

FINMA publishes ICO guidelines

In new guidelines published on 16 February 2018, the Swiss Financial Market Supervisory Authority ("FINMA") sets out how it intends to apply financial market legislation in handling enquiries from ICO organizers. The guidelines also define the information the FINMA requires to deal with such enquiries and the principles upon which it will base its responses, creating clarity for market participants.

Classification of tokens

In assessing ICOs, the FINMA will focus on the economic function and purpose of the tokens (i.e. the blockchain-based units) issued by the ICO organizer. The key factors are the underlying purpose of the tokens and whether they are already tradeable or transferable. At present, there is no generally recognized terminology for the classification of tokens either in Switzerland or internationally. The FINMA categorizes tokens into three types, but hybrid forms are also possible:

- Payment tokens are synonymous with cryptocurrencies and have no further functions or links to other development projects. Tokens may in some cases only develop the necessary functionality and become accepted as a means of payment over a period of time.
- Utility tokens are tokens which are intended to provide digital access to an application or service.
- Asset tokens represent assets such as participations in real physical underlyings, companies, or earnings streams, or an entitlement to dividends or interest payments. In terms of their economic function, the tokens are analogous to equities, bonds or derivatives.

Regulatory treatment

The regulatory treatment of the different tokens as stated in the new guidelines generally follows the previously applicable practice:

- **Payment tokens:** The FINMA will require compliance with anti-money laundering ("AML") regulations. However, the FINMA will not treat such tokens as securities. In addition, such tokens do typically not require licenses under the Banking Act (governing deposit-taking) or the Collective Investment Schemes Act (governing investment fund products).
- **Utility tokens:** These tokens do not qualify as securities if their sole purpose is to confer digital access rights to an application or service and if the utility token can already be used in this way at the time of issuance. Only if a utility token functions solely or partially as an investment in economic terms, the FINMA will treat such tokens as securities. Anti-money laundering regulations are generally not applicable as long as the main reason for issuing the tokens is to provide access rights to a non-financial application of blockchain technology. Besides, such tokens do generally not require licenses under the Banking Act (since there is typically no claim for a repayment) or licenses under the Collective Investment Schemes Act (funds received are typically not managed by third parties).
- **Asset tokens:** The FINMA considers asset tokens generally as securities, which means that securities law requirements for trading in such tokens, as well as civil law requirements under the Swiss Code of Obligations become applicable. Therefore, depending on the circumstances, the issuance of such tokens may require a license under the Stock Exchange Ordinance and if the tokens issued are comparable to equities or bonds it may result in prospectus requirements. Furthermore, the issuance of asset tokens should generally not trigger the application of AML-regulations (no financial services or payment

instrument). Besides, licenses under the Banking Act or Collective Investment Schemes Act are usually not required (since there is usually no repayment obligation and the ICO does not serve collective investment scheme purposes).

It should be noted that the individual token classifications are not mutually exclusive. Asset and utility tokens can also be classified as payment tokens (referred to as hybrid tokens). In these cases, the requirements are cumulative; in other words, the tokens are deemed to be both securities and means of payment. In addition, the regulatory treatment may be different in connection with pre-financing or pre-sale rounds of ICOs.

Minimum information requirements for ICO enquiries

In the appendix, the FINMA lists the minimum information requirements for ICO enquiries. The list mainly includes standard information according to the general practice for ruling requests in connection with ICOs. However, it requires that the development team determines on a very specific level the terms and conditions of their ICO already at the time of the filing of the ruling request for the FINMA.

Assessment

With issuing clear guidelines such as today, the FINMA supports the further development of blockchain related businesses in Switzerland. There are still some open questions and in practice many of the tokens are mixtures of different types which makes a classification a challenge. However, step-by-step the regulatory treatment develops and allows already today the planning of an ICO with a certain level of assurance around the regulatory treatment. With the current direction of the regulatory development Switzerland continues to be an attractive, stable and predictable place for crypto related businesses undertaking ICOs.

The new guidelines can be found here: <https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/>

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Status as of 16 February 2018

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