A primer on the regulation of trading in cryptocurrencies and asset management related to cryptocurrencies in Switzerland

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I. Introduction

Cryptocurrencies, which are based on distributed ledger technology, have gained importance in financial services in the recent past. This primer seeks to give an overview of the key obligations under Swiss regulatory laws related to:

- Trading in cryptocurrencies
- Initial coin offerings (ICOs)
- Entities trading in cryptocurrencies
- Asset management related to cryptocurrencies
- Anti-money laundering obligations

II. Executive Summary

Trading in cryptocurrencies is increasingly subject to regulation on multiple levels, namely:

- Trading
- ICOs
- Entities trading in cryptocurrencies
- Asset management related to cryptocurrencies

Payment tokens, exchange of cryptocurrencies into fiat money, custody wallets, banks, securities dealers and asset managers are generally subject to anti-money laundering requirements, such as registration, supervision and identification of counterparty requirements. Anti-money laundering obligations are the basic regulatory requirements that apply to most entities trading in cryptocurrency markets. Depending on their additional activities, they might require a licence as a bank, securities dealer (Swiss version of an investment firm), bilateral organised trading facility (OTF) or asset manager, or a combination of these licences. Switzerland is also planning to introduce a new licence category in the near future, called fintech-bank. Licences are required in the cases listed below.

- Accepting client deposits, in particular when issuing OTC derivatives which are not securities, generally requires a banking licence. The banking licence is the highest regulated category of financial market participation. Cryptocurrencies and their associated private keys may be deposits under the Swiss Banking Act.
- Trading in cryptocurrencies which are securities, either on behalf of clients or on one's own account (if certain turnover thresholds are being exceeded), generally requires a securities dealer licence. The licensing requirements also apply to the entity's public issuing of derivatives. Bilateral systematic internalisation of cryptocurrencies and related derivatives or financial instruments is subject to additional regulatory requirements under the Swiss Financial Market Infrastructure Act (FMIA).
- Asset management activities related to Swiss and foreign collective investment schemes regarding cryptocurrencies and related financial instruments generally require a licence. The distribution of collective investment schemes and the representation of foreign collective investment schemes also require a licence. Individual portfolio management and advisory activities are, under the current regulatory regime, not subject to a licensing requirement (except for AML registration). However, this is likely to change under the new regulatory regime planned to enter into force soon.

Trading in cryptocurrencies that are derivatives may be subject to multiple obligations depending upon the status of the counterparties involved, such as reporting and risk mitigation (trade confirmation, portfolio reconciliation, portfolio compression, dispute resolution and valuation, as well as initial and variation margins).

III. The regulation of cryptocurrency trading

A. Categories of cryptocurrencies

There is a rich variety of cryptocurrencies available. There is no generally recognised classification of ICOs and the tokens that result from them, either in Switzerland or internationally. Switzerland does not yet have an established legal doctrine or case law on cryptocurrencies. The Swiss Financial Market Supervisory Authority FINMA differentiates between three types of tokens. These are utility tokens, payment tokens and asset tokens. This classification uses an economic approach, applying the concept of "substance over form". A token may have characteristics of multiple types of tokens. The classifications of tokens are not mutually exclusive. Asset and utility tokens could also be classified as payment tokens (referred to as hybrid tokens). In such cases, the requirements are cumulative; in other words, the tokens are deemed to be both securities and a means of payment at the same time.

1. Trading in utility tokens

Utility tokens are tokens which are intended to provide digital access to an application or service by means of a blockchain-based infrastructure. Utility tokens are currently not treated as securities by FINMA if their sole purpose is to confer digital access rights to an application or service when issued. There is no connection with capital markets, which is a typical feature of securities. Utility tokens will, however, also be treated as asset tokens if they also have an investment purpose when issued.

2. Trading in 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. Payment tokens are most similar to currencies. Given that payment tokens are designed to act as a means of payment and are not analogous in their function to traditional securities, FINMA currently does not treat payment tokens as securities. There are, however, other scholarly opinions that consider payment tokens to be securities.

3. Trading in 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. FINMA generally 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 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. In the pre-financing and pre-sale phases of an ICO which confers 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. In addition to regulatory requirements and obligations (see below), securities are subject to prospectus requirements under the Swiss Code of Obligations if they are analogous to equities or bonds.

4. Trading in tokens that are derivatives

Trading in asset tokens that are derivatives is generally subject to the regulatory obligations applicable to derivatives. These are the reporting obligation, risk mitigation obligations, and, at least in theory, the clearing obligation and the platform trading obligation under the Swiss Financial Market Infrastructure Act (FMIA). All of these obligations under the FMIA have been developed tailored to a bilateral relationship between two counterparties trading in derivatives. It is, however, difficult to clearly identify the counterparties to tokens that are derivatives due to the decentralised nature of blockchain-based tokens and the anonymity of the holders of the tokens. Fulfilment of regulatory obligations applicable to derivatives can thus be cumbersome.

B. Initial coin offerings (ICOs)

There are currently no specific financial market regulations in Switzerland that cover initial coin offerings (ICOs) explicitly. ICOs are thus currently treated in accordance with the generic categorisation of tokens into payment, utility and asset tokens. Asset tokens qualifying as securities are subject to treatment under financial market regulations and are, in particular, subject to the prospectus requirement if they are economically equivalent to a share or bond. The placement of securities and the issuance of securities in the form of derivatives, along with trading in securities, may be subject to licensing requirements (see below). Securities are also tokens that are put into circulation at the point of fundraising. Pre-financing is a situation in which the investors have the prospect of receiving tokens at some point in the future, while the tokens or the underlying blockchain remain to be developed. Tokens that are issued pre-ICO and which entitle investors to acquire different tokens at a later date are called pre-sales.

IV. The regulation of entities trading in cryptocurrencies

A. Cryptocurrencies which are not securities

1. Swiss foreign banks

a. Swiss based banks

(1) Banking licence

The professional acceptance of public deposits generally requires a banking licence, unless an exemption applies. Generally, all liabilities qualify as deposits. This is also true for derivatives that do not qualify as securities, for example, because they are tailor-made and not appropriate for mass trading, such as bespoke CFDs or other OTC derivatives. Professional acceptance of public deposits generally means more than 20 depositors or public promotion of the willingness to accept deposits. There are currently different scholarly opinions on whether cryptocurrencies and the transfer of the private key qualify as a deposit. At the core of the dispute is whether such digital assets can be segregated or not. Even if considered a deposit, there might, however, be multiple exemptions applicable, with no banking licence needed. Typical exemptions are:

- Not qualifying as professional activity: the acceptance of deposits of up to CHF 1 million is not considered to be professional activity if these are not invested and not subject to interest payments if the clients are pre-informed about the lack of FINMA supervision and deposit insurance.
- Deposits with precious metals dealers, asset managers, or similar enterprises that are not subject to interest payments and made for the sole

intention of settling transactions, if the settlement occurs within 60 days. Securities dealers benefit from a longer settlement period determined on a case-by-case-basis.
- Non-qualifying deposits: for example, deposits are not public if deposited by banks, qualified shareholders having at least 10% of the votes or the capital and related third parties, and institutional investors having at least one person dealing full-time with asset management matters (professional treasury).

FINMA treats cryptocurrency client dealers that engage in similar activities to client FX dealers like them. Client cryptocurrency dealers that accept fiat money for cryptocurrencies from clients on accounts and are themselves party to cryptocurrency transactions with their clients generally do require a banking licence. This is, however, not the case if an asset manager has sole power of attorney, allowing the management of cryptocurrency positions.

(2) Fintech banking licence

Switzerland is about to introduce a fintech banking licence that should put fintechs, and in particular entities trading in cryptocurrencies, under more adequate supervision. This new licence category will waive own capital and liquidity requirements, only require accounting and an audit related to the Swiss Code of Obligations, and is free from deposit insurance requirements. Fintech licensees are only entitled to accept public deposits up to CHF 100 million under this category and might not pay interest or invest deposits.

b. Foreign banks

Foreign banks, meaning banks that are duly licensed as banks abroad, have the term “bank” in their name or are executing a banking activity have to apply for a licence in Switzerland if they are professionally employing personnel in Switzerland on an ongoing basis and are operating in or from Switzerland either as a branch or representative office.

(1) Branch

Branches enter into transactions, hold customer accounts or legally oblige the foreign bank in any other way.

(2) Representative office

Representative offices are active for a foreign bank in any way other than a branch, such as by forwarding customers’ orders or marketing activities.

2. Obligations of a bank

a. Requesting a license

Dealers in cryptocurrencies that require a banking licence have to file an application to get a banking licence with the Swiss Financial Market Supervisory Authority, FINMA. FINMA will then check whether the applicant fulfils all the requirements imposed by law. Most of these requirements must be fulfilled when the licence is granted and on an ongoing basis.

b. Organisational requirements

Any bank needs to have a board of directors with at least three members and a separate management team. A bank also needs a compliance and risk management function as well as an internal audit function, along with the business function. The bank must implement an effective separation between the trading desk, credit business, settlement and the control functions (risk and compliance). The outsourcing of internal audit, compliance and risk management is generally possible. Any bank must also have an effective internal control system in place.

c. Capital requirements

Any bank must have equity of at least CHF 10 million and is subject to additional capital requirements depending upon its business activity and risk profile. Banks are also subject to special regulatory accounting rules.

d. Notification requirements

Banks have to inform FINMA about the fact that they are initiating operations in a foreign jurisdiction. The acquisition or divestment of subsidiaries, representations or branches in a foreign jurisdiction must also be reported to and pre-approved by FINMA. FINMA must also be informed about qualified holders of shares in the bank and about any decrease, increase or reaching of the related qualified holdings of 10%, but also 20%, 33% or 50% of the capital and the votes.

e. Pre-approval requirements

Any foreign shareholders of a bank need pre-approval from FINMA. Any change to the organisational documents of a bank must also be pre-approved by FINMA.

f. Behavioural requirements

Any member of the board of directors and the management must be fit and proper to execute the function of a director or a manager. This obligation also applies to the bank itself. Its organisation must be adequate to pursue the business objective and purpose of the bank.

3. Asset protection

Privileged deposits of depositors are subject to special protection. Deposits in the name of the depositor up to an amount of CHF 100,000 are privileged claims

subject to privileged treatment in bankruptcy. Banks must cover 125% of their privileged deposits with Swiss and covered claims. Securities are also subject to privileged treatment in the event of bankruptcy. Dormant accounts – accounts where a bank is no longer in a position to establish contact – are subject to special protective provisions.

B. Trading in cryptocurrencies which are securities

Trading in cryptocurrencies that are securities requires the trading entity to be licensed as a securities dealer. Securities are standardised, certificated and uncertificated financial instruments suitable for mass trading. They are thus either offered publicly in a similar structure and denomination or placed with more than 20 clients, unless they are being created specifically for individual counterparties. Payment tokens and utility tokens are not securities and trading in these derivatives does not generally trigger the obligation to get licensed as securities dealers.

A security can trigger multiple legal consequences when being traded. These consequences are:

- Persons professionally trading in securities will potentially have to apply for a licence as a securities dealer (the Swiss equivalent of an investment firm or broker/dealer).
- Facilities allowing for the multilateral trading of securities require a licence as a stock exchange or multilateral trading facility (MTF) or must be reported as an organised trading facility (OTF).
- Facilities allowing for the bilateral trading of securities must be operated by a duly licensed operator (the Swiss bilateral version of an OTF, which replaces the systematic internaliser in the EU).

1. Current regulation of investment firms professionally trading/executing cryptocurrencies in the form of securities (Securities Dealer Act)

a. Swiss-based securities dealers

Professional trading in securities typically requires a license as a securities dealer granted by the Swiss Financial Market Supervisory Authority, FINMA. The detailed requirements and licensing process depends heavily upon the place of domicile of the securities dealer and the business activity pursued. A Swiss-domiciled securities dealer is any legal entity or partnership that professionally sells or buys securities either

- on its own account on the secondary market with the intent of reselling them within a short period of time (own-account dealers and market makers)
- on behalf of third parties (client dealers)
- by publicly offering securities to the public on the primary market (issuing houses)
- by professionally creating derivatives and offering them publicly on the primary market (derivative house)

"Own account dealers" (see below) and "issuing houses" (see below) have to be primarily active in the financial sector at an individual and group-consolidated level. This means that the main business activity of a group must be in the financial sector. Even sizeable securities trading activities of treasury companies within a group that is pursuing a primary business purpose other than a financial activity are thus not subject to the licensing requirements of a securities dealer if the securities trading is closely related to the group's business activity (e.g. treasury departments of industrial companies). This does not, however, apply to market makers and client dealers, who will have to apply for a licence even if the group's main business activity is not a financial activity.

(1) Trading on one's own account (proprietary trading)

Securities dealers trading on their own account will only become subject to a licensing requirement if they pose a systematic risk to the financial system. That is why their gross annual turnover in securities must be at least CHF 5 billion. They typically do not have any clients. Securities dealers trading on their own account generally act in a professional capacity and on a short-term basis. Key aspects of trading on one's own account include trading without instructions from third parties and taking on risk, which is primarily market risk. In the context of a clearing situation it can, however, lead to a counterparty risk if clients do not advance money to settle the securities. Trading on a short-term basis means the active management of securities to achieve gains from short-term fluctuations in prices or interest rates within a short period of time. Long-term investments in securities and, in particular, the holding of securities until maturity, are not deemed to be trading on one's own account.

(2) Trading on one's own account (market makers)

Market makers trade publicly in a professional capacity in securities, on their own account and on a short-term basis. They trade publicly, because they offer the securities to anybody. They set a firm bid and ask for prices on an ongoing basis or on request (request for quote).

(3) Trading on behalf of third parties (client trading)

Client dealers handle securities in their own name, but on behalf of clients, in their professional capacity. A professional capacity is assumed if the securities dealer maintains accounts directly or indirectly or acts as a custodian for more than 20 clients. Whether the

securities dealer is dealing on account for the client or on his/her own account is determined based on economic considerations, namely who is bearing the risk of the transaction. If the client is bearing the economic risk, trading activities over the nostro accounts of the securities dealer are deemed transactions on behalf of the client. Client dealers maintain accounts for the settlement of the transactions for these clients or with third parties, or keep these securities for themselves or for third parties in their own name.

No licensing requirement is triggered if the entity deals only with clients who are Swiss, or foreign banks or securities dealers, other enterprises under government supervision, shareholders or companies with significant holdings in the debtor and any parties affiliated or related to them, and institutional investors with professional treasury departments. Asset managers and investment advisors are not deemed to be securities dealers if they are acting based on a power of attorney, unless they purchase or sell securities to their clients using their own account or securities deposits.

(4) Placing cryptocurrencies as securities (issuing houses)

Securities dealers in the form of issuing houses place cryptocurrencies as securities issued by third parties on a professional basis at a fixed price or for commission, and offer them to the public on the primary market. A key criterion for whether the placement of cryptocurrencies as securities on the primary market is an activity of a securities dealer is thus whether it is "public". An offering is public if it is addressed to an unlimited number of people, in particular by means of advertisements in the media, prospectuses or other electronic means. Offers of securities made exclusively to qualified investors such as domestic and foreign banks and securities dealers or other enterprises under government supervision, shareholders and partners with a significant equity interest in the borrower and parties affiliated and related to them, and institutional investors with professional treasury departments, meaning the employment of one person on a full-time basis managing the company's assets, are not considered. An offering is deemed to be "public" even if securities have been placed with fewer than 20 people, but the offering has been addressed to an unlimited number of people, who do not have to be exclusively qualified investors.

(5) Creating cryptocurrencies as derivatives (derivative houses)

Derivatives houses create cryptocurrencies in the form of derivatives, meaning financial instruments whose value is derived from an underlying. They handle this professionally themselves and offer them parties publicly on the primary market on their own account or on account of third. A placement of derivatives with less than 20 clients after a public offer qualifies still as public offer. A placement of derivatives with less than 20 clients does not trigger the requirements of a securities dealer.

b. Foreign securities dealers

Foreign securities dealers are entities that either

- possess an equivalent license abroad, or
- apply the expression "securities dealer" or an expression of similar meaning in their corporate name, business purpose, or documents, or
- conduct trading in securities.

Foreign securities dealers, meaning entities that are not domiciled in Switzerland, are generally subject to the same requirements as Swiss-domiciled securities dealers, unless the law sets forth different obligations. Securities dealers that are actually managed in Switzerland and execute their transactions mainly out of Switzerland must incorporate in Switzerland and be organised according to Swiss regulations. They will be subject to the regulatory requirements of a Swiss securities dealer. Securities dealers organised under Swiss law are deemed to be under foreign control if a foreign person indirectly or directly holds more than 50% of the votes or has a material influence on the securities dealer in any other way.

Foreign securities dealers will need to be licensed in Switzerland either as a branch or as a representative office if they employ staff in a professional capacity in Switzerland on an ongoing basis.

(1) Branch

Foreign securities dealers will need to be licensed as a branch of a foreign securities dealer in Switzerland if they trade securities, have client accounts or legally oblige the foreign securities dealer.

(2) Representative office

The securities dealer will need to be licensed as a representative office of a foreign securities dealer if it becomes active in any other way in Switzerland, namely by forwarding client orders or performing representational activities. According to established FINMA practice, the following activities are typical of a foreign securities dealer:

- Employing persons in Switzerland that are fully integrated into the organisation and broker securities trades and forward orders.
- A corporation in Switzerland that is not licensed as a Swiss securities dealer, but carries the same or a similar name and brokers securities and forwards orders.
- Existence of exclusive contracts with natural persons and legal entities in Switzerland to broker securities. In such a situation, the Swiss

representative acts exclusively for the foreign securities dealer and gets reimbursed for each trade.
- Conclusion of non-exclusive contracts with natural persons and legal entities in Switzerland for the brokering of trades, but with authorisation to use its own corporate name. The representative is compensated for each trade.

c. Obligations of a securities dealer

(1) Applying for a license

Anyone falling within one of the categories of a securities dealer mentioned above has to apply for a licence with the Swiss Financial Market Supervisory Authority, FINMA. The licence will be granted if certain key requirements are fulfilled at the time that the licence is granted and on an ongoing basis.

(2) Organisational requirements

A securities dealer must have an adequate organisation in place that allows for the execution of its activities. The securities dealer must have a board of directors and a management team. The members of the management team will have to be fit and proper for the execution of their respective functions. There must be an adequate separation between trading, asset management and administration. The securities dealer must also establish an internal control system consisting of compliance, risk management and internal audit. An external regulatory audit firm must also be appointed. It is possible to unify some of the control functions with a specific person.

(3) Capital requirements

Any securities dealer must have fully paid-in minimal capital of at least CHF 1.5 million. Any shareholder indirectly or directly holding more than 10% of the capital or the voting rights of a securities dealer or that may in any other way influence the business activities of the securities dealer must meet FINMA's fit and proper criteria. The provisions applicable to banks regarding their own capital and accounting generally also apply to a securities dealer. Privileged deposits of clients are subject to enhanced protection.

(4) Reporting, information and approval obligations

Any securities dealer will have to comply with multiple reporting, information and approval obligations on an ongoing basis. Any change to the preconditions for granting the licence, but in particular the articles of association, regulations, material change of business activity, management, board of directors and external audit firm, as well as build-ups, investments and divestments of foreign operations, must be pre-approved by FINMA.

Any indirect or direct acquisition or sale of a stake in a securities dealer reaching, exceeding or falling below the thresholds of 20%, 33% or 50% of the capital or the votes must be reported to FINMA.

(5) Algorithmic and high frequency trading

Participants in Swiss trading venues that are engaging in algorithmic or high frequency trading activities are subject to enhanced recording requirements and their systems must ensure adequate functioning even in stress situations.

2. Regulation of investment firms trading/executing securities professionally under the FinSA- and FinIA regime

a. Securities trading and execution under the FinSA regime

Securities will fall within the scope of application of FinSA because they are assets, meaning financial instruments and other financial investments, in the sense of FinSA. Cryptocurrencies can also qualify as financial instruments. Trading in securities and the execution of client orders related to trading on one's own account in cryptocurrencies is a financial service. Short-term trading on one's own account in securities mainly as a financial activity thus requires a licence if such activity could endanger the functionality of the market or if the trader is a member of a trading venue. Market-making activities are generally also subject to a licensing requirement.

b. Behavioural requirements

FinSA sets forth new behavioural requirements for financial market participants. Some of these obligations have already been applied under previously applicable regulations. Others have already been applicable under contract law and have been transformed into regulatory law. Trading in securities/financial instruments and the execution of orders related to securities/financial instruments in the form of financial services are subject to multiple requirements, such as but not limited to client classification, the duty to maintain professional training, the duty to inform clients and the duty to document and justify. It is not necessary for any suitability and appropriateness test to be undertaken by financial intermediaries who are solely executing or forwarding orders related to securities initiated by clients. An important behavioural conduct rule in the context of the execution of trades in securities/financial instruments is the duty of "best execution". Financial intermediaries must ensure that any execution made for clients is done as optimally as possible in terms of price, time of execution and other criteria. Securities-lending activities related to securities of clients require specific prior written consent.

c. Organisational requirements

Investment firms trading in securities/financial instruments or executing orders related to securities/financial instruments are also subject to organisational requirements addressing conflict-of-interest situations and inducements. The new regulatory obligations about inducements orient themselves particularly closely towards the case law related to discretionary asset management agreements.

d. Investment firms trading in securities under the FinIA regime

Under the new FinIA regime, securities dealers will be called investment firms, bringing them into line with EU terminology. According to FinIA, an investment firm is – or is at least supposed to be – regulated identically to a securities dealer under the SESTA. Any professional trading on its own account or on behalf of clients in securities thus requires a licence as an investment firm. An investment firm can have accounts for the settlement of securities. Securities can also be held with third parties. However, it cannot take deposits from third parties. Any such activity requires a banking licence. Any investment firm is subject to minimal capital requirements, regulatory capital requirements and liquidity and risk management obligations. It has to record the orders received and the executed transactions and will have to fulfil the required reporting to the regulator.

C. Bilateral systematic internalisation of cryptocurrencies as securities or financial instruments (Swiss Financial Market Infrastructure Act)

Trading arrangements in derivatives or financial instruments related to cryptocurrencies can be an organised trading facility (OTF) that is subject to special regulation. An OTF is, in Switzerland, the catch-all facility for many other trading set-ups encompassing bilateral and multilateral as well as discretionary and non-discretionary trading activities in both securities and financial instruments, meaning any other financial instruments used for investment purposes, while not constituting securities. The Swiss OTF offers a lot of flexibility, which makes it a highly suitable platform for cryptocurrency trading.

An OTF is any trading facility that:

i. is governed by a set of rules that is standardised and binding to participants
ii. allows for the conclusion of contracts within the scope of application of these rules
iii. enables the initiative to trade to come from the participants.

An OTF can only be operated by a bank, securities dealer, trading venue, facility recognised as a trading venue or a legal entity within a financial group that is controlled directly by a financial market infrastructure and is subject to consolidated FINMA supervision. Unlike under MiFID II/MiFIR, a systematic internaliser is not a special category of investment firm/securities dealer but is either a bilateral OTF or a securities dealer if the related requirements are met.

The operation of an OTF is also subject to requirements that ensure orderly trading, transparency and investor protection, such as best execution requirements in the case of discretionary trading. Any operator of an OTF must issue rules and regulations, and appoint an independent control function that monitors compliance with these regulations. Pre-trade transparency is required in the case of bilateral and multilateral liquid trading, meaning at least 100 trades on average per day over the last year. Post-trade transparency is only required in the case of multilateral trading. Anyone operating an OTF or intending to do so in the future must report this fact or intent to the Swiss regulator FINMA.

V. The regulation of cryptocurrency-related asset management activities

Asset management services related to cryptocurrencies are on the rise. From a regulatory point of view, they can be separated into collective investment schemes and individual portfolios.

A. Collective investment schemes

1. Types of collective investment schemes

Funds or collective investment schemes are assets raised from usually at least two independent investors for the purpose of collective investments in cryptocurrency-related strategies. Funds can be open-ended, meaning that they have a fluctuating number of investors, or closed-ended, meaning that they have a fixed number of shares.

a. Swiss collective investment schemes

In Switzerland, open-ended collective investment schemes might be set up in the form of a contractual fund or an investment company with variable capital (SICAV). With open-ended collective investment schemes, investors have either a direct or an indirect legal entitlement, at the expense of the collective assets, to redeem their units at the net asset value. Closed-ended collective investment schemes in Switzerland might be set up in the form of a limited partnership for collective capital investments or an investment company with fixed capital (SICAF). What they all have in common is that they must be authorised by FINMA.

b. Foreign collective investment schemes

Foreign collective investment schemes must be approved by FINMA prior to any distribution. The duly appointed and FINMA-authorised representative of foreign collective investment schemes must submit the relevant binding documents, such as the sales prospectus, articles of association and fund contract, to FINMA. In addition to a representative, a paying agent must also be appointed. Foreign open-ended collective investment schemes are either assets that were accumulated on the basis of a fund contract, or another agreement with a similar effect for the purpose of collective investment or whose investors have a legal right to the redemption of their units at the net asset value with regard to the company itself or with regard to a closely associated company. In addition, they must be managed by a fund management company with its registered office and main administrative office abroad.

2. In-house funds

In-house funds of a contractual nature which are created by banks and securities dealers for the purpose of collectively managing assets of existing clients, in particular in the form of currencies, are not subject to a licensing requirement. In-house funds require, however, that the clients participate exclusively on the basis of a written discretionary management agreement, no unit certificates are issued, and that they are not distributed. The creation and dissolution of in-house funds must be notified to the external auditor. The assets of the investors will be segregated in case of a bankruptcy of the bank or the securities dealer.

3. Management of collective investment funds

Anyone managing collective investment schemes must obtain authorisation from FINMA. There are generally two forms of asset managers: fund management companies and asset managers of collective investment schemes.

a. Fund management company

The main company managing collective investment schemes is the fund management company. It manages the collective investment scheme at its own discretion and in its own name but for the account of the investors. It decides, in particular, the issuance of units, investments and their valuation, the calculation of the net asset value, the issuance and redemption prices in addition to income distributions, and the exercise of all rights associated with the collective investment schemes. It may delegate investment decisions and specific tasks, provided this is in the interest of efficient management and only persons who are properly qualified to execute the task are appointed. It may, however, only delegate investment decisions to asset managers of collective investment schemes who are subject to recognised supervision.

b. Asset manager of collective investment schemes

An asset manager of collective investment schemes ensures the proper conduct of portfolio and risk management for one or more collective investment schemes. It needs prior authorisation by FINMA. It might in addition also perform administrative activities, the discretionary management of individual portfolios, investment advisory services, distribution of collective investment schemes and the representation of foreign collective investment schemes. Specific tasks might be delegated, provided it is in the interest of efficient management. Investment decisions might, however, only be delegated to an asset manager of collective investment schemes who is subject to recognised supervision.

4. Distribution of collective investment funds

The distribution, meaning the offering and advertising of collective investment schemes that are not exclusively directed at regulated financial intermediaries or regulated insurance companies, of foreign collective investments in Switzerland or from Switzerland, is subject to authorisation by FINMA.

5. Outlook: asset management of collective investment schemes under the FinSA- and FINIA regimes

Fund management companies of collective investment schemes investing in cryptocurrencies are covered by the FinSA and FINIA regimes. The final versions of FinSA and FINIA will be unlikely to show material changes compared to the current regulatory situation. The current draft of the FINIA stipulates that the managers of assets in the name and on behalf of pension funds must also be authorised by FINMA.

B. Individual portfolio management and advisory functions

1. Current situation

The investment management and advisory functions of individual portfolios consisting of cryptocurrencies or related to cryptocurrencies is currently not subject to much regulation. Such activities are executed based on power of attorney granted by the account holder to the asset manager or advisor. Investment management activities are, however, subject to anti-money laundering regulation.

2. Outlook: management of individual portfolios under the new FinSA- and FINIA regimes

The management of individual portfolios of cryptocurrencies being financial instruments will undergo a paradigm change under the new FinSA and FINIA regimes. There will be a new authorisation category for asset managers of individual portfolios. The requirements in terms of organisation, capital and behavioural obligations will probably be similar to the ones applicable to asset managers of collective assets.

VI. Anti-money laundering obligations

A. Cryptocurrency activities subject to anti-money laundering supervision

1. Payment tokens

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.

2. Utility tokens

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.

3. Exchange of cryptocurrency into fiat money

The exchange of a cryptocurrency for fiat money is subject to AML requirements.

4. Custody wallet

The offering of services to transfer tokens if the service provider maintains the private key is a financial intermediary activity subject to AML requirements.

5. Banks, securities dealers and asset managers

Securities dealers and banks duly licensed by FINMA are financial intermediaries. They are subject to the requirements of Swiss anti-money laundering provisions. Any other trading activities not subject to a licence as a securities dealer are not subject to the Swiss anti-money laundering regulations (unless they concern a payment token). Asset managers of individual portfolios are also subject to anti-money laundering supervision, but are not subject to FINMA authorisation.

B. Obligations of entities engaging in cryptocurrency activities subject to anti-money laundering supervision

1. Registration with a self-regulatory organisation or with FINMA if not FINMA-supervised

Financial intermediaries not supervised by FINMA must register with an AML-self-regulation organisation or directly with FINMA. They will then become subject to the client and beneficial owner identification and transaction surveillance requirements set forth in the applicable directives of the self-regulation organisation.

2. FINMA-supervised entities

Banks and securities dealers have to comply with the verification of the identification requirements of contractual parties and the establishment of the identity of the controlling person and the beneficial owner according to the Agreement on the Swiss Banks' Code of Conduct with regard to the exercise of due diligence (CDB16). Compliance with these requirements is audited by the external auditor on an annual basis.

3. General obligations of all financial intermediaries subject to AML obligations

a. Identification of a contractual party

Financial intermediaries undertake to verify the identity of the contracting partner when establishing business relationships. The execution of transactions involving trading in securities must exceed CHF 25,000 in the case of an account opening. For natural persons, the following details must be appropriately documented:

- Last name
- First name
- Date of birth
- Nationality and the actual domiciliary address
- Means used to prove identity

For legal entities and partnerships, the following details must be appropriately documented:

- Company name
- Actual registered office
- Means used to prove identity

b. Establishment of the identity of controlling persons and beneficial owners

If an operating legal entity or partnership has one or more controlling persons with voting rights or capital shares of 25% or more, these are to be identified in writing. Controlling persons are those natural persons who effectively have ultimate control over the company. Whether these persons exercise control directly or indirectly via intermediate companies is irrelevant. A controlling person must generally be a natural person. The contracting partner must confirm the name, first names and actual domiciliary address of the controlling person in writing or by using Form K.

The financial intermediary requires from its contracting partner a statement concerning the beneficial ownership of the assets. Generally, the beneficial owners of the assets are natural persons. If the contracting partner declares that the beneficial owner is a third party, then the contracting partner has to document the latter's last name, first name, date of birth and nationality, along with his/her actual domiciliary address, or the company name, address of registered office and country of registered office using Form A.

c. Business relationships and transactions with increased risk

Financial intermediaries have to determine business relationships and transactions that are subject to increased risk. The initiation of such business relationships and the execution of such transactions are subject to enhanced due diligence requirements. Such business relationships must be approved by the management.

d. Organisation

Financial intermediaries must establish an organisation that allows for efficient compliance with the applicable anti-money laundering regulations and has, in particular, to designate a dedicated anti-money laundering function. New products must be checked by the securities dealer for their compliance with the applicable regulations. Securities dealers must establish an effective mechanism for the surveillance of transactions and business relationships based on an IT system.

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