

THE FINANCIAL
TECHNOLOGY
LAW REVIEW

SECOND EDITION

Editor
Thomas A Frick

THE LAWREVIEWS

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Editor
Thomas A Frick

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PUBLISHER

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PREFACE

This is already the second edition of *The Financial Technology Law Review*. Concerns about new developments that blockchain, big data and AI will trigger in the finance sector have not disappeared since the first edition. However, the use of IT in the finance sector is not new and many applications that would be labelled today as fintech are already quite old, at least by today's standards. Financial market participants and their legal advisers already have considerable experience in implementing such changes. As far as improved support products are concerned, the general rules of financial regulations can be applied quite easily to new developments.

Some of the recent developments may already have seen their peak, for example, the great number of cryptocurrencies imitating bitcoin. Others, in particular stablecoins and security tokens, but also robo-advisers and the use of big data, AI and other blockchain applications, may still be at an early stage. They may have the potential to disrupt the industry, at least in some of its sectors. Again, there has been more scepticism, not only in a recent report by the Bank for International Settlements but also in management consultant studies such as 'Blockchain's Occam problem', arguing that blockchain is a technology in search of a problem.

Regulators' surprise about the sheer dynamism of these advances – both the speed of the technical developments and the speed with which such new possibilities were implemented – has ebbed and a number of countries have started to draft (or have already implemented) new laws or changes to their current laws to address fintech issues. This is particularly the case in the area of anti-money laundering rules, a prime concern not only of regulators but also of banks and other financial market participants. Unless the industry can be certain that participating in the crypto-economy will not lead to increased anti-money laundering risks, established financial players remain cautious.

The national solutions chosen (and the speed with which regulators are willing to react by providing guidelines to market participants) varies considerably between jurisdictions. This may be a consequence of different regulatory cultures, but in addition, the existing legal systems may pose varying and unplanned obstacles to the some of the new applications. It may, for example, be difficult to transfer rights on the blockchain if the national code prescribes that rights can only be assigned in writing. Therefore, a structured collection of overviews over certain aspects of fintech law and regulation such as the present one continues to be valuable not only for the international practitioner, but also for anyone who looks for inspiration on how to deal with hitherto unaddressed and unthought-of issues under the national law of any country.

The authors of this publication are from the most widely respected law firms in their jurisdictions. They each have a proven record of experience in the field of fintech; they know

both the law and how it is applied. We hope that you will find their experience invaluable and enlightening when dealing with any of the varied issues fintech raises in the legal and regulatory field.

The emphasis of this collection is on the law and practice of each of the jurisdictions, but discussion of emerging or unsettled issues has been provided where appropriate. The views expressed are those of the authors and not of their firms, of the editor or of the publisher. In a fast-changing environment, every effort has been made to provide the latest intelligence on the current status of the law.

Thomas A Frick

Niederer Kraft Frey

Zurich

April 2019

TAIWAN

*Abe T S Sung and Eddie Hsiung*¹

I OVERVIEW

In recent years, Taiwan has adopted various initiatives to facilitate financial innovation with the development of technology. In particular, the Financial Supervisory Commission (FSC), Taiwan's financial regulator, published the 'Fintech Development Strategy Whitepaper' in May 2016 to demonstrate its commitment to fintech. In addition, an action plan designed by the FSC to develop Taiwan's financial sector was later unveiled in June 2018. The plan aims to spur financial innovation and implement a range of financial policies to respond to financial service demands.

Also, to promote fintech services and companies, the Taiwan government promulgated a law for the fintech regulatory sandbox, the FinTech Development and Innovation and Experiment Act (the Sandbox Act), on 31 January 2018, which took effect on 30 April 2018. The Sandbox Act was promulgated to enable fintech businesses to test their financial technologies in a controlled regulatory environment.

There are currently no tax incentives specifically provided for fintech companies.

II REGULATION

i Licensing and marketing

No special fintech licence

In Taiwan, conducting finance-related activities generally requires a licence from the FSC. However, there is no special licence specifically targeted at fintech companies. Depending on the types of regulated activities, fintech companies must meet certain qualifications as required under relevant laws and FSC regulations.

Local marketing rules

The Financial Consumer Protection Act (FCPA) and its related regulations provide for the general marketing rules applicable to marketing materials for financial services. In general under the FCPA, when carrying out advertising, promotional or marketing activities, financial services providers should not falsify, conceal, hide or take any action that would mislead financial consumers, and should ensure the truthfulness of the advertisements.

In addition to the general marketing rules under the FCPA, financial service providers may also be subject to additional marketing rules as specified in the laws and regulations governing specific types of financial services or products.

¹ Abe T S Sung is a partner and Eddie Hsiung is an associate partner at Lee and Li, Attorneys-at-Law.

Automated digital advisory

Although no special fintech licence exists that is specifically targeted at fintech companies, some guidelines and operating rules have been introduced in recognition that traditional licence requirements do not address fintech. For example, the FSC has approved the ‘Operating Rules for Securities Investment Consulting Enterprises Using Automated Tools to Provide Consulting Service (Robo-Adviser)’ (the Robo-Adviser Rules) issued by the Securities Investment Trust and Consulting Association of Taiwan, Taiwan’s self-disciplinary organisation of the asset management industry. Pursuant to the Robo-Adviser Rules, licensed securities investment consulting enterprises may provide online securities investment consulting services by using automated tools through algorithms (Robo-Adviser Services), and must comply with certain rules including, among others:

- a* there should be a periodical review of the algorithm;
- b* relevant know-your-customer procedures should be conducted before provision of advice;
- c* a special committee should be established to supervise the adequacy of the Robo-Adviser Services; and
- d* the customers should be informed of precautions before using Robo-Adviser Services.

Credit information service

Pursuant to the Banking Act and relevant regulations, an entity collecting credit-related information from financial institutions, processing such information and maintaining the relevant database and providing credit-related information and records to financial institutions for credit checking purposes must obtain prior approval from the FSC. Currently, the Joint Credit Information Center (JCIC) is the only FSC authorised entity that offers such services. In practice, a bank would normally review the credit information or records provided by the JCIC as part of the bank’s credit investigation on an applicant for a credit extension.

If an entity is not considered as offering such services, no FSC approval is required, but it will still be subject to the Personal Data Protection Act (PDPA) regarding its collection and use of any personal data.

ii Cross-border issues

There is no concept of a ‘passporting right’ in Taiwan. To engage in regulated financial activities, a company needs to apply for the relevant licences to the FSC. As mentioned above, depending on the types of regulated activities, the applicant must meet certain qualifications as required under relevant laws and FSC regulations. Also, under current financial laws and regulations, no person is allowed to provide any financial services in Taiwan without obtaining prior approval or a licence from the FSC.

As for foreign exchange-related restrictions, for each calendar year, a Taiwanese company may, upon filing a report with the Central Bank of the Republic of China (Taiwan) (the Central Bank), purchase foreign currency with Taiwan dollars and remit the foreign currency out of Taiwan for purposes other than trade or service-related payments, in an amount up to US\$50 million or its equivalent without special approval from the Central Bank. Foreign exchange purchase for purposes other than trade or service-related payments exceeding the applicable ceiling would require special approval from the Central Bank. Such approval is discretionary and is decided by the Central Bank on a case-by-case basis.

III DIGITAL IDENTITY AND ONBOARDING

Taiwan's Ministry of Interior has developed a mechanism called the Citizen Digital Certificate. With such Certificate, certain types of governmental applications may be submitted and handled online, without the need to go to the government's physical office in person. For example, certain tax filings may be done with such certificate. However, such certificate may not be considered a generally recognised digital identity in Taiwan.

However, the Minister of the National Development Council, a policy-planning authority of Taiwan, announced in 2018 that in order to promote digital transformation in Taiwan and elevate the efficiency of public services, the Taiwan Digital ID Card will be distributed in the second half of 2020. However, the exact details of the policy are not yet confirmed.

With regard to digitised onboarding of clients, a customer is generally required to be present at the physical location of a bank in order to open a bank account with such bank for the first time, while there are certain financial services that may be purchased purely online (e.g., certain types of insurance policies).

IV DIGITAL MARKETS, FUNDING AND PAYMENT SERVICES

i Collective investment scheme

Local funds (securities investment trust funds)

The most common form of collective investment scheme in Taiwan is securities investment trust funds, which may be offered to the general public or privately placed to specified persons. Public offering of a securities investment trust fund needs prior approval or effective registration with the FSC or the institution designated by the FSC. No prior approval is required for a private placement of a securities investment trust fund; however, it can only be placed with eligible investors and within five days after the payment of the subscription price for initial investment offering. A report on the private placement should be filed with the FSC or the institution designated by the FSC. Under current laws and regulations, public offering and private placement of securities investment trust funds may only be conducted by FSC-licensed securities investment trust enterprises (SITEs). Currently, the paid-in capital of a SITE should not be lower than NT\$300 million, and certain qualifications exist for the shareholders of a SITE. A fintech company that is not a SITE will not be able to raise funds in the same way as a SITE.

Offshore funds

Offshore funds with the nature of a securities investment trust fund may also be publicly offered (subject to FSC prior approval) or privately placed (subject to post-filing with the FSC or its designated institution) to Taiwan investors, subject to certain qualifications and conditions. An offshore fintech company that does not have the nature of a securities investment trust fund will not be able to be offered in Taiwan.

ii Crowdfunding

The following two ways of fundraising are generally known as the equity-based crowdfunding platforms in Taiwan. Such ways of crowdfunding are exempted from the prior approval or effective registration normally required under the Securities and Exchange Act (SEA).

The 'Go Incubation Board for Startup and Acceleration Firms' of the Taipei Exchange

The Taipei Exchange (TPEX), one of the two securities exchanges in Taiwan, established the Go Incubation Board for Startup and Acceleration Firms (GISA) in 2014 for the purpose of assisting innovative and creative small non-public companies in raising capital. The regulations governing the GISA were amended in December 2018. A company with innovative or creative ideas with potential for development is qualified to apply for GISA registration with TPEX. After TPEX approves the application, the company will start receiving counselling services from TPEX regarding accounting, internal control, marketing and legal affairs. After the counselling period, there is another TPEX review to examine, among other things, the company's management teams, the role of board of directors, accounting and internal control systems, and the reasonableness and feasibility of the plan for capital raising, and, if the TPEX deems it appropriate, the company may raise capital on the GISA. The amount raised by the company through the GISA may not exceed NT\$30 million unless otherwise approved. In addition, an investor's annual maximum amount of investment through the GISA should not exceed NT\$150,000, except for angel investors defined by TPEX or wealthy individuals with assets exceeding an amount set by TPEX and having professional knowledge regarding financial products or trading experience.

Equity-based crowdfunding on the platforms of securities firms

A securities firm may also establish a crowdfunding platform and conduct equity crowdfunding business. Currently, a company with paid-in capital of less than NT\$50 million may enter into a contract with a qualified securities firm to raise funds through the crowdfunding platform maintained by such securities firm, provided that the total amount of funds raised by such company through all securities firms' crowdfunding platforms may not exceed NT\$30 million in a year. The amount of investment made by an investor on a securities firm's platform may not exceed NT\$50,000 for each subscription, and may not exceed NT\$100,000 in aggregate in a year, except for angel investors as defined in the relevant regulations.

iii Peer-to-peer lending

While, to date, there are no laws or regulations specifically regulating or governing peer-to-peer lending, the Bankers Association of the Republic of China (the Bankers Association) has promulgated a Self-Disciplinary Rules of Business Cooperation between Member Banks of Bankers Association and Peer-to-Peer Lending Operators (the P2P Self-Disciplinary Rules), and such P2P Self-Disciplinary Rules have been filed with the FSC for record.

According to the P2P Self-Disciplinary Rules, banks may work together with the peer-to-peer lending operators on the following businesses:

- a* a bank providing a fund custodian service;
- b* a bank providing a cash flow service;
- c* a bank providing credit review and rating services;
- d* a bank extending a facility to the customer (i.e., the P2B model);
- e* advertising and marketing activities; and
- f* a bank providing a credit document custody service.

iv Loans trading

The general principle under Taiwan's Civil Code is that any receivable is assignable unless:

- a* the nature of the receivable does not permit such transfer;
- b* the parties to the loan have agreed that the receivable shall not be transferred; or
- c* the receivable, in nature, is not legally attachable.

Receivables under loans, subject to (b) above, are generally transferable; however, a bank is subject to stricter rules that, in general, loans that continue to perform cannot be transferred by a bank except for limited exceptions (such as for the purpose of securitisation). For this reason, Taiwan does not currently have an active secondary loan market.

v Payment services

Traditionally, payments by wire transfer can only be made through a licensed bank. Payments via cheques and credit cards are also run through banks. Non-banks engaging in credit card-related business and issuance of electronic stored-value cards should also obtain approval from the FSC. In 2015, the Act Governing Electronic Payment Institutions (the E-Payment Act) was enacted. This E-Payment Act regulates the activities of an electronic payment institution, acting in the capacity of an intermediary between payers and recipients to engage, principally, in:

- a* collecting and making payments for real transactions as an agent;
- b* accepting deposits of funds as stored value funds; and
- c* transferring funds between e-payment accounts.

According to the E-Payment Act, an electronic payment institution should obtain approval from the FSC unless it engages only in (a) above and the total balance of funds collected and paid and kept by it as an agent does not exceed the specific amount set by the FSC.

V CRYPTOCURRENCIES AND INITIAL COIN OFFERINGS

As of the date of this article, there are no legal or regulatory rules or guidelines in relation to blockchain technology in Taiwan. However, with the rise of certain applications of blockchain technology such as virtual currencies or cryptocurrencies, Taiwan's regulators have issued several press releases to announce their positions and attitude towards such developments, as well as to educate and warn the general public in Taiwan.

On 30 December 2013, both the Central Bank and the FSC first expressed the government's position toward bitcoin by issuing a joint press release (the 2013 Release). According to the 2013 Release, the two authorities held that bitcoin should not be considered a currency, but a highly speculative digital virtual commodity. In another FSC press release in 2014 (the 2014 Release), the FSC ordered that local banks must not accept bitcoin or provide any other services related to bitcoin (such as exchange bitcoin for fiat currency). Such government positions were reiterated by the FSC in an FSC press release on 19 December 2017 (the 2017 Release).

Given the above, in light of the authorities' attitude, bitcoin is not considered to be legal tender, currency or a generally accepted medium of exchange under the current regulatory regime in Taiwan; instead, bitcoin is deemed as a digital virtual commodity. The government's attitude stated in the abovementioned press releases only cover bitcoin, instead of any other types of virtual currencies or cryptocurrencies (except for initial coin offerings (ICOs) as

further explained below). However, we tend to think that any other virtual currencies or cryptocurrencies, if having the same nature and characteristics as bitcoin, should also be considered as digital virtual commodities.

i ICOs and token offerings

In response to the rising amount of ICOs and other investment activities regarding virtual currencies or cryptocurrencies, the FSC also expressed the following view on ICOs through the 2017 Release as mentioned above:

- a* An ICO refers to the issue and sale of virtual commodities (such as digital interests, digital assets, or digital virtual currencies) to investors. The classification of an ICO should be determined on a case-by-case basis. For example, if an ICO involves offer and issue of securities, it should be subject to Taiwan's SEA. The issue of whether tokens in an ICO would be deemed securities under the SEA would depend on the facts of each individual case.
- b* If any misrepresentations with respect to technologies or their outcomes or promises of unreasonably high returns are used by the issuer of virtual currencies or an ICO to attract investors, the issuer would be deemed as committing fraud or illegal fundraising.

Given the above, in an ICO (or other types of token offering, such as private token pre-sale before the ICO stage), the core issue in this regard is whether an ICO would be considered as issuing securities under Taiwan's securities regulations. Under current Taiwan law, the offer and sale of securities in Taiwan, whether through public offering or private placement, are regulated activities and shall be governed in accordance with the SEA, its related regulations as well as relevant rulings issued from time to time by the FSC.

The term 'securities' has a very broad (but maybe not clear enough) definition in Taiwan. According to Article 6 of the SEA, 'securities' could mean government bonds, corporate stocks, corporate bonds and other securities approved by the competent authority, and any stock warrant certificate, certificate of entitlement to new shares and certificate of payment or document of title representing any of the above securities shall be deemed securities. Additionally, according to a recent Taiwan Supreme Court opinion, a contract or agreement would be considered as a security under the SEA if it has monetary value, the nature of an investment and transferability.

According to a news report in October 2018, the Chairman of FSC, Willington Koo, advised that the FSC will announce relevant new regulations governing offering of tokens with natures in securities (STOs) in June 2019.

ii Anti-money laundering

It was also reported that, according to Mr Koo, the FSC will regulate the anti-money laundering activities of cryptocurrency trading platforms or exchanges under Taiwan Anti-money Laundering Act after the Executive Yuan (EY) officially authorises the FSC as the regulator of anti-money laundering activities of cryptocurrency trading platforms or exchanges. As at the time of writing, the EY has not granted such authorisation to the FSC so far. In addition, it is unclear at this stage what requirements will be imposed by the FSC on anti-money laundering activities of cryptocurrency trading platforms or exchanges.

VI OTHER NEW BUSINESS MODELS

The legal implications of any new business models should be examined on a case-by-case basis. Take self-executing contracts (i.e., smart contracts based on blockchain technology) for example. As mentioned above, as at the time of writing, no laws or regulations have been specifically promulgated or amended as a result of blockchain technology (including smart contracts). However, as a general rule, in Taiwan, general contracts can be formed by a meeting of the minds, and these can be expressed and proven by way of electronic records, unless otherwise provided by law. For example, under current law and practice, it is not feasible to structure a contract under which the relevant obligations will be automatically performed (when relevant conditions precedent are met) by electronic means when it comes to, for example, the creation of a valid mortgage over real estate or pledge over shares with physical certificate. Additional legal formality will be required and can only be fulfilled physically.

VII INTELLECTUAL PROPERTY AND DATA PROTECTION

The issue here would be whether fintech business models and related software can be protected by intellectual property rights such as copyright or patent.

i Copyright

Under Taiwan's Copyright Act, there are no registration or filing requirements for a copyright to be protected by law. However, there are certain features that qualify for a copyright, such as originality and expression. Therefore, while there is a type of copyright called 'computer program copyright' under Taiwan's Copyright Act, whether a work is copyrightable would still depend on whether the subject work has the required components (such as the features described above), especially the feature 'expression' (instead of simply an 'abstract idea'). As to a new copyright developed by an employee of a company during the course of employment, where a work is completed by an employee within the scope of employment, the employee is the author of the work while the economic rights to such work will be enjoyed by the employer unless otherwise agreed by the parties. As to a new copyright developed by a contractor, the contractor who actually makes the work is the author of the work unless otherwise agreed by the parties; the enjoyment of the economic rights arising from the work should be agreed by the parties, or such rights should be enjoyed by the contractor in the absence of such agreement. However, the commissioning party may use the work.

ii Patent

As to patent, an inventor may file an application with Taiwan's Intellectual Property Office, and the patent right will be obtained once the application is approved. According to the Patent Act of Taiwan, the subject of a patent right is 'invention' and an invention means the creation of technical ideas, utilising the laws of nature. As a general rule, business methods are regarded as using social or business rules rather than laws of nature, and therefore may not be the subject of a patent right. As for a fintech-related software invention, if it coordinates the software and hardware to process the information, and there is a technical effect in its operation, it might become patentable. For instance, a 'method of conducting foreign exchange transaction' would be deemed as a business method and thus not patentable; however, a 'method of using financial information system to process foreign exchange transactions'

may be patentable. As to a new patent developed by an employee of a company during the course of employment, the right of an invention made by an employee during the course of performing his or her duties under employment will be vested in his or her employer and the employer should pay the employee reasonable remuneration unless otherwise agreed by the parties. As to a new invention developed by a contractor, the agreement between the parties should prevail, or such rights should be vested in the inventor or developer in the absence of such agreement. However, if there is a fund provider, the funder may use such invention.

iii Data protection

In Taiwan, personal information is protected by Taiwan's PDPA; the collection, processing and use of any personal data are generally subject to notice and consent requirements under the PDPA. Pursuant to the PDPA, personal data is defined broadly as: the name, date of birth, ID Card number, passport number, characteristics, fingerprints, marital status, family, education, occupation, medical record, medical treatment, genetic information, sexual life, health examination, criminal record, contact information, financial conditions, social activities and other information that may directly or indirectly identify an individual.

Under the PDPA, unless otherwise specified under law, a company is generally required to give notice to (notice requirement) and obtain consent from (consent requirement) an individual before collecting, processing or using any of said individual's personal information, subject to certain exemptions. To satisfy the notice requirement, certain matters must be communicated to the individual, such as the purposes for which his or her data is collected, the type of the personal data and the term, area and persons authorised to use the data.

Given the above, if a fintech company wishes to collect, process or use any personal data, it will be subject to the obligations under the PDPA as advised above.

VIII YEAR IN REVIEW

i Regulatory sandbox

As advised in Section I, the Sandbox Act has been in effect since 30 April 2018. The enforcement rules for the regulatory sandbox were further promulgated by the FSC in April 2018.

According to the Sandbox Act, an applicant needs to obtain approval from the FSC before entering the sandbox. Once approved, the experimental activities may enjoy exemptions from certain laws and regulations (such as FSC licensing requirements and certain legal liability exemptions). According to the Sandbox Act, any experimental activity needs to be 'innovative'. After completion of the approved experiments, the FSC will analyse the results of the experiments. If the result is positive, the FSC would actively examine the existing financial laws and regulations to explore the possibility of amending them so that the business model or activity previously tested in the sandbox could become legally feasible.

At the time of writing, three applications for entering the sandbox were approved, including one bank's application for an online credit card business credit loan and two companies' applications for cross-border remittance for foreign workers.

ii Digital-only banks

In 2018, the FSC promulgated relevant regulations governing the application for establishment of digital-only banks (i.e., banks without physical branches). According to the FSC's press release and relevant news report, the deadline for digital-only bank applications

was 15 February 2019, and three applications were filed with the FSC by this deadline. According to the FSC, it will only approve two applications, and the result will be announced by June 2019. Once approved, a digital-only bank will be subject to the same requirement for paid-in capital as ordinary commercial banks, which is NT\$10 billion.

IX OUTLOOK AND CONCLUSIONS

i Virtual currencies or cryptocurrencies, exchange operators and ICOs

The governance of cryptocurrency transactions, exchange operators and ICOs is a trending topic in Taiwan, and several public hearings and seminars were held to discuss this. Some suggested that the regulators and legislators should enact a new law to specifically regulate the exchange operators, but others proposed to establish a self-disciplinary organisation to set out relevant self-disciplinary rules for cryptocurrency-related activities, including ICOs. The most recent development is that, as advised above, the FSC, according to Mr Koo, will announce relevant new regulations governing offering of STOs in June 2019. However, the scope of such new regulations (e.g., whether the regulations will cover not only the primary market (i.e., offering) but also the secondary market (i.e., trading)) is still uncertain.

ii Regulatory sandbox

According to a press release issued by the EY in 2018, regulators expect to process at least 10 applications for financial innovation experimentation each year for the next three years. With three approved experiments in the regulatory sandbox, as mentioned above, we foresee more applications to come.

ABOUT THE AUTHORS

ABE T S SUNG

Lee and Li, Attorneys-at-Law

Abe T S Sung is a partner at Lee and Li, Attorneys-at-Law. His main practice areas are banking, structured finance, capital market and general corporate matters. He has advised many domestic and foreign financial institutions in their financing deals as well as regulatory and compliance matters, including Citi Bank, ANZ Bank, BNP Paribas, Credit Agricole, Societe Generale, Uni Credit Bank, BBVA, Mizuho Bank, Bank of Tokyo-Mitsubishi UFJ, Bank of Taiwan, CTBC Bank, Taishin Bank and Bank SinoPac. He also helped to structure Taiwan's milestone project financing deal for the development of Taiwan High Speed Rail, and was actively involved in several other BOT and structured financing deals, such as refuse incineration plants, power plants and urban area redevelopment. According to *Chambers Asia's* survey, clients commend him for combining 'commercial sense with an open mind', and consider him as 'the first choice' for structured finance.

Abe Sung received his LLB degree from Fu-Jen Catholic University and holds an LLM degree in international banking law from Boston University Law School.

EDDIE HSIUNG

Lee and Li, Attorneys-at-Law

Eddie Hsiung is an associate partner at Lee and Li, Attorneys-at-Law. He is licensed to practise law in Taiwan and New York, and is also a CPA in Washington State, the United States. His practice focuses on securities, M&A, banking, finance, asset and fund management, cross-border investments, general corporate and commercial, fintech, startups, etc. He regularly advises leading banks, securities firms, payment and credit cards and other financial services companies on transactional, licensing and regulatory and compliance matters, as well as internal investigation. He is familiar with legal issues regarding the application of new technologies such as fintech (e-payment, digital financial services, regulatory sandboxes) and blockchain (ICOs, cryptocurrencies, platform operators) and AI, and is often invited to participate in public hearings, seminars and panel discussions in these areas.

Eddie Hsiung received his LLB degree from National Taiwan University and holds two LLM degrees from National Taiwan University and Columbia Law School.

LEE AND LI, ATTORNEYS-AT-LAW

9F, 201 Tun Hua N Road

Taipei 10508

Taiwan

Tel: +886 2 2183 2232 / +886 2 2183 2162

Fax: +886 2 2514 9841

abesung@leeandli.com

eddiehsiung@leeandli.com

www.leeandli.com

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