KING&WOOD MALLESONS
金杜律师事务所

The Power of Together

Building a legal architecture for the metaverse

FATF 2021 guidance sets the scene for global policymakers, regulators and industry on virtual assets and decentralised systems

What you need to know

November 2021

A rapidly evolving landscape

Key things to know

The Financial Action Task Force (**FATF**) – the global standard setter on anti-money laundering and counter-terrorist financing (**AML/CTF**) – has released its updated guidance to support its recommendations for the global AML/CTF framework for virtual assets, virtual asset service providers (**VASPs**) and their related activities.

Specifically, the "Updated Guidance for a Risk-Based Approach for Virtual Assets and Virtual Asset Service Providers" (**FATF VA Guidance**) is the culmination of FATF's efforts since the original guidance was published in 2019. At a high level, it demonstrates a heightened focus on rapidly emerging areas of development including the following:

- **Stablecoins**, which seek to achieve parity against, or operate within a narrow band of another reference asset, with multiple centralised and decentralised models emerging.
- **Peer-to-peer (P2P) transactions and decentralised protocols**, which are experiencing rapid growth, particularly in the decentralised finance (**DeFi**) arena.
- **Non-fungible tokens (NFTs)** representing unique in-game assets, collectibles, artwork, assets etc that have burst into the mainstream.
- **"Travel rule" data-sharing implementation**, a challenging technical and regulatory topic for national regulators and industry alike.
- **Inter-agency information sharing and cooperation**, which supports transnational alignment and enforcement efforts.

This alert outlines the key points arising out of the FATF VA Guidance, sharing our views and providing insight on the regulatory approach to virtual assets and VASPs. Importantly, this remains guidance – it will be for each jurisdiction to implement what it considers appropriate for its own market.

Why now? How the world has changed in 2 years

Virtual assets continue to rise in popularity at both retail and institutional levels across multiple markets, with the sector edging toward $3 trillion in market capitalisation. Bitcoin and Ether reached fresh all-time highs in Q4 2021, new protocols such as Solana are supporting the burgeoning NFT sector and DeFi locked value estimates circle around the USD200 billion mark.

Novel technologies, products and services undoubtedly spur financial innovation, boost competition and create opportunities to positively redesign our financial services sector. At the same time, they inevitably create opportunities for criminals and terrorists to find new pathways to launder their proceeds and finance their illicit activities. Where innovation meets pseudonymity and speed, the lure for criminals is intensified. The virtual asset sector is no exception. The opportunity for direct connectivity without regulated intermediaries or appropriate technical controls can be a risk accelerant.

These developments have led to increased regulatory focus on virtual assets and VASPs.

Governments globally are passing laws and regulations to bring VASPs into licensing and registration regimes with strict AML/CTF obligations. Some jurisdictions such as the Philippines, Canada, Japan and Malta have already been "mutually evaluated" by FATF against its VASP recommendations; in some cases this has resulted in further upgrades required. Others such as Hong Kong SAR are rapidly preparing for this process with new laws, with certain jurisdictions such as Singapore already grappling with peer-to-peer regulation. The European Commission's Regulation of Markets in Crypto-assets (MiCA) has iterated and evolved, covering a range of AML/CTF, consumer protection and ESG policy areas. More restrictive jurisdictions such as China (Mainland) have taken a different tack.

Further, in October 2021, the Office of Foreign Assets Control (**OFAC**) published its guidance in respect of compliance with OFAC sanctions for technology companies, exchanges, administrators, miners, wallet providers, VASPs and virtual assets holders. The OFAC guidance stresses that compliance obligations apply equally to both transactions involving virtual assets and those involving traditional fiat currencies, and that activities of all United States (**US**) persons, as well as activities of non-US persons that involve the US, US persons, or goods or services exported from the US, can be subject to OFAC regulations. The guidance also urges members of the virtual asset industry to adopt due diligence best practices, including implementing risk assessment, internal controls, and remedial measures.

The FATF VA Guidance will add to this agenda.

What does the FATF VA Guidance bring to the table?

The FATF VA Guidance supplements and replaces an earlier draft released by FATF in June 2019, which we wrote about here. In June 2020, FATF completed its 12-month review of the 2019 version of the Guidance and released its findings in a report (**Review Report**).

The Review Report found that (among other things) both public and private sectors had made progress in implementing the revised FATF Standards on virtual assets and VASPs, but that challenges remained. For example, some jurisdictions had not yet established AML/CTF regimes for VASPs at all.

Simultaneously with the Review Report, also in June 2020, FATF released its report to the G20 on stablecoins ("**Stablecoin Report**"). This report sets out (among other things) how FATF standards apply to stablecoins and how FATF plans to enhance the global AML/CTF framework for virtual assets and stablecoins.

As a result of the Review Report and Stablecoin Report, FATF has prepared the Updated Guidance to address challenges identified in the two reports.

Ultimately, FATF is seeking to close loopholes that exist if virtual assets and VASPs go unregulated and to ensure they are subject to safeguards and standards in line with those applicable to the traditional financial sector.

Key things to know

The FATF VA Guidance focuses on six key areas where greater direction from FATF was sought:

Clarifying concepts	Stablecoins	P2P and DeFi	Licensing and registration	Global cooperation	Travel rule

FATF focus 1: Clarifying in-scope virtual assets and VASPs

"Virtual assets" – an ever-growing class

"A virtual asset is a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations." (Glossary, page 109 of the FATF VA Guidance Guidance)

The FATF VA Guidance clarifies the following:

- **Digital representations of fiat currencies** (eg a bank record maintained in digital format) are not virtual assets.
- **Central bank-issued digital currencies (CBDCs)** are fiat currency not virtual assets for FATF purposes. Despite that, FATF Standards would apply to them similar to any other form of fiat currency.
- **Stablecoins can be virtual assets** – depending on whether they have inherent value to be traded, transferred or otherwise used for payment or investment.
- **NFTs may be in scope**. Whilst NFTs may not initially appear to constitute virtual assets, they may be considered and treated as virtual assets due to secondary markets that enable the transfer or exchange of value (in other words, they can be traded, transferred or used for payment or investment purposes).

The recognition of NFTs within the FATF universe will be the most difficult to implement with the degree of precision required. Already we see nuances emerging in NFT issuances and marketplaces that blur the lines between genuinely non-financial assets and a parallel economy of sorts (hello, metaverse), and a sector needing some degree of balanced regulation. After all, money laundering offences themselves are not usually limited to "money" – they often extend to other property. There is also statutory recognition in many jurisdictions that intermediaries of high value assets such as real estate, precious metals and precious stones also require controls. Stablecoins merit greater certainty and the inclusion of this area should be welcomed, even if they can take multiple forms – more on this below.

Clarifying the VASPs in scope

"Virtual asset service provider means any natural or legal person who is not covered elsewhere under the Recommendations, and as a business conducts one or more of the following activities or operations for or on behalf of another natural or legal person: exchange between virtual assets and fiat currencies; exchange between one or more forms of virtual assets; transfer of virtual assets; safekeeping and/or administration of virtual assets or instruments enabling control over virtual assets; and participation in and provision of financial services related to an issuer's offer and/or sale of a virtual asset." (Glossary, page 109 of the FATF VA Guidance)

The FATF VA Guidance clarifies the following:

DeFi is in FATF's sights DeFi refers to financial tools built on open and permissionless blockchain-based networks. The FATF VA Guidance makes it clear that creators, owners and operators or some other persons who maintain control or sufficient influence in the DeFi or distributed applications (**DApps**) are likely to be VASPs because they are providing or actively facilitating VASP services. FATF's reasons that where customers can access a financial service it stands to reason that some party has provided that service even if that was a temporary or shared act.	**Our view:** This is an especially interesting development. It challenges some common views that DeFi is impossible to regulate, that all DeFi is DeFi (that is, fully decentralised) and that decentralised actors potentially unknown to one another should be treated differently than those under the umbrella of a legal entity - contrary to the principle of functional equivalence. A number of aspects of DeFi (or pseudo-DeFi) already fall within regulated activities in certain jurisdictions, although classic triggers regularly fall short of capturing everything within this burgeoning ecosystem. FATF's approach arguably draws inspiration from existing principles of primary and secondary liability, including complicity and common purpose, as well as non-corporate association structures recognised in multiple jurisdictions. In some cases, FATF's guidance seeks to complement and not necessarily fundamentally alter existing frameworks.
Keys, platforms, smart contracts… Virtual asset escrow services, including services involving smart contract technology, brokerage services, order-book exchange services, advanced trading services, and custody providers (eg safekeeping by holding private keys on behalf of customers or administering by managing assets) are all considered VASPs.	**Our view:** This clarification mirrors the reasonably broad definitions of custody and safekeeping we see in certain markets and will need to be taken into account by jurisdictions such as Hong Kong that have more limited regimes covering those providing trust or similar services (under a "trust or company service provider" licence) but with less clarity on key management. However, some of these areas remain highly open to interpretation and arguably go beyond regulation of other asset classes.

In essence, FATF encourages member and observer jurisdictions to take an expansive approach to the definitions of "virtual assets" and "VASPs". This reflects FATF's objective to close the gap on assets falling outside its horizon – that is, even if certain assets do not qualify as virtual assets, they may still fall under categories of other kinds of financial assets (eg fiat currency, securities, etc) and therefore, FATF Standards also apply. It is important to note however that until any of this becomes law, it remains guidance from an international body.

FATF focus 2: Stablecoins

Stablecoins are simple in terms of aim, but can be complex in terms of structure and multitudinous in terms of operation, legal nature and application.

At a high level, stablecoins seek to maintain parity with, or operate within a narrow band of, the prevailing price of a reference asset. That reference asset may be a fiat currency (say, USD) or it may be something else like gold, another virtual asset etc. Some are more, and some are less, successful with that relative stability.

Beyond that general aim, the structure can vary dramatically. For example, a stablecoin can be a beneficial interest in assets held on trust, an interest in a collective investment scheme, a derivative, a mere promise to pay by the issuer (a debt or regulated payment facility), an algorithmically generated and self-rebalancing asset or something else entirely. Terms and conditions are regularly murky (or change), making assessments of which regulatory bucket applies all the more challenging. This does not mean that a stablecoin is not regulated. Indeed, many stablecoins and related services (such as custody of reserves) already are – even if enforcement has historically been low.

FATF recognises this wide array of possibilities. Its key points on this topic are as follows:

- **Characterisation is important.** The key question in this context is whether the stablecoin has inherent value to be traded or transferred and used for payment or investment (therefore, a virtual asset for FATF's purpose) or, rather, it is simply a means of recording or representing ownership of something else (regulated as a security, derivative etc). This distinction is helpful for FATF's purposes, but requires a jurisdiction-specific lens applied. As noted above, stablecoins under FATF's VASP regime would already fall within scope of other regulated services in multiple markets, depending on their structure. Each jurisdiction is likely to consider its existing laws and adapt FATF's guidance accordingly when adopting new ones to see where the gaps lie.

- **Finding the best regulatory fit.** Where characterisation proves difficult, FATF recommends countries assess their regulatory systems and decide which designation will best suit in mitigating and managing the risk of the product.

- **Recognising the risk profile.** FATF specifically discusses certain special features of stablecoins and their impacts on ML/TF risks. In particular, stablecoins have greater potential for mass-adoption; assets which are freely exchangeable and have the benefit of a liquid market can be attractive for ML/TF activities.

- **Dynamic risk assessments and monitoring.** AML/CTF supervisors should ensure VASPs are assessing ML/TF risks relating to stablecoins before launch and in a forward-looking manner (because ML/TF risks can increase as stablecoins become mass-adopted). VASPs should also be taking adequate risk mitigation steps before launch. Risk mitigation could include limiting the scope of customers' ability to transact anonymously and/or by ensuring that AML/CTF obligations are fulfilled, eg by conducting KYC, having relevant people in place who are charged with complying with AML/CTF and using software to monitor transactions and detect suspicious activity.

Given their potential to achieve mass adoption, it is not a surprise that FATF has highlighted the need for greater focus on stablecoins. Indeed, the requirement to conduct ongoing monitoring and assessment of ML/TF risks is not something new, as this requirement has been considered as an essential component of effective AML/CTF systems. Further, as these become more widely adopted, it is increasingly likely that existing laws will be enforced more fully.

Stablecoins - a significant focus at the transnational level

FATF is not alone in tackling stablecoins. The International Monetary Fund has long referenced stablecoins amongst other new forms of digital payment that require focus. More recently, the Financial Stability Board released its "Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements" progress report in October 2021 and the United States President's Working Group on Financial Markets and other key agencies released a "Report on Stablecoins" in November 2021 covering key models, applications, risks and regulatory gaps. A year earlier, the Bank for International Settlements released a "Stablecoins: risks, potential and regulation" (BIS Working Paper No 905), with a more recent report on digital money (BIS Working Paper No 973) also addressing the topic.

One of the most interesting developments involves proposed guidance by the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (**IOSCO**) to the effect that stablecoin arrangements "should observe international standards for payment, clearing and settlement systems". This includes applying the Principles for Financial Market Infrastructures (PFMI) to "systemically important stablecoin arrangements". These recommendations indicate that over time, stablecoins may no longer be treated as a separate asset category and also reflect that perceptions of true novelty may well be misplaced.

Recognition that blockchain is often an infrastructure-level innovation rather than solely about novel applications also appears in the European proposal for regulating market infrastructures based on distributed ledger technology (**DLT**). This regime aims to enable regulated institutions develop DLT-based infrastructure for the trading, custody and settlement of securities. It operates as a regulatory sandbox, allowing operators to request temporary exemptions from certain regulatory requirements that have previously been identified as obstacles to such development. Similar recognition is also seen in initiatives such as Project Genesis (for tokenisation of green bonds) in Hong Kong. Supervised sandboxes and proofs of concept provide an opportunity for transparency, investor protection and financial stability while supporting technological innovation.

Stablecoins often rely on relationships – partnerships, consortia, contracts and other inter-dependencies. These carry their own special considerations. A successful blockchain-related consortium, for example, should be founded on rules of engagement that provide participants with operating guardrails, as well as clear rights, responsibilities and remedies. A staged approach may be required, with initial governing rules dealing with funding of consortium activities and other similar considerations replaced with more tailored rules once the functionality of the stablecoin has been determined.

FATF focus 3: Risks and potential risk mitigants for P2P transactions

FATF calls on countries and VASPs to understand ML/TF risks associated with P2P transactions, and how such transactions can potentially avoid compliance with FATF Standards (because of the absence of an intermediary in the transactions).

Transactions to and from non-obliged entities (eg private / unhosted wallets) and transactions where at an earlier stage P2P transactions have occurred should be considered higher ML/TF risk.

The following measures are recommended to mitigate this increased risk for P2P transactions and to limit a jurisdiction's exposure to P2P transactions:

- Implementing the virtual asset equivalent of currency transaction reports.
- Denying licensing of VASPs if they allow transactions to and from non-obliged entities (ie private / unhosted wallets). This takes a step further in giving the travel rule stronger "bite" as it would plug a perceived gap in prior iterations of the travel rule. However, to some degree, this also tightens the ecosystem through *indirect* vectors – that is, through peer pressure - "I can't trade with you unless you're also regulated".
- Enhanced record-keeping requirements and enhanced due diligence requirements for VASPs that allow P2P transactions (if permitted).
- Ongoing enhanced supervision of VASPs with a feature enabling P2P transactions.
- Issuing public guidance to raise awareness of risks posed by P2P transactions.

FATF leaves AML/CTF supervisors to take a risk-based approach when considering whether or not to impose additional requirements to P2P transactions. We expect local practice on P2P transactions will vary vastly, and this is already reflected in existing regulatory approaches to "vanilla" areas such as (fiat) lending regulation. We expect that jurisdictions where P2P transactions and concomitant risk factors appear sufficiently material will seek to implement controls, although this is likely to be staged as regulators build capability at the licensing, supervision and enforcement levels. Some jurisdictions like Singapore have pulled away already.

FATF focus 4: VASP licensing / registration

FATF is acutely aware of the "cross-border problem". That is, most licensing and registration regimes have a jurisdictional nexus requirement, which some platforms navigate through offshore hub models, limited onshore presence where their users are located and high level brand awareness—only marketing models.

The FATF VA Guidance includes a number of key points on this subject:

- VASPs should be required to be licensed or registered in the jurisdiction where they are created.
- Jurisdictions may also require VASPs that offer products and/or services to customers in their jurisdiction to be licensed or registered in the jurisdiction.
- National regulatory authorities should have mechanisms to monitor the VASP sector and identify people or entities that carry out virtual asset activities or operations without the requisite license or registration.

Some trends are already emerging on this topic. In some jurisdictions, jurisdictional nexus is expanding to include engagement with local users irrespective of presence or marketing. In other markets, regulators are signalling their expectation for *proactive blocking* mechanisms (geoblocks, contractual restrictions, KYC checks) even if their laws do not require it. These trends will undoubtedly continue. At the same time, it is essential that licensing and registration pathways are genuinely available – otherwise shadow markets are inevitable.

VASPs operating across borders will generally need to comply with subtly different AML/CTF obligations in each jurisdiction, and may need to adapt processes and procedures. Further, beyond AML/CTF other licences or authorisations may be required, including under existing securities or financial product regulation, or emerging virtual asset-specific regulation. This means that even where VASPs only operate in one jurisdiction, they may need to comply with multiple regulatory regimes, overseen by different regulators and hold more than one licence or authorisation.

Note: We wrote about the current and proposed VASP licensing regime in Hong Kong which can be found here. You may also refer to our articles on the Australian regime: ASIC, IOSCO and the FSB update on crypto-asset views and ASIC calls for submissions on treatment of crypto-assets as underlying for exchange traded products.

FATF focus 5: Information sharing and cooperation between supervisors

Cross-border information sharing by authorities and the private sector with their international counterparts is essential because of the cross-border nature and multi-jurisdictional reach of virtual assets.

FATF has developed a list of principles of information-sharing and cooperation between VASP Supervisors. The full list covers identifying supervisors and VASPs, and best practices for information exchange and co-operation between jurisdictions, including the following provisions.

- Each country must designate at least one competent authority as their supervisor of VASPs for AML/CTF purposes, and the competent authority cannot be a self-regulatory body.
- Countries must clearly identify their supervisors of VASPs for AML/CTF purposes. This means if a country has multiple AML/CTF supervisors, the country should clearly identify the scope of the supervisors' regulatory remit.
- If a VASP operates across multiple jurisdictions, a primary supervisor could be identified if the VASP has a significant proportion of its business operations in that jurisdiction.

In the dynamic and fast-growing sector of virtual assets and VASPs, we agree this is important guidance. In our experience, there is no greater destroyer of innovation than regulatory uncertainty.

FATF focus 6: Travel rule

Under FATF Recommendation 16, virtual asset transfer must meet wire transfer rules – often called the “travel rule”. This requires certain information to “travel with” a transactions – far easier for fiat payment arrangements that rely on a well-established messaging network than for a new sector that needs new data sharing rails to be developed.

When VASPs were brought into Recommendation 16 in 2019 this brought significant challenges to the VASP industry. Simply put, the infrastructure wasn’t there to support implementation of the rule. There is no sympathy for this position in the Updated Guidance:

- The travel rule will apply to more transactions with the expanded VASPs in scope (including DeFi and DApp operators)
- VASPs should be required to conduct sanctions screening
- VASPs that do not implement the travel rule should be considered high risk
- VASPs should undertake counterparty VASP due diligence
- Travel rule compliance can be effected via contract or business practice if no law compels compliance in beneficiary jurisdictions
- Batched information is only acceptable as long as submission occurs immediately and securely; post facto submission should not be permitted
- Transactions with unhosted wallets should be considered high risk and require additional scrutiny

FATF stresses the importance of the travel rule and would like member and observer jurisdictions to implement requirements under the travel rule as quickly as possible. VASPs should gear up and invest in technological solutions and compliance infrastructure, enabling them to comply with the travel rule requirements. Remember, compliance with the travel rule does not just stop at performing information sharing and sanctions screening; VASPs must have risk-based policies and procedures in place in order to determine appropriate follow-up actions (eg how to manage high levels of “false positives”, determine when to execute or reject a transfer request, etc).

Navigating the path ahead

The FATF VA Guidance provides helpful clarifications in many areas and by making VASPs accountable and providing for regulation, it recognises that virtual assets are here to stay. This promises innovation, final inclusion and a wealth of positive possibilities.

Industry input and a balanced approach are critical

Certain aspects of the FATF VA Guidance are likely to send ripples through the industry and aspects remain to be ironed out. For example, who precisely will be consider the "owner" or operator of a DApp? Could this be numerous parties and if so, how is the overlap to be managed. In our experience, overlap in obligations leads to gaps in compliance. In this case, it could also mean assigning AML/CTF obligations to parties who are not responsible for governance of a project.

Whilst AML/CTF regulation is on the rise for the VASP sector, data privacy laws and regulations are tightening across all sectors and jurisdictions. VASPs will need to balance the need to transmit and store information required to comply with the travel rule against the need to requirements to obtain consent to collect and store personal data and the requirements relating to data retention and destruction. This will not be an easy balancing act to achieve, although technology solutions - including the role of technologies such as zero knowledge proofs (ZKPs) – is coming into greater prominence.

So too are securities and other financial product regimes being applied to or tailored for VASPs. For example, regulation of exchanges, custodians and fund managers beyond AML/CTF is being considered by national regulators and international bodies, with guidance blooming on customer protection and risk management controls. These apply in addition to AML/CTF obligations and can significantly shape operations, risk controls, customer engagement and the cost of doing business.

…and the push for functional equivalence should be welcomed

Importantly, whilst the FATF VA Guidance seeks to set out a risk based approach to VASP supervision, it also advocates a level-playing field whereby jurisdictions are encouraged to:

> "*treat all VASPs, regardless of business model, on an equal footing from a regulatory and supervisory perspective when they provide fundamentally similar services and pose similar risks*." [At paragraph 25(c)]

Treating all centralised and decentralised VASPs the same may lead to regulatory overreach and an unnecessary compliance burden for inherently lower risk centralised businesses. Instead, a level-playing field should be based on functional and operational equivalency.

Speak to us, anytime.

King & Wood Mallesons has a long track record in advising banks, VASPs, software developers and industry groups on important regulatory developments, licensing requirements, data privacy law and how to implement AML/CTF systems and controls.

Please contact us if you have any questions. We would be delighted to help.

Key contacts

Urszula McCormack
Partner
T +61 2 9296 2570/+852 3443 1168
urszula.mccormack@au.kwm.com

Dale Rayner
Partner
T +61 2 9296 2139
dale.rayner@au.kwm.com

Annabel Griffin
Partner
T +61 2 6217 6075
annabel.griffin@au.kwm.com

Eli Han
Partner
T +1 212 319 4755
eli.han@us.kwm.com

Rudolf Haas
Partner
T +49 69 505029 318
rudolf.haas@eu.kwm.com

Yu Leimin
Partner
T +86 21 24126108
yuleimin@cn.kwm.com

Leonie Tear
Counsel
T +852 3443 8375
leonie.tear@hk.kwm.com

Hannah Glass
Senior Associate
T +61 2 9296 2069
hannah.glass@au.kwm.com

This article was written by Urszula McCormack, Annabel Griffin, Leonie Tear, Hannah Glass, Violet Wong and Nikita Ajwani.

**Any reference to "Hong Kong" or "Hong Kong SAR" shall be construed as a reference to "Hong Kong Special Administrative Region of the People's Republic of China".*

The Power of Together

About King & Wood Mallesons

Recognised as one of the world's most innovative law firms, King & Wood Mallesons offers a different perspective to commercial thinking and the client experience. With access to a global platform, a team of over 2,900 lawyers in 29 locations around the world, works with clients to help them understand local challenges, navigate through regional complexity, and to find commercial solutions that deliver a competitive advantage for our clients.

As a leading international law firm headquartered in Asia, we help clients to open doors and unlock opportunities as they look to Asian markets to unleash their full potential. Combining an unrivalled depth of expertise and breadth of relationships in our core markets, we are connecting Asia to the world, and the world to Asia.

We take a partnership approach in working with clients, focusing not just on what they want, but how they want it. Always pushing the boundaries of what can be achieved, we are reshaping the legal market and challenging our clients to think differently about what a law firm can be.

Join the conversation:

Subscribe to our WeChat community. Search: KWM_China
www.kwm.com

King & Wood Mallesons refers to the firms which are members of the King & Wood Mallesons network. See www.kwm.com for more information.

Asia Pacific | Europe | North America | Middle East