommittee is organized into three working groups: the Jurisdiction Working Group, the Blockchain Modality Working Group, and the SRO Working Group. In March 2019, the ABA Subcommittee published a paper prepared by members of the Jurisdiction Working Group and their colleagues that provides a comprehensive survey of the regulation of cryptocurrencies and other digital assets at the federal and state levels in the U.S., along with summaries of key initiatives outside the U.S. The subcommittee is undertaking other projects through its working groups. The Blockchain Modality Working Group is considering commercial and regulatory issues relating to application of blockchain technology in the financial markets and financial services industry, and the SRO Working Group is considering issues for potential implementation of self-regulation with respect to markets for digital assets.

The views expressed in this comment letter have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing policy of the American Bar Association.

## Introduction

The Section wishes to underscore a few threshold considerations and encourage the Board, Committee 2, and IOSCO members to consider these issues further.

The Consultation Report addresses key considerations for regulation of CTPs for crypto-assets that fall within a regulatory framework administered by the regulatory authority in a particular jurisdiction. We agree with the Consultation Report's acknowledgement that it is a separate issue to determine whether a particular crypto-asset or activity involving the asset falls within the jurisdiction of a regulatory authority. Crypto-assets can have diverse terms and uses, each representing a unique bundle of property rights and interests. Transactions in particular types of crypto-assets may well appropriately be outside a formalized scheme of market regulation, such as cash market transactions in digitized assets that represent title ownership to tangible commodities.

As the Board, Committee 2, and IOSCO members are aware, regulation of CTPs across the globe differs tremendously. In the United States, for example, the Commodity Futures Trading Commission (CFTC) generally does not regulate trading in the spot or forward cash markets for crypto assets that are commodities, but does retain enforcement authority to police manipulation and fraud in the spot and forward markets and asserts additional regulatory authority over crypto-asset derivatives. Where the crypto-asset represents a security, the U.S. Securities and Exchange Commission (SEC) primarily regulates both initial offering and secondary market transactions in the asset. Separately, some states regulate the transmission of cryptocurrency under legacy statutes and regulations, but such regulations do not go so far as to regulate the platforms upon which CTP purchases and sales are executed (other than with respect to know-your-customer and anti-money laundering requirements), as is addressed in the Consultation Report. On the other hand, Japan has instituted new robust regulation, which includes a self-regulatory structure.

As jurisdictions continue to consider the risks of crypto-asset trading, we would encourage the Board, Committee 2, and IOSCO members to also consider what types of regulation are appropriate for CTPs. For example:

- Would it be appropriate to regulate the CTP market through a self-regulatory organization (SRO) model, or would a mix of SRO with some form of regulatory oversight be appropriate? What types of considerations should local jurisdictions consider when structuring such a regulatory framework?
- Separately, would regulation by enforcement be sufficient, and what would be the key considerations in order to make such a determination?

In addition to consideration of types of regulatory oversight and structure, local jurisdictions continue to evaluate what risks are posed by these trading platforms and whether additional regulation of crypto-asset trading is necessary. The market is tackling not only the question of whether and what additional regulation is necessary, but also how to adapt existing regulations to cover new risks and do so in a framework that is not prohibitively expensive. We would encourage the Board, Committee 2, and IOSCO members to consider any additional guidance they might have regarding the foregoing, including innovative approaches to regulation. In that regard, LabCFTC, implemented by the CFTC "to promote responsible financial technology (FinTech) innovation and fair competition" as "the hub for the agency's engagement with the FinTech innovation community," may be instructive.<sup>4</sup>

---

<sup>4</sup> See <https://www.cftc.gov/LabCFTC/index.htm>.

## Self-Regulatory Organizations

The Board, Committee 2, and IOSCO members are encouraged to consider whether SROs could be used appropriately in the regulatory framework given the unique features of CTPs, rapidly evolving crypto-asset markets, and IOSCO's principle related to self-regulation, assessment methodology, and *Model for Effective Self-Regulation*. IOSCO members also are encouraged to consider engaging with their respective legislative bodies to evaluate whether legislation is necessary or appropriate to enhance or empower SRO credibility and authority.

While an SRO is an optional feature of the regulatory structure in which an IOSCO member operates, as discussed below, IOSCO previously has noted that an appropriately used SRO has the potential to harness the knowledge of the industry it governs, respond quickly to marketplace changes, and potentially also facilitate cross-border information sharing.

We encourage the Board to consider the relevancy of IOSCO Principle 9 (Principle relating to Self-Regulation) in the context of regulation of CTPs.<sup>5</sup> This Principle recognizes the value of SROs used appropriately in the regulatory structure, even though use of SROs is optional. In addition, IOSCO's assessment methodology recognizes that appropriately used SROs bring industry expertise and flexibility to address rapidly changing marketplaces.<sup>6</sup> Further, IOSCO's *Model for Effective Self-Regulation* highlights the potential value of self-regulation:

*Self-regulation, typically involving a unique combination of private interests with government oversight, is an effective and efficient form of regulation for the complex, dynamic and ever-changing financial services industry.*<sup>7</sup>

In its self-regulation guidance, IOSCO also considers the "general elements that have served to make self-regulation successful" and builds a template of SRO functions:

*Building upon the identified elements for effective self-regulation, this paper proposes a general template of functions as an aid for developing an SRO structure that is appropriate for the characteristics of the marketplace and any applicable government oversight framework. The paper also addresses the relationship of the SRO to the government regulator, advocating deference to SROs as "frontline" regulators, subject to government oversight under general performance standards.*<sup>8</sup>

According to the IOSCO guidance, the elements that contribute to the effectiveness of the self-regulatory model include: industry specialized knowledge; industry motivation; contractual relationship; transparency and accountability; flexible compliance programs; and coordination and information sharing. The IOSCO guidance also provides the following reasons to consider incorporating self-regulation into regulatory frameworks:

- *Self-regulation has a long history of working effectively*

---

<sup>5</sup> IOSCO Principle 9 states: "Where the regulatory system makes use of Self-Regulatory Organizations (SROs) that exercise some direct oversight responsibility for their respective areas of competence, such SROs should be subject to the oversight of the Regulator and should observe standards of fairness and confidentiality when exercising powers and delegated responsibilities." *Objectives and Principles of Securities Regulation*, IOSCO, May 2017, p.5, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>.

<sup>6</sup> *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation*, IOSCO, May 2017, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>. The assessment methodology states: "Self-Regulatory Organizations (SROs) can be a valuable complement to the regulator in achieving the objectives of securities regulation." *Id.* at p.53. According to the assessment methodology, the "appropriate use" of an SRO is related to, among other things: "The augmentation of regulatory resources by utilizing the SRO's expertise, its proximity to the market and its flexibility in addressing issues that arise in the changing market environment." *Id.* at p.55.

<sup>7</sup> *Model for Effective Self-Regulation*, Report of the SRO Consultative Committee of IOSCO, May 2000, p.1, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD110.pdf>.

<sup>8</sup> *Id.* at pp.1-2.

- *SROs possess flexibility to adapt to regulatory requirements of a rapidly changing business environment*
- *SRO contractual relationships can reach across international boundaries*
- *Industry input and representation contribute to a strong and effective compliance culture*
- *Self-regulation generally imposes fewer costs than government regulation*
- *SROs provide an intimate knowledge of the markets and products.*<sup>9</sup>

Finally, the IOSCO guidance states:

*IOSCO Committees and their respective working groups should therefore consider, recognize and incorporate self-regulatory approaches in the guidelines or standards they develop for the specific regulatory issues they examine.*<sup>10</sup>

In conclusion, we suggest that the Board, Committee 2, and IOSCO members consider the potential role of SROs in the regulation of CTPs and the crypto-asset markets. Given the passage of time, we also recommend that the IOSCO Board consider updating its SRO guidance *Model for Effective Self-Regulation* generally or in the context of CTPs.

### **Economic Cost-Benefit Analysis**

Tailoring regulation to the emergence of crypto-assets and associated trading platforms also raises important issues regarding the proper balance between promoting the objective of regulation and fostering a regulatory system that enables innovative new technologies to develop.<sup>11</sup> Crypto-assets, distributed ledger technology, and innovations in financial technology more broadly have the potential to significantly reshape the financial markets. These innovations promise to expand access to services for underserved individuals and to improve the efficiency, ease of use, and speed of services.

We agree that “fostering innovation should be balanced with the appropriate level of regulatory oversight,” and that “if a CTP trades a crypto-asset that is a security and it falls within a regulatory authority’s jurisdiction, the basic principles or objectives of securities regulation . . . should apply.”<sup>12</sup> As IOSCO examines how to apply the basic principles or objectives to new technologies, we encourage IOSCO to continue engaging with industry participants, including technologists, to understand both the risks and the benefits of new technologies.

At times, as the Consultation Paper recognizes, CTPs and crypto-asset trading generally will operate in ways that existing financial regulatory frameworks did not contemplate. At times, they may operate in ways that are inconsistent with existing frameworks. Technological developments change market structures and modalities and will continue to do so in the future. Where financial information was once transmitted through messengers and ticker-tapes, the same information now can be transmitted across the world in fractions of a second. Historically, these changes have caused periods of discomfort and required financial regulatory authorities to reassess the status quo.

As the proliferation of computers in the 1960s and 1970s drastically changed the role of the back-office, today market participants and financial regulators are grappling with defining the role of many traditional intermediaries in the context of financial instruments designed for disintermediation.

---

<sup>9</sup> *Id.* at p.12.

<sup>10</sup> *Id.* at p.13.

<sup>11</sup> IOSCO defines the objectives of securities regulation as protecting investors; ensuring that markets are fair, efficient, and transparent; and reducing systemic risk.

<sup>12</sup> Consultation Report at pp.4-5.

For example, questions arise regarding the role of transfer agents when an asset is transferred on a distributed ledger network that records changes of ownership, maintains security issuers' security holder records, and is capable of distributing dividends—all without a trusted intermediary. Digitization of both cash and equities on a shared ledger promise new streamlined asset interactions during settlement compared to the currently fragmented clearing and depository systems in place today. This potential disintermediation creates new risks, many of which are outlined in the Consultation Paper, but also may yield immeasurable benefits to the capital markets.

While regulatory harmonization is a laudable goal, sometimes one financial regulatory authority's early action in an area helps other jurisdictions to think about how they address the same area. We support IOSCO facilitating cooperation among regulators from different jurisdictions, but we also urge IOSCO to remain open to differing approaches to achieving regulatory objectives regarding crypto-assets and CTPs.

When financial regulatory authorities identify a reason to impose new regulatory requirements tailored to CTPs and other innovations in financial technology, such new requirements should be narrowly tailored to address clearly identified problems. With the rapid pace of advances in technology, we urge financial regulatory authorities to continue improving cost-benefit analyses to account not only for the direct impact of the rules being analyzed, but also the indirect burdens associated with a given rule and whether more flexible or less burdensome requirements can achieve the same or similar objectives. At the same time, the level and scope of the cost-benefit analysis to be performed should be tailored to the relative risk of the underlying activity that is being regulated. For example, adopting rules to permit regulated firms to replace legacy recordkeeping systems with non-controversial blockchain solutions should not require the same level of cost-benefit analysis as would a rule permitting regulated financial assets to be created, issued, traded, and stored solely on a public blockchain.

On behalf of the Section, thank you for your consideration of the views expressed herein. The Section, the Derivatives Committee and the ABA Subcommittee would be happy to respond to any questions or if the Committee requires further information.

Best regards,



Vicki O. Tucker  
Chair, American Bar Association Business Law Section

cc:

Rita Molesworth, Chair, Derivatives and Futures Law Committee (rmolesworth@willkie.com;  
(212) 728-8727)

Kathryn Trkla, Vice Chair, Derivatives and Futures Law Committee & Chair, IDPPS  
(ktrkla@foley.com; (312) 832-5179)

Michael Spafford, Vice Chair, Derivatives and Futures Law Committee & Vice Chair, IDPPS  
(michaelspafford@paulhastings.com; (202) 551-1988)