

Newsletter

Special Edition

The Geneva ICO guide – heading towards a Crypto Lake?

The Canton of Geneva has published a guide on Initial Coin Offerings (ICOs) on 28 May 2018 in view of attracting more ICO initiators to the region and strengthening Switzerland's leading position in this field by adding a «Crypto Lake» hub to the already well established Crypto Valley between the Cantons of Zug and Zurich. We welcome this initiative and would like to raise some further useful insights for ICO promoters in this context.



By **Hubertus Hillerström**
 lic. iur., MBA, Attorney at Law
 Phone +41 58 658 55 82
 hubertus.hillerstroem@walderwyss.com



Fouad G. Sayegh
 lic. iur., LL.M. (tax), Attorney at Law
 Phone +41 58 658 30 35
 fouad.sayegh@walderwyss.com



and **Yacine Rezki**
 MLaw, Attorney at Law
 Phone +41 58 658 30 29
 yacine.rezki@walderwyss.com

The Geneva ICO guide – heading towards a Crypto Lake?

The Canton of Geneva, or more precisely its Directorate General for Economic Development, Research, and Innovation (DG EDRI), has published a guide on Initial Coin Offerings (ICOs) on 28 May 2018 (hereafter: the guide). This publication comes timely as Switzerland is growingly recognized as prime location to launch and develop ICO projects and more generally blockchain related technology ventures. Both federal and cantonal authorities are building up a favorable framework intended to be encouraging for ICOs and companies active in the blockchain sector. The purpose of the guide is to assist ICO promoters who intend to establish and launch their project in Geneva. To that end, the guide offers an overview of certain legal and tax aspects relevant for ICOs and outlines seven criteria intended to help ICO initiators and allowing them to file for a review of their ICO projects by the authorities of the Canton of Geneva.

General legal considerations

Regarding the legal framework relevant for ICOs, the guide provides practical information concerning regulatory and tax aspects. This information consists of the FINMA regulatory categories for tokens, the value added tax (VAT) liability, and the general tax treatment of tokens by the Geneva Cantonal Tax Administration (CTA). As we shall see below, the information about the FINMA regulatory categories for tokens and the VAT liability deal with federal laws applied by the federal authorities. Therefore, the information provided by the guide must be considered as the interpretation of the law by the DG EDRI but is not a binding document neither for the FINMA nor the Federal Tax Administration (FTA). We have assumed that the guide has been reviewed by the CTA and reflect their general intention on how to treat ICOs from a tax perspective and therefore constitutes a strong element upon which the taxpayers could base their ruling requests.

Regulatory aspects

The regulatory aspects of ICOs are outlined in the guide by a reference to the FINMA guidelines published on 16 February 2018. As a reminder, according to the FINMA, the regulatory framework of ICOs depends on the category of tokens already created or which will be created by the ICO initiator. Therefore, the FINMA has provided a classification of tokens based on the economic function of the tokens issued: payment tokens, utility tokens, asset tokens, and hybrid tokens. Please refer to our Newsletter "Initial Coin Offerings - from Cryptocurrencies to Entrepreneurial Financing" of February 2018 for a more detailed review of these tokens and their regulatory implications.

Tax aspects

The tax aspects include developments regarding VAT and corporate income tax. As for the VAT, the guide acknowledges that the FTA has neither published any directives nor communications on ICOs. However, the guide suggests that it would be possible to make an analogy between the reasoning of the FINMA guidelines and the applicable VAT rules. In this hypo-

thesis, the applicable VAT rules would differ depending on the token's qualification for regulatory purposes. Thus, the payment token would be considered as a mean of payment and any revenue arising from their issuance would be out of scope, the utility token would be subject to VAT if it constitutes the prepayment of a service, and the VAT treatment of the asset token would depend on the underlying asset. In brief, the asset token would be subject to VAT if the underlying asset or service is. As indicated above, this approach is not binding on the FTA and should therefore be considered with restraint. It is highly recommended to seek proper confirmation from the FTA on a case-by-case basis.

As for corporate income tax, the guide indicates that, based on the CTA's practice, the financial resources received in exchange for the issued tokens will be treated as a taxable return, regardless of the tokens' characteristics. However, the issuing entity should be entitled to record an equivalent provision, provided it is formally bound to invest the funds in its own business. It is understood that the provision must then be dissolved as the financial resources obtained during the ICO are invested, or over a certain period of time to be agreed upon with the CTA. Any amount exceeding commercially justified expenses while developing the project will eventually be subject to corporate income tax. The guide recalls that further to the ongoing corporate tax reform, the corporate income tax rate in Geneva could be of 13.49% by 2020. Last but not least, the guide strongly invites issuing companies to seek a formal agreement ("ruling") with the CTA before implementing their projects. These considerations are mostly in line with our aforementioned Newsletter of February 2018. Yet we believe that the issuance of some tokens, because of their specific nature, may not trigger the same general tax consequences as summarized by the guide. Hence a thorough analysis of each specific situation remains of utmost importance.

The review of ICO projects by the authorities of the Canton of Geneva

The guide sets out a review procedure of ICO projects offered by the cantonal authorities – a study of the feasibility and the degree of progress of the project aimed at providing initiators with informative support and helping them through this process. However, the review is not a mandatory obligation and it does not provide a certificate of quality of the ICO projects or some sort of assessments which could be relied upon by third parties, such as potential investors. The feasibility and the degree of progress are determined by a list of seven criteria of qualification taken into consideration when the experts of the DG EDRI review an ICO project: (1) composition of the ICO team and its ecosystem, (2) technological aspects, (3) concept and business plan, (4) legal aspects, (5) investor onboarding process, (6) marketing strategy and public relations, and (7) calendar. With these criteria, the guide provides a short but helpful check list to ICO project promoters. To which extent the review and input provided by the DG EDRI will be of added value, remains to be seen in practice.

Missing aspects

The guide does not address income tax issues arising at the level of token holders, which could have been helpful to ICO promoters when informing their potential Swiss investors. The withholding tax and the stamp duty are also not covered in the guide. Although we could only have welcomed guidance in that respect, we should note that these taxes are not levied at the cantonal level, but at the federal level, and therefore the guide could only have provided general information, as initiators would still be subject to the interpretation made by the FTA. For more information on withholding tax, please refer to our Newsletter of February 2018. Moreover, certain aspects relevant for the register of commerce have not been analysed, such as for instance the possibility to accept tokens as contri-

bution in kind in view of the incorporation of a new company or practical questions relating to domicile companies preparing their ICO in Switzerland while keeping their operational activities in another country.

Conclusion

The Geneva guide to ICOs must be warmly welcomed as the cantonal authorities confirm once again their favorable position towards blockchain technology, distributed ledgers, and ICOs. The guide surely reinforces the legal and tax framework indispensable for any ICO promoters looking for visibility. Yet it does not constitute a legally binding document for the competent authorities and should not be used or seen as a document with legal value. On the other hand, the guide does not establish any constraining or mandatory rules but provide helpful informative advice. The guide confirms the CTA's availability and willingness to issue tax rulings offering security to issuing companies and investors alike. We believe that the guide will actively participate in fostering Geneva's position as a hub for the launch of ICOs, and may also encourage other federal and cantonal authorities to publish similar guidance, which would strengthen Switzerland's position as a whole when it comes to ICOs and blockchain projects.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Walder Wyss Ltd.
Attorneys at Law

Phone + 41 58 658 58 58
Fax + 41 58 658 59 59
reception@walderwyss.com

www.walderwyss.com