

Blockchain & Crypto Assets

We offer legal and regulatory advice to clients developing, implementing and operating new technologies.

Our expertise

The Blockchain & Crypto Assets Team of Pestalozzi, which consists of experts from financial services & regulation, capital markets, corporate & commercial, tax, and IP & TMT, provides legal and regulatory advice to clients developing, implementing and operating new technologies, such as the Distributed Ledger Technology (DLT), upon which Initial Coins Offerings (ICOs) or Token Generating Events (TGEs) are based.

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Our services

Our national and international clients are from different business sectors, such as commercial & trade, payment & settlement, lending & finance, asset & wealth management and biotech & medtech. To support the structuring and implementation of the clients' business models and their new technology projects, we provide a wide range of regulatory and legal advice concerning, inter alia, the clients' provision of software services, decentralised applications, incorporation, financial regulation, data protection, cyber risks and administrative proceedings in relation to FINMA and tax authorities.

Overview

Global trend towards regulation of crypto assets and ICOs

At international level, the necessity and potential emergence of a global regulatory framework on cryptocurrencies was discussed at the G-20 meeting in March 2018. The Bank for International Settlement (BIS) made a statement that "the authorities must be prepared to act against the invasive spread of cryptocurrencies to protect consumers and investors."

The International Organization of Securities Commissions (IOSCO) warned that "there are clear risks associated with these offerings. ICOs are highly speculative investments in which investors are putting their entire invested capital at risk." IOSCO compiled and published a list of national regulators' statements on ICOs, which provides an overview on the current regulatory developments.

Taking such warnings and statements into consideration, it seems that regulators and supervisors are ready to act in an adequate manner to protect the interests of consumers and investors. However, different regulatory approaches across the globe may complicate the establishment of a global regulatory framework on crypto assets.

Swiss approach regarding the regulatory framework for ICOs

The blockchain community has hitherto noted that the Swiss approach towards cryptocurrencies and ICOs is rather liberal and business-friendly. Nevertheless, FINMA published on 29 September 2017 its guidance 04/2017 to clarify that ICOs or the issuer's business model may be subject to financial market regulation if certain requirements are met.

Since then, several start-up companies and established institutions have had queries about the regulatory qualification of their ICOs or business models. To provide guidance, FINMA published on 16 February 2018 its guidelines for enquiries regarding the regulatory framework for ICOs which specify, among others, the information required by FINMA and on how FINMA will deal with such enquiries.

Classification of Crypto Assets in Switzerland

Payment Token / Payment ICO

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. FINMA will not treat payment tokens as securities. However, if payment tokens were to be classified as securities through new case law or legislation, FINMA would accordingly revise its practice.

Utility Token / Utility ICO

Utility tokens are tokens which are intended to provide access digitally to an application or service by means of a blockchain-based infrastructure. FINMA will not treat utility tokens 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 such a case, FINMA is of the view that the underlying function is to grant access rights and the connection with capital markets, which is a typical feature of securities, is missing. However, if utility tokens additionally or only have an investment purpose at the point of issue, FINMA will treat such tokens as securities in the same way as asset tokens.

Asset Token / Asset ICO

Asset tokens represent assets such as a debt or equity claim on the issuer. Asset tokens promise, for example, a share in the 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.

Hence, FINMA will treat asset tokens as 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.

Hybrid Tokens

Hybrid tokens are asset and utility tokens which also classify as payment tokens, or vice versa. Hence, the individual token classifications are not mutually exclusive. FINMA considers hybrid tokens to be both securities and means of payment.

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