Initial Coin Offerings (ICO) or Token Generating Events (TGE) in Switzerland: New FINMA Guidance and other relevant Swiss law aspects

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In response to the increased number of blockchain based ICOs in, or offered from, Switzerland as well as the regulators recent enforcement actions against unauthorized providers of the fake cryptocurrency "E-Coin", in its Guidance 04/2017 of September 29, 2017, FINMA published some further guidance on its views on ICOs.

Key takeaways:

- **The new FINMA Guidance does not provide for an ICO specific regulation. FINMA confirms its current principle based and technology neutral approach and highlights the need to carefully assess the compliance of an ICO with today's applicable Swiss (financial market) laws on a case by case basis.**

- **No ICO specific legislation or regulation is to be expected in Switzerland in the near future - but the last word hasn't been spoken.**

- **FINMA restates its recognition and support for new technology driven (financial services) solutions and reemphasized its commitment to initiate enforcement proceedings in case financial market regulation is breached or circumvented. Today, a number of (undisclosed) ICOs are apparently under review by FINMA.**

- **Other important Swiss corporate, contract or tax law requirements may apply and need careful analysis before launching an ICO.**

For ease of reference, this update follows the terminology in FINMA Guidance 04/2017 by using the still more frequently used term "ICO" - although the blockchain community

increasingly refers to the more general term "TGE" to highlight the more sophisticated features of a new generation token compared to a simple (first generation) coin.

1. New FINMA Guidance 04/2017

In its Guidance 04/2017, published on September 29, 2017 (see FINMA Guidance), FINMA confirmed its principle-based and technology neutral approach. Currently, ICOs are not specifically regulated in Switzerland. Therefore, as a rule of thumb, collecting funds for one's own account without a platform or issuing house acting as an intermediary is unregulated from a FINMA regulatory standpoint in cases where repayment is not obliged, payment instruments have not been issued and no secondary market exists.

The newly issued guidance seems to imply that an ICO specific regulation is not to be anticipated in the near future. Rather, FINMA points out to the regulatory hurdles that typically apply, or need to be assessed, in the context on an ICO. Given the vast variety and different structures and features of ICOs, FINMA is correct to conclude that a generic ICO regulation is unlikely to result in a more efficient regulation and a case by case analysis of applicable laws is required, in particular in the following areas:

- In case the ICO creates a token as a payment instrument, anti-money laundering rules may apply for professional cryptobrokers or other third parties or trading platforms which carry out exchange transactions or transfers with tokens (secondary trading with tokens);

- If the tokens issued in the ICO qualify as securities as per Swiss law, a licensing requirement to operate as a securities dealer may apply;

- Banking law provisions need to be considered, in case public deposits are accepted; and

- Collective investment schemes legislation may apply in case the ICO proceeds are managed externally.

The lack of a specific ICO regulation may, however, result in a situation where non-sophisticated market participants aiming to launch or participate in an ICO may find themselves with little guidance to comply with applicable laws or to protect themselves from unauthorized or fraudulent ICO activities (see also FINMA's recent enforcement actions).

Therefore, FINMA repeated its recognition and support for new technology driven (financial services) solutions, but reemphasized that it will continue to follow the market developments closely, committed to initiate enforcement proceedings in case financial market regulation is breached or circumvented.

As already disclosed in connection with FINMA's recent enforcement actions earlier in September, FINMA restated that it is apparently conducting at least eleven (undisclosed) investigations into other "presumably unauthorised business models relating to such coins". This clearly shows that a careful analysis of applicable laws is a necessity.

FINMA's attention to this topic is in line with developments abroad. For example, in July, the U.S. Securities and Exchange Commission (SEC) issued some guidance and views and more recently the ban on ICOs in China was in the global headlines. While it is to be welcomed that unlawful or fraudulent activities are strictly enforced and banned to avoid reputation issues for the whole community, it is important that the regulators do not move (too quickly) to a generic ICO specific regulation that aims to regulate all the different ICO structures and features the same way.

Regulators as well as the legal and blockchain community still need to gain experiences before one should consider specific ICO regulations. But it is an area to keep close watch: For example, this same week FINMA issued its guidance, the Swiss Federal Council, in an answer to an inquiry by a member of parliament, stated that the government, together with FINMA, is assessing an ICO specific regulation. As this was communicated in one sentence without further explanation, still, in the short term, new regulation seems not to be around the corner.

2. Other relevant Swiss law aspects in connection with ICOs/TGEs

Legal qualification: ICO issued crypto-tokens can be created with multiple features such as distribution of earnings, voting rights, rights to obtain services or tangible or intangible goods. Depending on its functionality, the legal assessment of the issued tokens is different. It is therefore important to assess an ICO and the issued tokens on a case by case basis.

ICO instead of traditional ways to obtain financing: If ICO issued tokens provide the ICO investor with a monetary reward (instead of company shares in a usual financing round in a venture capital situation), the issued token may (partially) qualify as equity or debt (or respective derivatives thereof) and usual prospectus or other legal or tax requirements may apply as they may similarly apply in traditional financing rounds.

Prospectus requirements: The legal assessment of applicable prospectus requirements depend in particular on whether the issued tokens provide the ICO investor with monetary rewards, the (functionality of the) token's legal qualification as debt or equity rights and whether the ICO and the thereby issued tokens are offered to the public.

No matter if equity or debt, the prospectus requirements under Swiss law are quite lean and usually not a no go for a serious token project as appropriate communication and transparency have become a standard in the sophisticated blockchain community and the usual whitepapers used in a token project cover many aspects of a traditional prospectus.

Corporate Form: Recently, many entities conducting an ICO in Switzerland have been set up as a foundation under Swiss law. Some features of a foundation, such as its independence from ownership of shareholders combined with a governmental supervision of Swiss foundations generates some stability and reliability for ICO investors. However, the selection of the appropriate legal form needs careful analysis.

For example, in the longer term, being organized as a foundation will make it generally speaking impossible to distribute funds out of the foundation in a way different than foreseen in the original constitutional documents. Other Swiss entities, such as the Swiss share corporation (Aktiengesellschaft) or the limited liability company (GmbH) may provide for

decisive advantages in the long run. As this holds true since decades in the traditional corporate world, also the way an entity needs to be set up in a blockchain driven world is often a very tax driven question.

Foreign (regulatory) laws: Finally, it is important to note that foreign (regulatory) laws are likely to apply in case the ICO investor is domiciled abroad, even in case of ICOs in, or offered out of, Switzerland.

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