Circular 2019/01
Tokenized Equity

Guidelines for Issuers of Equity and Related Tokens

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1 Introduction

The issuance of equity and equity-like instruments in the form of digital tokens is one of the most promising use cases for the blockchain and distributed ledger technology. It permits an easy and quick issuance of equity instruments in a manner which is in full compliance with applicable Swiss laws. It also offers additional functionalities like shareholder registries, corporate actions, or trading with and transfer of shares. The tokenization of equity instruments offers the possibility to raise capital and to establish a secondary market for a whole range of businesses that so far only have limited access to capital markets, enabling an “Internet of Finance”. We therefore strongly believe that equity tokens will become an important segment of capital markets in the not so distant future.

In order to foster an ecosystem around digital assets, this Circular provides guidelines for issuers of such tokens under Swiss law and aims at establishing best practices for security tokens, with a first focus on equity. We plan to regularly update this Circular to take into account the developments and intend to add further Circulars for other financial instruments. Currently, this Circular does not answer any tax questions.

2 Choice of Instrument

Tokenization offers a wide range of possibilities and optionalities to create bespoke tokens or to complement standard instruments with additional functionalities. While the room for innovation thus created will be an important driver for the adoption of tokenized instruments, it is crucially important to build any instrument on a firm legal basis. This implies a thorough analysis and decision which type of financing is most suitable for a given situation, whereas plain equity (shares) and debt (bonds) are the most established and well-known instruments.

2.1 Equity Tokens

The most straight-forward form of equity are shares. The shareholders are the owners of the issuing company and enjoy a well-defined bundle of legal rights towards the issuer. Sometimes, issuers decide to add a layer of indirection, by issuing options to buy shares or by having a nominee in between that holds the shares on behalf of the token holders. Other variants include the issuance of participation certificates or other alternative forms of equity.

Shares and other equity instruments can be issued as registered shares or bearer sharers. However, after May 2021, the issuance of bearer shares will only remain permitted when (i) listed on a stock exchange or (ii) if structured as intermediated securities (Bucheffekten). It is therefore not advisable to issue bearer shares.

Since Swiss law allows the separation of the securities registry (Wertrechtebuch) from the shareholder registry with the information on the beneficial owners (Aktienbuch), it is possible to tokenize registered shares and still keep the personal data of shareholders off-chain.

2.2 Debt Tokens

Debt tokens represent a nominal claim against the issuer on repayment of a monetary sum (principal) after a fixed term and usually also periodic interest payments. It can also be structured in such a way that it has equity-like features (mezzanine instruments). Startups frequently issue convertible debt which can or must be converted into equity at the option of the isser and/or the lender. This kind of structure requires a sophisticated underpinning in terms of documentation and are not discussed any further in this Circular.

3 Governance

This section provides ongoing governance guidelines that are not bound to specific events or circumstances.

3.1 Corporate Information

The issuer should ensure that all token holders are informed about their rights as token holders and that the basic information about the company is always available and up to date, ideally on the website of the issuer. For a non-conclusive list of potentially relevant documents, see section “List of Documents”. Furthermore, there must be a contact address for token holders.

3.2 Shareholder Relations

The issuer is legally obliged to provide shareholders with yearly financial statements about the company and to answer inquiries from shareholders at meetings. Furthermore, in the case of publicly traded tokens, the financial statements should be audited. Also, it is recommended to provide periodic updates regarding the key performance indicators (KPIs) of the company, and to be transparent regarding important events such as a change in the management. Generally, a high and regular publication frequency of selected indicators is preferable over infrequent, extensive publications. Thus, the first priority for a smaller firm should be to identify the right KPIs and to frequently and consistently report them. For more mature firms, it can also make sense to switch to more strict reporting standards early on, in particular when considering a listing on an exchange.

Technically, the smart contract behind the issued tokens should offer functionality for generic announcements that are publicly recorded on the blockchain. This could for example be used to signal when shares have been declared invalid or other important shareholder matters such as ad-hoc announcements occur, but not necessarily the normal reporting. Generally, it should be made easy for the shareholder to enter into communication with the company and to exercise their rights digitally.

See section 4 for further requirements in relation to a public offering.

3.3 Code of Governance

There are a number of well-known best practices for corporate governance that should be considered, most importantly regarding voting rights and management compensation.

3.3.1 Best Practices

To formalize the governance of the company, the company should consider endorsing the relevant sections of the “Swiss Code of Best Practice for Corporate Governance”. These best practices have been designed for publicly listed companies, but many items also make sense for small and medium businesses. When planning a larger token offering with a compulsory prospectus, the company should commit to the Swiss Code of Best Practice for Corporate Governance or a specifically tailored variant thereof.[1]

3.3.2 Voting

The issuer must enable and encourage shareholder participation and in particular the exercise of voting rights. Most notably, the company itself should abstain from voting at its own assemblies (in case it holds some of its own shares) and there should be no contractual or other regulation in place that allow the board to decide about the votes of absent shareholders unless they have been specifically instructed. Furthermore, abstentions should be counted like absent votes, such that a majority is reached whenever there were more yes than no votes.

3.3.3 Board and Management Compensation

One of the most critical topics in corporate governance is the compensation of board members and the management, in particular when it is done in the form of equity or equity-like instruments. Public shareholders should be informed about how many shares, options and other instruments are allocated every year for the compensation of the board, the management, and other employees. Furthermore, it should be made transparent how many shares and other instruments are currently held by each of these groups. This allows the public shareholders to better evaluate how well their interests are aligned with those of the board and management as well as how much dilution to expect due to employee incentive plans.

3.4 Open Technology

The issuer must be transparent about the chosen technology and should provide the source code for all relevant smart contracts. Ideally, the source code has been verified by an independent auditor and the results published. The chosen platform should be based on open standards. Any permanent dependency on a particular platform or vendor must be disclosed. The consequences and possible mitigations in case of a default of a vendor should be outlined. Assuming the consent of the affected token holders, the issuer should make sure it is possible to migrate tokens to different platforms if necessary.

[1] https://www.economiesuisse.ch/en/publications/swiss-code-best-practice-corporate-governance

3.5 Data Protection and Privacy

The technical infrastructure used by the issuer must ensure that personal data is protected from both an IT system security aspect and a data protection aspect. The architecture of the system must be designed in such a way that data cannot be viewed or manipulated without authorization The issuer must inform the token holders by whom and for what purpose their personal data is processed and ensure their consent. Even though Swiss data protection regulations are more liberal than those of the European Union, we recommend to adhere to the European General Data Protection Regulation (GDPR), especially when addressing an international audience.

Reference should be made to the requirements arising from the principles of privacy by design and privacy by default. However, there is an inherent conflict between the distributed, irrevocable nature of data on a blockchain and the requirement to keep personal data private. The easiest way to resolve this conflict is to keep personal data off-chain. Also, it might be helpful to know that GDPR does not apply to data that the users publish themselves. For example, if a user provides the issuer with a deposit address for tokens, the information that must be protected is who the address belongs to, but not the fact that the address exists and what tokens it contains.

While GDPR grants users the right to demand deletion of their personal data, such demands must not be met when there are contradicting regulations. For example, Swiss law requires companies to keep all documents that lead to an entry in the shareholder registry for ten years after the entry has been removed again. Thus, requests for deletion must be limited to the data not needed to fulfill other legal requirements.

3.6 Administrative Privileges

Generally, the use of centralized administrative privileges to address problems like the loss of a private key should be avoided. There are more elegant approaches deal with lost keys, for example by adding a function to let anyone claim an address as lost and recover its tokens at the risk of losing a significant collateral in case the claim turns out to be false. The default way of resolving a loss of a token according to the upcoming blockchain law is to have a judge declare the token invalid, potentially flag lost token, and issue a new one.

Some argue that administrative privileges help financial intermediaries to fulfill their duties with regard to freezing or otherwise restricting the transfer of a token. However, this only concerns cases in which the financial intermediary holds the tokens on behalf of the client, and thus does not require any privileges as they can control the tokens directly. The power of the holder to dispose of the token is a key property of securities. Granting the issuer technical privileges to move the token without the consent of the holder might even prevent the token from enjoying the benefits of a legal recognition as security token under the planned adjustments to Swiss securities law.

Nonetheless, there might be good reasons to add limited administrative privileges, for example to pause the smart contract as a whole in case of a fork. In case the smart contract grants any special administrative privileges to the issuer or a third party, these privileges must be fully disclosed and the circumstances under which they can be invoked by whom well-defined. Furthermore, it must be clear who can be held liable in case of an abuse of these administrative privileges.

3.7 Transferability Fallback

The Federal Council has proposed to add explicit legal foundations for blockchain-based securities to the Swiss Code of Obligations.[2] Until these changes have been enacted by parliament, there remains a risk that the technical transfer of a security token does not legally transfer the attached security along with it. In order to mitigate this risk, we recommend to put appropriate fallback mechanisms in place. For example, the first shareholder that receives freshly minted tokens could authorize the company to assign the shares to the correct shareholder with a conditional assignment in blank (Blankozession) that can be used in case the subsequent transfers turn out to be invalid.

3.8 Shareholder Agreements

A shareholder agreement can help preserving the strategic capacity to act in the context of potential acquisitions or financing rounds (e.g. drag-along rights). Furthermore, the shareholder agreement should protect minority shareholders (e.g. by granting them tag-along rights). The shareholder agreement is an agreement between shareholders and should be legally and technically separated from the "plain" share token.[3] Generally, a company cannot force its shareholders to join a shareholder agreement, but it can condition the direct sale of shares on agreeing with it.

4 Offerings

This section describes concerns that specifically arise when offering tokens to the public for the purpose of fundraising.

4.1 Equal Rights for all Shareholders

All shareholders must be treated equally, unless explicitly agreed otherwise. The latter could for example be the case if there are different classes of shares. When issuing shares, all investors must be informed about the price and number of shares that are being issued. Existing shareholders need to be given the right to buy shares at the same condition as everyone else to the extent that they do not get diluted. Exceptions apply for employee shares approved by the general assembly.

[2] Bundesrat, Rechtliche Grundlagen für Distributed Ledger-Technologie und Blockchain in der Schweiz, https://www.newsd.admin.ch/newsd/message/attachments/55150.pdf, p.64, 14.12.2018

[3] An example of such separation are the ServiceHunter AG Shares (SHS, https://etherscan.io/token/0xbc41f5259e10e36341ff0da77a5870abc698de56) and the Draggable ServiceHunter AG Shares (DSHS, https://etherscan.io/token/0x414324b0aba49fb14cbfb37be40d8d78a2edf447). The latter smart contract serves as a sub-register to the first one, thereby allowing holders of DSHS tokens to be registered in the shareholder registry despite holding the tokens indirectly through the "draggable" smart contract that implements parts of the shareholder agreement.

4.2 Prospectus

The public offering of securities requires the publication of a prospectus, which must be formally approved by an accredited authority.[4] The approval process takes about twenty days after the complete file has been submitted and is valid for twelve months. The structure and the contents of the prospectus are defined in detail in the Financial Services Ordinance (FSO).[5] For shares and other equity securities a full prospectus has to include all the information set forth in Annex 1 to the FSO. This includes a summary, a risk disclosure section as well as all relevant information about the issuer and the issue. The prospectus can be drafted in one of the official languages of Switzerland or in English.

The FSA provides for a number of exceptions from the obligation to publish a prospectus, e.g if securities are offered only to professional clients, or to less than 500 retail clients, or when the total issue is less than CHF 8 millions over a 12-month period. However, even if there is no statutory obligation to publish a prospectus, it is advisable to prepare an offering memorandum which specifies the applicable exemption and covers all the information needed to make an informed decision about their investment. This is advisable for liability reasons, but also because this is clearly is an emerging trend. Annex 1 FSO is a good check-list for this information.

A Swiss prospectus or the described exemptions only allow to make an offering in Switzerland. When addressing investors from other countries, the respective foreign regulation must be adhered to. For a public offering of securities in the European Union, a prospectus must be prepared in accordance with the EU Prospectus Regulation (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market). The prospectus must also be approved by an EU or EEA competent authority; it can then be notified in one or several other EU/EEA jurisdictions thus permitting public offerings in those jurisdictions. It is very likely that an EU approved prospectus will automatically be recognized in Switzerland, whereas a Swiss approved prospectus most likely will not be recognized in the EU.

4.3 Know-Your-Customer (KYC)

Financial intermediaries are obliged to identify their customers. However, as shareholders are not customers and the issuance of shares is not a financial intermediation, the know-your-customer rules formulated in the Anti-Money Laundering Act are not applicable to the direct issuance of security tokens. While the issuer must identify holders of registered shares, there is no direct legal necessity to perform extensive identity checks. However, in order to be able to use the funds raised through the issuance of tokens, the bank of the issuer will demand a verification of the identity of the investors, which - according to the current guidelines issued by SwissBanking - must be done by a regulated financial intermediary and thus cannot be done by the issuer itself in case it

[4] The following paragraph reflects the state of the law after the effective date of the Financial Services Act (FSA, FIDLEG) on 1 January 2010. A further description can be found on: https://www.regservices.ch/en/prospectus-inspection-office/

[5] Not yet officially published

is not a regulated financial intermediary.[6] We recommend that the issuer does not make payments (e.g. for dividends) or grant other rights to unidentified token holders. In relation to the company, only shareholders registered in the shareholder registry count as such.

4.4 No-Action Letter

Under the FINMA ICO Guidelines[7] it is possible and common practice to request a no-action letter from FINMA. The purpose of this letter is to gain clarity about the qualification of a token and applicable regulations. A no-action letter can also concern the business model and shield the issuer which stays within the outlined boundaries from FINMA enforcement actions. The response time from FINMA can take several months, depending on the complexity of the enquiry. FINMA charges a (modest) fee for no-action letters. No-action letters are also regularly requested by investors and banks.

If the legal qualification of the issued token is clear, it is unnecessary to obtain a no-action letter regarding its qualification. The issuance of equity in tokenized form is clear if (i) a standard equity instrument (ordinary shares, voting shares or participation rights) is issued; (ii) the issue is made on the basis of a full prospectus (if made in the course of a public offering) or on the basis of market standard documentation (if made in the course of non-public offering), and (iii) the issuer's business activities are clearly outside of the scope of the Collective Investment Schemes Act (CISA). The decision not to seek a no-action letter should be taken only after consultation with a qualified lawyer and the decision well-documented.

5 Trading

This section provides guidelines for publicly traded security tokens.

5.1 Listing

A listing of an equity token on an exchange is often seen as a seal of quality and is the most established way to create a liquid market. However, equity and other tokens which qualify as securities (Effekten) in accordance with the Financial Market Infrastructure Act (FMIA) can currently not be listed at a trading venue in Switzerland or in the EEA due to legal and technical impediments[8], including listing rules which are very difficult to meet for small and medium sized enterprises and which require, among other things, settlement through a traditional clearing and settlement system. The situation is expected to change with the entry into force of the Swiss Blockchain Act which will create a DLT Trading Systems license.

In order to ensure investor protection and ensure equitable trading conditions, issuers of listed securities must meet certain conditions regarding the frequency and quality of their financial

[6] Leitfaden zur Eröffnung von Firmenkonti für Blockchain-Unternehmen https://www.swissbanking.org/library/richtlinien/leitfaden-der-sbvg-zur-eroeffnung-von-firmenkonti-fuer-blockchain-unternehmen

[7] Note that some tokens can be both, a security token and a payment token. In that case, additional requirements might apply. See also https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung

[8] See Federal Council, Legal framework for distributed ledger technology and blockchain in Switzerland, 14 December 2018, 101.

reporting, ad-hoc publicity and governance structure. These requirements are defined and enforced by the exchange in collaboration with the competent authorities. A listing requires the issuer to meet high (and therefore often costly) listing standard, and is therefore mostly done by mature issuers.

As an alternative to centralized trading venues, there are a number of decentralized exchanges, often falling outside the scope of any licensing requirement. Listing on a decentralized exchange comes with much fewer regulatory requirements, but also lower levels of investor protection. Furthermore, institutional investors might not be able to invest through unregulated exchanges due to self-imposed or legal restrictions.

5.2 Market Making

In case of small companies or in the absence of well-established, properly licensed trading venues with good liquidity provision, issuers should consider to act as liquidity providers themselves. They can do so by not only offering shares for sale, but by also buying them back.

Any market making activity is subject to restrictions under corporate law. It is only permissible if the issuer has capital in excess of the paid-in share capital[9] and it is not allowed to acquire more than 10% of its shares.[10] The acquisition of own shares must be made public in the annex to the annual accounts.[11] All shareholders must be treated equally[12], i.e. the market making activity must be organized in such a manner that no shareholder can gain an unfair advantage (i.e. a preferential opportunity to sell his shares).

Market Making on a regular, professional basis (gewerbsmässig) requires a license as a securities house under the Financial Institutions Act (FinA), even if done by the issuer and even if the issuer is not primarily active in the financial sector. The “professional basis” test requires that market making is an independent economic activity aimed at making profit.[13] Any market making activity by the issuer should therefore be organized in such a manner that it is not undertaken as a profitable standalone business.

5.3 Insider Trading

Often, the shareholders of small companies are bound by shareholder agreements with elaborate rules for the trading of shares. To a certain extent, this guards against insider trading. Once these agreements are abandoned to make shares freely tradable, that risk should be mitigated by other means. As soon as the shares become freely tradable, the issuer should set-up rules to govern insider trading that are binding to all employees and board members. Insider trades should be made transparent to all shareholders (without necessarily identifying the insider by name). Furthermore, the issuer should define whether and how shareholders have recourse against insiders that made significant trading gains by exploiting their privileged access to information.

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9 See article 659(1) CO.

10 See article 659(1), 656a(2) CO.

11 Article 959c(2)(5) CO.

12 Article 717(2) CO.

13 FINMA Circular 2008/5 “Securities Dealers”, N 12, 40.

6 List of Documents

The following documents should be made available to the token holders (if applicable):

1. The Articles of Association, which provide the legal basis for the tokenization of equity.
2. Financial statements and audit reports (may be part of the prospectus).
3. A formal board decision to tokenize all or selected shares. Individual tokenization agreements between the company and the affected existing shareholders at the moment of tokenization can be kept private.
4. Token Terms outlining the terms of the token including its transferability.
5. The source code of the token contract, allowing the investors to verify that the smart contract functions in accordance with the token terms.
6. A shareholder agreement that governs the rights and duties between the shareholders.
7. The source code of the smart contract enforcing or partially enforcing the shareholder agreement.
8. Audit reports for the relevant smart contracts.
9. A prospectus (or information memorandum) describing a public offer to buy security tokens.