Stage one: classification

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Why the opinion comes first

Everything else follows from the classification, so it must be done before the entity is formed and before any investor is approached. FINMA's 2018 guidelines distinguish payment tokens, utility tokens and asset tokens, treat hybrids cumulatively, and treat claims to receive tokens in a pre-financing or pre-sale phase as asset tokens if they are standardised and suitable for mass trading.[1] MAS's Guide to Digital Token Offerings asks whether the token is a capital markets product under the Securities and Futures Act. That turns on whether it constitutes a share, a debenture, a unit in a collective investment scheme or a derivative. The Guide then asks whether the issuer or an intermediary carries on a regulated activity.[2] The two frameworks ask similar questions in different words. A token that is a pure utility or payment token under FINMA's taxonomy will usually sit outside the SFA. The divergence appears with hybrids. A utility token that also functions as a means of payment is a payment token for Swiss AML purposes and a digital payment token for Singapore PSA purposes, which brings the issuer's and the distributor's activities within two separate licensing regimes.

A classification opinion should address, for each jurisdiction, the five questions that the regulators ask. What right does the token confer? Is that right against the issuer? Is the token transferable and fungible? Is it intended to be traded? What does the issuer promise in its communications? The last question is the one founders underestimate. A token marketed with a promise of appreciation, a buy-back programme or a revenue share is an asset token whatever the code says. Both regulators read the Discord channel.

The no-action route

FINMA answers enquiries on the regulatory status of a planned token under its 2018 guidelines on the basis of a questionnaire and a fee. The answer, while not formally binding, is in practice followed.[3] The process takes two to four months and costs CHF 10,000 to CHF 40,000 in FINMA fees depending on complexity. MAS does not operate an equivalent no-action procedure for token offerings. Issuers rely on legal opinions and, for borderline cases, on a pre-application discussion with the FinTech and Innovation Group that produces no written confirmation. Most Swiss-issued tokens that are marketed in Singapore therefore carry a FINMA enquiry response and a Singapore counsel opinion, which together form the file that exchanges ask for at listing.

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Notes

1. FINMA, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs) of 16 February 2018, sections 3.1 to 3.3 (token categories; hybrids; pre-financing and pre-sale treated as securities where standardised and suitable for mass trading).
2. MAS, "A Guide to Digital Token Offerings", last updated 26 May 2020, paras 2.1 to 2.9 (when a digital token is a capital markets product) and 3.1 to 3.8 (intermediaries). Part K, Chapter IV.
3. Financial Market Supervision Act of 22 June 2007 (FINMASA; FINMAG), SR 956.1, Art. 15 (fees); FINMA Ordinance on Fees and Charges (FINMA-GebV), SR 956.122, Art. 8 (fee by time spent, hourly rates of CHF 100 to CHF 400); FINMA, ICO Guidelines 2018, Annex (minimum information for enquiries).

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