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well as other FINMA supervised institutions will need to devise methods to structure their business set-up, internal policies and procedures in line with FINMA's stringent interpretation of the law.

While the Guidance applies only to service providers subject to FINMA supervision, we expect recognized Swiss AML self-regulatory organizations to follow suit with respect to their interpretation of analogous provisions in their regulations. These apply to a range of Swiss blockchain service providers such as certain custody wallet providers, trading or exchange platforms, meaning that these businesses can expect to be faced with similar challenges in this area as the prudentially regulated financial institutions.

Overall, this development is somewhat paradoxical in light of the original intention of developers of blockchain technology, who aimed at reducing or eliminating the need for (trusted) intermediaries. However, transactions between unregulated individuals or entities that do not avail themselves of the services of a financial intermediary subject to AML regulation will remain unaffected by the new practice.

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Swiss Financial Market Supervisory Authority Publishes New Guidelines for "Stable Coins"

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Against the backdrop of the growing number of projects for so-called "stable coins" since mid-2018, the Swiss Financial Market Supervisory Authority (FINMA) on 11 September 2019 published new guidelines explaining the regulatory qualification of tokens that are linked to underlying assets such as fiat currency, commodities or securities with the goal to minimise fluctuations in their market value. The new guidelines supplement FINMA's ICO Guidelines of 16 February 2018, which continue to apply. While the stable coin guidelines are general in nature, their publication coincides with the recent announcement by the Swiss based Libra Association to launch a payment token that is backed by a basket of fiat currencies, a project that has attracted worldwide attention by governments and regulators.

By Martin Peyer / Gadi Winter

1) Background

On 11 September 2019, FINMA published guidelines with a focus on "stable coins" (Stable Coin Guidelines) as a supplement to its February 2018 guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICO Guidelines). The

Stable Coin Guidelines confirm FINMA's principle-based and technology-neutral approach to financial market regulation and provide a high-level overview of the regulatory qualification of stable coins under Swiss financial market laws, in particular with respect to the Swiss Banking Act, the Collective Investment Schemes Act (CISA), the Anti-Money Laundering Act and the Financial Market Infrastructure Act. Furthermore, FINMA distinguishes between four categories of stable coins by reference to the underlying assets.

2) Supplemental Rules for Stable Coins

Since the release of FINMA's ICO Guidelines in February 2018, FINMA has observed an increasing number of projects for tokens that are linked to underlying assets such as *e.g.* a basket of currencies or commodities. For the purposes of the Stable Coin Guidelines, FINMA refers to such tokens as "stable coins", although it considers that this is primarily a marketing term. The aim of linking tokens to underlying assets is to prevent speculative swings which are typical for "traditional" payment tokens such as Bitcoin or Ether and to help establish cryptocurrencies as a stable, low-volatility means of payment. Against this background and given that there are no specific rules for stable coins under Swiss law, the Stable Coin Guidelines outline FINMA's approach for the application of the legal and regulatory framework to such coins.

That said, FINMA does not consider stable coins to be a new type of token. It emphasises that the categorisation set out in the ICO Guidelines remains applicable although it is rather unlikely that utility tokens will be backed by underlying assets. Since stable coins are in most cases intended to serve as a means of payment or value transfer, they often qualify as a form of payment token even if the holder may redeem the token for the underlying assets with the issuer. Stable coins which are used as a means of payment will therefore also fall within the scope of Swiss anti-money laundering (AML) regulation.

The Stable Coin Guidelines further focus on Swiss fund regulation, which was previously only addressed in a generic way in FINMA's ICO Guidelines. In case a stable coin is deemed a unit in a collective investment scheme (see below for further details), it may also qualify as an asset token.

3) Same Risks, Same Rules

In the Stable Coin Guidelines, FINMA follows – similar to the ICO Guidelines – its well established approach of focusing on the economic function and the purpose of a token ("*substance over form*") and applying the existing regulatory framework in a technology-neutral manner according to the principle "*same risks, same rules*" while continuing to evaluate projects on a case-by-case basis (even taking into account advertising claims relating to the respective coin). This means that a stable coin that exposes its

holders to risks similar to banking activities may require its issuer to apply for a banking licence under the Swiss Banking Act, whereas a stable coin which is similar to a fund may trigger licensing obligations under the CISA.

4) Categorisation of Stable Coins based on their Underlyings

Stable coins exist in many different forms depending on their legal, technical, functional and economic design. Nevertheless, the new Stable Coin Guidelines establish four main types of stable coins based on their underlyings:

– **Stable coins backed by currencies**: The issuer of a stable coin backed by currencies may require a license as a bank pursuant to the Swiss Banking Act, if the holder of the coin has a right of redemption at a fixed price (*e.g.* 1 coin equals 1 CHF) against the issuer. This is because in such a set-up, the issuer may be deemed to have accepted deposits from the public. By contrast, if the coin holder may redeem the stable coin only at the current value of an underlying currency basket (*i.e.* at net asset value), the coin may qualify as a unit in a collective investment scheme rather than as a deposit. To distinguish between a deposit and a unit in a collective investment scheme, FINMA looks at the question of who bears the risks related to the management of the underlying assets (such as profits or losses from interest, market fluctuations of the underlyings or counterparty and operational risks). If the coin holder bears the risks, the coin is likely to qualify as a unit in a collective investment scheme. If the issuer of the stable coin, however, bears all these risks, the coin does not constitute a unit in a collective investment scheme and will not trigger any licensing or approval requirements under the CISA.

– **Stable coins backed by commodities**: The licensing requirements for an issuer of stable coins backed by commodities depend on the type of underlying commodity and whether the coin holder has a contractual claim only or acquires a right *in rem* in the underlying commodity. Stable coins representing a right *in rem* are not subject to financial market regulations and do not qualify as securities if (i) the holder does not only have a contractual claim in the underlying commodity, (ii) the transfer of the coin results in a transfer of the ownership in the commodity, and (iii) the underlying commodities do not constitute a deposit of fungible goods according to article 481 of the Code of Obligations (*i.e.* the custodian will become the owner of the underlyings). By contrast, where a stable coin represents a contractual claim against the issuer, the qualification of the coin depends on the type of underlying. The issuer may require a banking license if the stable coin is backed by banking-grade precious metals (*Bankedelmetalle*) and, thus, is similar to a precious metal (bank) account. If other commodities are used as underlyings, the coin may constitute a security and potentially also qualify as a derivative resulting in a potential licensing obligation for the issuer as a securities dealer. Lastly, commodity-based stable coins may also qualify as units in a collective investment scheme if the

investors are exposed to the risks related to the management and custody of the underlying commodities.

– **Stable coins backed by real estate**: Redeemable stable coins which are backed by real estate (*i.e.* one or several real properties) will in most cases fall within the scope of the CISA and require a license thereunder (unless a statutory exemption applies) since the underlying real estate will usually be managed by the issuer on behalf of the coin holders and the latter do not have a right *in rem* in the real estate.

– **Stable coins backed by securities**: A stable coin that is backed by a *single* security and that provides for a (contractual) right of the coin holder in the underlying security likely qualifies as a security itself. By contrast, if the underlying assets are composed of several securities, the respective stable coin constitutes in most cases a unit in a collective investment scheme.

5) New Prospectus Requirements under the Financial Services Act

Although the prospectus requirement in respect of stable coins is not discussed in detail in the Stable Coin Guidelines, it is noteworthy that with the new Swiss Financial Services Act (FinSA) (expected to enter into force as of 1 January 2020), the prospectus requirements for all tokens (including stable coins) that qualify as securities will undergo substantial changes. Whereas under the current rules, the issuer would only be required to prepare a prospectus if the token represents shares, bonds or units of collective investment schemes, the rules under the new Swiss Financial Services Act require the preparation and approval by a Review Board (*Prüfstelle*) of a prospectus for the public offering of all tokens (including stable coins) qualifying as securities unless an exemption applies (*see* articles 35 ff. FinSA). Furthermore, for certain tokens qualifying as financial instruments which are offered to retail clients, a key information document must be prepared (articles 58 ff. FinSA).

6) Conclusion

The stabilization mechanism adds an additional layer of complexity to the regulatory treatment of stable coins vs. other types of tokens. While the Stable Coin Guidelines set out the framework based on which FINMA assesses stable coins, FINMA reiterates at the same time that a case-by-case analysis will be required depending on the specific features of a stable coin. Consequently, issuers of stable coins will have to carefully assess the impact of the stabilization mechanism on their regulatory status. Requesting a ruling from FINMA based on a detailed description of the stabilization mechanism and the underlying assets will in our view continue to be good practice for most projects.

Moreover, issuers of stable coins and other tokens in general have to assess the implications of the anticipated entry into force of the Financial Services Act on 1 January 2020 for their projects, in particular with respect to prospectus requirements and the requirement to prepare a key information document for certain tokens.

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Swiss Debt Capital Markets: More Flexibility under New Swiss Withholding Tax Rules

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A bond issued by a foreign resident issuer which is guaranteed by its Swiss resident parent company may be reclassified in a domestic issuance subject to 35 withholding tax if the proceeds raised under such bond are used in Switzerland. Under the rules which entered into force on 1 February 2017, it was possible to use the proceeds in Switzerland up to an amount equal to the equity of the foreign issuer. New rules which entered into force on 5 February 2019 added further flexibility with respect to the permissible use of proceeds in Switzerland.

By Stefan Oesterhelt

1) Introduction

Switzerland levies a 35 percent withholding tax (*Verrechnungssteuer*) on interest payments on bonds. International capital markets generally do not accept bond issuances with deduction of Swiss withholding tax. As a consequence, it is common for Swiss multinational groups to issue bonds through a foreign subsidiary. However, the Swiss Federal Tax Administration reclassifies such foreign issuance in a domestic issuance if the amount of proceeds used in Switzerland exceeds certain thresholds. While historically the proceeds had to be used outside of Switzerland completely, it was permissible to use the proceeds in Switzerland up to the equity of the foreign issuer since 1 April 2017 (see already Stefan Oesterhelt, Swiss Capital Markets: New Swiss Withholding Rules CapLaw 2017). A new guidance which has been published on 4 February 2019 by the Swiss Federal Tax Administration increases the amount which can be used in Switzerland considerably.

2) General Principles

A bond issued by an entity resident outside Switzerland will be (re-)characterized as domestic issuance if such bond is guaranteed by the Swiss parent company and the proceeds from the issuance are used in Switzerland. In such case, the Swiss guarantor