

## Publication of the French Financial Markets Authority (“AMF”) summary of answers following the public consultation on Initial Coin Offerings (“ICO”)

February 23, 2018

**Following the AMF discussion paper on ICO regulation released last Fall, the AMF is moving towards setting up an *ad hoc* legal framework for this new type of fundraising. If implemented, France would be the first country to offer a regulation specific to ICOs. In the meantime, the AMF is already advising ICO issuers through its “Universal Node to ICO’s Research & Network” (“UNICORN”) program.**

With the aim of putting France at the forefront of financial innovation in Europe, the AMF released a discussion paper on October 26, 2017, to gather the views of stakeholders on the different ways to regulate ICOs. The AMF received 82 answers from digital economy players, either individuals, finance professionals, market infrastructures, academics or law firms.

By way of reminder, an ICO is an emerging type of fundraising, involving the issuance of tokens, which rely on both the use of cryptocurrencies and distributed ledger technologies (otherwise known as “blockchain”), with the purpose of financing specific projects initiated by a company or a community of developers at an early stage of development.

The tokens issued through ICOs may have different characteristics depending on each transaction, but it is crucial to inform the public as to the nature of the tokens and the related risks and potential rewards.

ICOs have proved to be both an innovative and effective way to raise funds, with more than \$4 billion raised globally through ICOs in 2017, and €66 million in France over five ICOs by February 19, 2018. This success is mainly explained by the fact that ICOs are currently unregulated and therefore tokens may be distributed to a very wide audience, enabling issuers to raise funds more easily and quickly than through the traditional IPOs or venture-capital transactions.

The most important part of the discussion paper is dedicated to the regulatory framework set up around ICOs. In its discussion paper, the AMF introduced three possible regulatory options to:

- promote a best practice guide while maintaining the existing legal framework (option 1);
- extend the scope of existing regulation to include ICOs as public offerings of securities (option 2);
- adopt a new legislation specifically designed to regulate ICOs (option 3).

Option 3, i.e. an ICO-specific regulation, received the strongest support among almost two-thirds of the respondents, with the other third expressing support for option 1. Out of 82 answers received, only 3 expressed support for option 2.

In addition, respondents unanimously agreed that an information document should be mandatorily provided to buyers of tokens, and should, at a minimum, include information on:

- the ICO project and its advancement;
- the rights conferred by the tokens;
- the accounting treatment of the funds raised during the ICO.

According to almost all of the respondents, this document should also allow for identification of the legal entity issuing the tokens, its management team and founders, and their skills. Moreover, it should be granted AMF approval or receive the approval of a special purpose institution.

The vast majority of respondents argued in favor of drawing up rules regarding the escrow of the funds raised and establishing an anti-money laundering and anti-terrorism financing scheme.

As a result of these answers, the AMF drew up the basic principles of an *ad hoc* ICO regulatory framework as follows.

ICO issuers targeting the French public could obtain AMF approval under certain conditions and guarantees for investors. This may help more established corporates, that are well beyond the start-up stage, to consider ICOs as a way to raise funds, whereas unregulated ICOs may be perceived as too risky, including from a reputation point of view.

Non-approved ICOs would not necessarily be illegal but they would have to include a warning to potential investors stating they are not approved and therefore carry risk. Token offerings that do not include such a warning could be sanctioned.

Following this discussion paper, the AMF Board has decided to continue working on a specific legal framework for ICOs providing for the appropriate guarantees, particularly with respect to the necessary information to be released for this new type of offer. This work will be carried out in coordination with the other public authorities concerned.

If this framework is implemented, France would be the first country to set up a legal framework specific to ICOs.

Moreover, the AMF is still implementing its “Universal Node to ICO’s Research & Network” (“**UNICORN**”) program, aimed at advising ICO issuers. This original approach seeks to secure the completion of ICOs in France, through dialogue with, and advice from, the AMF to ICO issuers. In the two month period following the October 26, 2017 launch, the AMF met with 15 entrepreneurs, who had either completed or were intending to complete an ICO, and it is currently aware of 21 ICOs that have been completed, or that are to be completed in France.

In addition, the discussion paper looked into the qualification of ICOs within the existing financial instruments’ framework.

As to the legal nature of tokens:

- The answers essentially support the view that tokens do not qualify as equity securities. However, some respondents observed that, on rare occasions, tokens may qualify as equity securities as they grant financial or non-financial rights similar to those usually carried by shares or preference shares. Therefore, a proper case-by-case examination of all of the tokens’ features must be a priority.
- Similarly, the answers essentially support the view that tokens do not qualify as debt securities.

As to the qualification of token issuers as intermediaries in so-called “miscellaneous assets” (i.e. a specific French law regime applicable to intermediaries in certain assets other than securities), the respondents’ observations generally comfort the AMF’s analysis in the consultation document that ICOs present features comparable with offerings of “miscellaneous assets.” However, the AMF does not believe that this regime is applicable to ICOs

Moreover, the answers comforted the AMF analysis on the following observations:

- ICOs cannot qualify as so-called “collective investments”, because the funds raised through an ICO are intended to finance a particular project and the issuer cannot manage the funds on behalf of the subscribers;
- neither crowdfunding adviser (CIP) nor investment services provider (PSI) status can apply to ICOs; and
- other legal regimes may apply depending on the features of the ICO and the tokens; in particular, those relating to consumer law, payment services and personal data processing.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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