Guidelines

for enquiries regarding the regulatory framework for initial coin offerings (ICOs)

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1   Purpose

In an ICO, investors transfer funds, usually in the form of cryptocurrencies, to the ICO organiser. In return they receive a quantity of blockchain-based coins or tokens which are created and stored in a decentralised form either on a blockchain specifically created for the ICO or through a smart contract on a pre-existing blockchain.

In FINMA's Guidance 04/2017, published on 29 September 2017, FINMA set out its position on initial coin offerings (ICOs) and highlighted areas in which ICOs may be covered by existing financial market regulation.

In these guidelines, FINMA provides market participants with information on how it will deal with enquiries regarding the supervisory and regulatory framework for ICOs. The guidelines specify the information required by FINMA to process enquiries from market participants and also set out the principles on which FINMA will respond to them.

2   Making an enquiry

In view of the sharp increase in ICO projects in recent months, FINMA is receiving significant numbers of enquiries from market participants about the applicability of financial market regulation to ICOs and the existence of licensing requirements. To enable FINMA to respond quickly and precisely to these enquiries, minimum information requirements are set out in the appendix

regarding the project in general, as well as details of the design and issuance of the tokens and potential secondary trading. To enable FINMA to respond effectively ICO organisers need to define and document clearly the terms and conditions of their planned ICO.

Enquiries can be submitted to FINMA's FinTech Desk (fintech@finma.ch) in one of Switzerland's official languages (German, French and Italian) or in English. The processing of enquiries is subject to a fee.[1] ICOs which have already taken place will only be assessed in the context of investigations into potentially unlicensed activities; the same applies to submissions made to FINMA solely for information. FINMA treats enquiries exclusively from the perspective of existing financial market regulation. Market participants themselves remain responsible for evaluating and complying with other obligations especially under civil law and tax law.

3 Principles applied when assessing specific enquiries

As set out in FINMA Guidance 04/2017, there are several ways in which ICOs may be covered by existing financial market regulation. At present, there are no ICO-specific regulatory requirements.

ICOs raise a variety of legal issues for which there is no relevant case law and no consistent legal doctrine. Given the wide variety of types of token and ICO set-ups, it is not possible to generalise. Circumstances must be considered holistically in each individual case. The minimum information requirements for organisers form the basis for these decisions. FINMA will base its assessment on the underlying economic purpose of an ICO, most particularly when there are indications of an attempt to circumvent existing regulations.

In view of the dynamic market and the high level of interest from a large number of market participants, FINMA is publishing these guidelines to clarify the principles on which it will base its response to specific enquiries.

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[1] The fee will be based on the time required and the applicable hourly rate (see the FINMA Ordinance on the Levying of Supervisory Fees and Levies for details).

3.1 Token categories

There is no generally recognised classification of ICOs and the tokens that result from them, either in Switzerland or internationally. FINMA bases its own approach to categorisation on the underlying economic function of the token.

Payment tokens: Payment tokens (synonymous with cryptocurrencies) are tokens which are intended to be used, now or in the future, as a means of payment for acquiring goods or services or as a means of money or value transfer. Cryptocurrencies give rise to no claims on their issuer.

Utility tokens: Utility tokens are tokens which are intended to provide access digitally to an application or service by means of a blockchain-based infrastructure.

Asset tokens: Asset tokens represent assets such as a debt or equity claim on the issuer. Asset tokens promise, for example, a share in future company earnings or future capital flows. In terms of their economic function, therefore, these tokens are analogous to equities, bonds or derivatives. Tokens which enable physical assets to be traded on the blockchain also fall into this category.

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 some ICOs, tokens are already put into circulation at the point of fund-raising. This takes place on a pre-existing blockchain. In other types of ICO, investors are offered only the prospect that they will receive tokens at some point in the future and the tokens or the underlying blockchain remain to be developed. This is referred to as **pre-financing**. **Pre-sale** represents another possible permutation. In this case, investors receive tokens which entitle them to acquire other different tokens at a later date.

3.2 Classification of tokens as securities[2]

Securities regulation is intended to ensure that market participants can base their decisions regarding investments such as equities or bonds on a reliable and defined set of information. Moreover, trading should be fair, reliable and offer efficient price formation.

FINMA will base its determination as to whether tokens qualify as securities on the following legal definitions. Securities in the sense of the Financial Market Infrastructure Act (FMIA) are standardised certificated or uncertificated securities, derivatives and intermediated securities (Art. 2 let. B FMIA), which are suitable for mass standardised trading, i.e. they are publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, insofar as they have not been created especially for individual counterparties (Art. 2 para. 1 FMIA).

Uncertificated securities are defined as rights which, based on a common legal basis (articles of association/issuance conditions), are issued or established in large numbers and are generically identical. Under the Code of Obligations (CO), the only formal requirement is to keep a book in which details of the number and denomination of the uncertificated securities issued and of the creditors are recorded (Art. 973c para.3 CO). This can be accomplished digitally on a blockchain.

3.2.1 Payment tokens / cryptocurrencies

There are various legal opinions as to whether tokens of this kind constitute securities. Some assert that all types of tokens should be considered as securities; others disagree. Given that payment tokens are designed to act as a means of payment and are not analogous in their function to traditional securities, FINMA will not treat payment tokens as securities. This is consistent with FINMA's current practice (e.g. in relation to Bitcoin and Ether). If payment tokens were to be classified as securities through new case law or legislation, FINMA would accordingly revise its practice.

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[2] Terminology used in this section follows the non-binding English translation of the FMIA (https://www.admin.ch/opc/en/classified-compilation/20141779/index.html) and of the CO (https://www.admin.ch/opc/en/classified-compilation/19110009/index.html) provided by the Swiss government.

3.2.2 Utility tokens

Utility tokens will not be treated as securities if their sole purpose is to confer digital access rights to an application or service and if the utility token can actually be used in this way at the point of issue. In these cases, the underlying function is to grant the access rights and the connection with capital markets, which is a typical feature of securities, is missing.

If a utility token additionally or only has an investment purpose at the point of issue, FINMA will treat such tokens as securities (i.e. in the same way as asset tokens).

3.2.3 Asset tokens

FINMA treats asset tokens as securities. Asset tokens constitute securities within the meaning of Article 2 let. b FMIA if they represent an uncertificated security and the tokens are standardised and suitable for mass standardised trading.

An asset token also qualifies as a security if it represents a derivative (i.e. the value of the conferred claim depends on an underlying asset) and the token is standardised and suitable for mass standardised trading.

In the case of the pre-financing and pre-sale phases of an ICO which confer claims to acquire tokens in the future, these claims will also be treated as securities (i.e. in the same way as asset tokens) if they are standardised and suitable for mass standardised trading.

3.3 Legal implications of treatment as a security

If, based on the guidelines set out above, FINMA comes to the conclusion that the tokens of an ICO constitute securities, they fall under securities regulation. Under the Stock Exchange Act (SESTA), book-entry of self-issued uncertificated securities is essentially unregulated, even if the uncertificated securities in question qualify as securities within the meaning of FMIA. The same applies to the public offering of securities to third parties. The creation and issuance of derivative products as defined by FMIA to the public on the primary market is however regulated (Art. 3 para. 3 Stock Exchange Ordinance, SESTO). Underwriting and offering tokens constituting securities of third parties publicly on the primary market, is, if conducted in a professional capacity, a licensed activity (Art. 3 para. 2 SESTO).

The issuing of tokens that are analogous to equities or bonds can also result in prospectus requirements under the Swiss Code of Obligations. FINMA has no direct responsibility in this area but expects ICO organisers to themselves clarify these requirements. According to the draft Financial Services Act (FinSA) prospectus requirements will become part of supervisory law (Art. 37 Draft FinSA). The Swiss Code of Obligations and FinSA provide for a number of different exceptions and exemptions.

3.4 Classification as deposits

The primary purpose of the Banking Act is to protect the public, particularly bank creditors and their deposits. The issuing of tokens is not generally associated with claims for repayment on the ICO organiser and such tokens do not therefore fall within the definition of a deposit. To this extent there is no requirement to obtain a banking licence. If, however, there are liabilities with debt capital character (e.g. promises to return capital with a guaranteed return), the funds raised are treated as deposits and there is a requirement under the Banking Act to obtain a licence unless exceptions apply.

3.5 Applicability of the Collective Investment Schemes Act

The purpose of the Collective Investment Schemes Act is to protect investors in, and ensure the proper functioning of the market for investment fund products. The provisions of the Collective Investment Schemes Act are relevant only if the funds accepted in the context of an ICO are managed by third parties.

3.6 Applicability of the Anti-Money Laundering Act

The objective of the Anti-Money Laundering Act (AMLA) is to protect the financial system from money laundering and the financing of terrorism. Anyone who provides payment services or who issues or manages a means of payment is a financial intermediary subject to the AMLA (Art. 2 para. 3 let. b AMLA).

The issuing of payment tokens constitutes the issuing of a means of payment subject to this regulation as long as the tokens can be transferred technically on a blockchain infrastructure. This may be the case at the time of the ICO or only at a later date.

In the case of utility tokens, anti-money laundering regulation is 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 (see Art. 2 para. 2 let. a no. 3 AMLO, FINMA Circ. 11/1 "Financial intermediation under AMLA" margin no. 13 et seq.).

3.7   Compliance with AMLA

Anti-money laundering regulation gives rise to a range of due diligence requirements including the requirement to establish the identity of the beneficial owner and the obligation either to affiliate to a self-regulatory organisation (SRO) or to be subject directly to FINMA supervision.

These requirements can be fulfilled by having the funds accepted via a financial intermediary who is already subject to the AMLA in Switzerland and who exercises on behalf of the organiser the corresponding due diligence requirements. In these circumstances an ICO organiser does not themselves have to be affiliated to an SRO or to be licensed directly by FINMA.

Under current FINMA practice, the exchange of a cryptocurrency for fiat money or a different cryptocurrency falls under Art. 2 para. 3 AMLA. The same applies to the offering of services to transfer tokens if the service provider maintains the private key (custody wallet provider).

The table below illustrates the key factors:

	Pre-financing and pre-sale / The token does not yet exist but the claims are tradeable	**The token exists**	
ICO of payment tokens	= Securities ≠ subject to AMLA	≠ =	Securities means of payment under AMLA[3]
ICO of utility tokens[4]		≠ = ≠	Securities, if exclusively a functioning utility token Securities, if also or only investment function means of payment under AMLA if accessory
ICO of asset tokens[4]		= ≠	Securities means of payment under AMLA

4 Miscellaneous

FINMA may, following further consolidation of its supervisory practice in relation to ICOs and/or changes in financial market legislation, decide to publish its interpretation in the form of a circular at a later date.

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[3] If the payment tokens can be technically transferred on a blockchain infrastructure.

[4] Hybrid tokens can qualify as both a security and a means of payment.

Appendix: Minimum information requirements for ICO enquiries

General information	
Name of the project	
Company name / names of the project operators including domicile of the company/companies, address(es), email address(es) and website(s)	
Details of all persons involved (incl. addresses and/or domicile of the company), in particular: • founder • token issuer • token seller other secondary trading participants (platform, ICO organisers, etc.)	
Have the above-named persons been granted licences under financial market law in other countries? If yes, please provide the relevant details.	

Project description	
Project name, goals and project plan	
Key features of the service to be developed	
Which market participants (investors) does the ICO target?	
Are there any restrictions regarding investors?	
Information about the project organisation and project planning (timing of the various ICO phases, milestones, etc.)	
Information about the technologies to be used (distributed ledger technology used; are new or existing	

technologies used; is this an open source project; etc.)	
With which cryptocurrencies (or legal tender) will the ICO be financed and how?	
How much money (in CHF) is the ICO intended to raise?	
Have the funds already been allocated to a specific project? How will surplus funds be handled?	

Token issue

Will a token be created in the course of the ICO?	
If yes: In which steps will the token be created (technical standards, e.g. ERC20, technology used, etc.)?	
At which point, by whom and in which manner will the token be transferred to the investors?	
Which functionalities are planned for the token? (detailed description)	
At which point will the functionalities planned apply?	
Which rights does the investor acquire? How are they documented (please provide and refer to specific participation and issuing conditions).	
Will a financial intermediary who is subject to AMLA in Switzerland be commissioned to meet the due diligence requirements under AMLA?	
If yes: please provide detailed information about the relevant processes and the financial intermediary in question	

Transfer and secondary market

How can the token be transferred (please provide information about compatible wallets, technical	

standards)?	
Is the token already functional at the time of transfer? If yes, to what extent?	
How and where can the token be acquired or sold after the issue (are there any secondary market platforms)?	
Will it be possible to use the tokens to buy goods or services or make payments to third parties?	
Are there plans for the project operator / issuer to buy back tokens?	