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Practical Implications of the new FINMA Guidance on Payments on the Blockchain

On 26 August 2019, the Swiss Financial Market Supervisory Authority FINMA ("FINMA") published its Guidance 02/2019. Therein, FINMA provides new insight into how Swiss anti-money laundering rules apply in a blockchain environment.

1. FINMA Guidance 02/2019 Payments on the blockchain

In June 2019, the Financial Action Task Force (FATF) issued its guidance on virtual assets and virtual asset service providers concluding that the effective implementation of anti-money laundering measures requires that information about the client as well as the beneficiary is transmitted when a token is being transferred. In the implementation of this recommendation, FINMA on 26 August 2019 published its guidance 02/2019 ("Guidance 02/2019") providing some helpful insight into how the Swiss anti-money laundering regime applies to transactions in a blockchain environment.

Having recognized the innovative potential namely of the blockchain technology, FINMA confirmed its technology-neutral approach to the regulation and supervision

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of these new technologies. This approach means, that in order to prevent the circumvention of existing financial market regulation, FINMA applies the same rules to financial services irrespective of whether they are offered via traditional means or via a blockchain solution. In particular, this holds true for the Swiss law requirements which aim to prevent and combat money laundering.

Under Swiss anti-money laundering regulation, financial intermediaries have a wide range of duties, including, among others, joining a self-regulatory organization, the duties to monitor their business relationships, perform "know your customer" checks and, if there are reasonable grounds to suspect money laundering, file a report with the Money Laundering Reporting Office Switzerland. Furthermore, the failure to perform these duties may result in criminal sanctions.

While, in general, it is clear that these rules apply to blockchain service providers their specific repercussions may vary depending on what activity the blockchain service provider in question pursues:

2. Initial coin offerings

A blockchain service provider may issue tokens in the course of a so called initial coin offering ("ICO").

The Guidance 02/2019 does not address how this activity will be treated from an anti-money laundering point of view. Since the Guidance 02/2019 does not deal with the issuance of tokens and since the token purchase is a bilateral relationship between the issuer and the purchaser, the Guidance 02/2019 has no particular impact on the duties of the issuer in this respect. However, that does not mean that the issuer does not fall under Swiss anti-money laundering regulation. FINMA has addressed this on previous occasions, namely in its guidance

on ICOs published on 16 February 2018. According to this guidance, issuing so-called payment tokens qualifies as the issuance of a means of payment if they are transferrable on a blockchain. Therefore, the issuing entity has to adhere to the requirements of the Swiss anti-money laundering act ("AMLA"). However, this is not the case if the tokens issued may be qualified as either utility tokens or assets tokens. Nonetheless, the issuer of a hybrid tokens again will be subject to the rules of AMLA if the token issued qualifies at least partly as a payment token. Furthermore, it is the act of issuing a means of payment which triggers the duties under AMLA. Consequently, namely in the case of one-time-ICOs, this raises the question of how long the issuer actually qualifies as a financial intermediary regulated under AMLA. In turn, this will affect how long the issuer in questions remains subject to the duties of AMLA.

3. Operation of the Platform

Besides the applicability in the token sale stage, and regardless thereof, the Guidance 02/2019 might be applicable to the operator of a blockchain based payment or exchange platform. This first requires an assessment whether or not the operator qualifies as financial intermediary under AMLA, which, among other things, depends on how the platform works in detail.

On the one hand, if the Switzerland-based operator of the relevant platform were engaged in the execution of transfers of means of payment (either as exchange service provider or as agent to execute or receive a payment on behalf of one or several customers), the operator would qualify as financial intermediary and the Guidance 02/2019 would be applicable. Hence, the operator would be required to identify the customer and the beneficiary of the relevant transaction as well as to adhere to the further obligations under AMLA.

On the other hand, if the relevant exchange or payment platform allowed for direct peer-to-peer transactions with no engagement of a Swiss-based platform operator (i.e. no means of payment transmitting through the operator's own wallets), the operator would not be subject to the obligations imposed by the Guidance 02/2019 with regard to these transfers. Of course, if the platform operator engaged in other activities of a financial intermediary, the operator becomes subject to these obligations with regard to these particular activities, but not with regard to the operation of the platform in general.

Having said that, the Guidance 02/2019 may have indirect, non-legal consequences. Third party service providers that qualify as Swiss-based financial intermediaries being active on the relevant platform will be subject to the Swiss rules on anti-money laundering and need to be able to comply with, among others, the Guidance 02/2019. Hence, any platform operator intending to offer the platform's services to Swiss service providers offering a technical solution that allows to transfer the required identification data along with the actual transfer of payment tokens will have a competitive advantage. How this can be properly ensured while respecting the privacy of users remains to be discussed. For example, Bitcoin Suisse AG recently published a proposal for such a solution.

4. Conclusion

The Guidance 02/2019 is not per se applicable to every blockchain related service provider. The applicability needs to be determined on a case by case basis. However, especially in view of potential sanctions and negative reputational effects, platform operators are well advised to implement technical solutions to enable network participants qualifying as Swiss financial intermediaries to comply with the Guidance 02/2019.

If you have any questions regarding the applicability of Guidance 02/2019 to you, please feel free to contact us.



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