



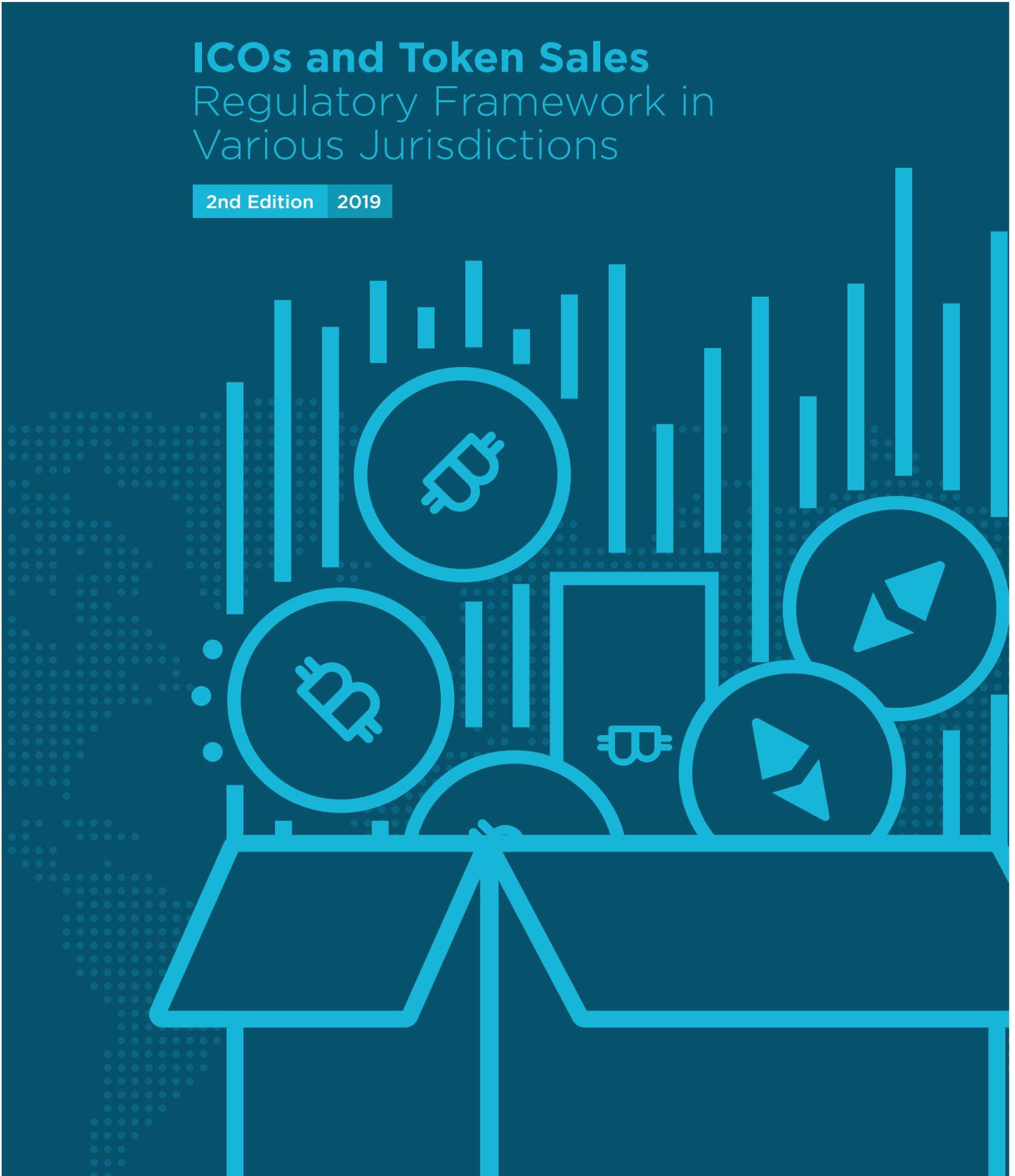
**LEGALINK**

INTERNATIONAL BUT PERSONAL

# ICOs and Token Sales

## Regulatory Framework in Various Jurisdictions

2nd Edition 2019



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## THE **13** QUESTIONS WE ASKED

- 1 Does your country allow or prohibit ICOs and Token Sales?
- 2 Does your country regulate ICOs and Token Sales?
- 3 If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?
- 4 If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.
- 5 Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.
- 6 If a foreign entity conducts an ICO and offers tokens to residents of your country, will your government require the foreign entity to comply with any rules and regulations? If so, please provide an overview of how ICOs conducted by foreign entities are regulated by the government of your jurisdiction.
- 7 What is the legal nature of crypto in your country (for example, is crypto considered a security, commodity, currency etc.)?
- 8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token developers or crypto exchanges for violating your country's laws? If so, please provide an executive summary of the most significant prosecution(s).
- 9 In your country, are there any significant commercial disputes or civil cases (non- government) involving crypto? If so, please provide an executive summary of the most significant dispute(s)/ case(s).
- 10 Does your jurisdiction tax crypto transactions? If so, please provide a basic explanation of how and at what rate they are taxed.
- 11 Separate from ICOs, does your jurisdiction regulate crypto trading or crypto exchanges? If so, please provide an overview of the regulation.
- 12 Does your country offer any unique or important benefit to crypto-focused companies (for example, clear regulatory guidance)? If so, please describe the unique/ important benefit.
- 13 Please identify a point of contact at your firm for cryptocurrency- related matters.

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**1** Does your country allow or prohibit ICOs and Token Sales?

The United States (U.S.) allows ICOs and Token Sales.

**2** Does your country regulate ICOs and Token Sales?

Yes, the U.S. regulates ICOs and Token Sales.

**3** If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?

U.S. Securities and Exchange Commission (SEC)  
U.S. Department of the Treasury, Financial Crimes Enforcement Network (FinCEN)  
U.S. Commodities Futures Trading Commission (CFTC)  
U.S. Department of Justice (DOJ)  
Individual states.

**4** If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.

How coin and token offerings are structured will determine how they are regulated. If an ICO or Token Sale involves the sale of a “security,” then the offering and participants in the offering are subject to SEC jurisdiction and must comply with U.S. federal securities laws. Traditionally, whether an ICO or Token Sale involves a security was likely to depend on whether the offering involves: (1) an investment of money; (2) in a common enterprise; (3) with a reasonable expectation of profit; and (4) through the managerial efforts of others. If the offering satisfied this decades-old, four part test, then it was generally expected that it would be considered a security. If it did not satisfy all four parts, then it was expected that the offering likely would not be considered to involve a security. When the SEC analyzes whether a security is involved, it will look at the specific facts and circumstances of the offering and will look at the true nature of the offering.

On April 3, 2019, the SEC provided a crucial piece of guidance through a “no-action letter” it issued to Turnkey Jet, Inc. (“TKJ”). The letter states the SEC would not recommend any enforcement actions against TKJ regarding tokens

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it intends to offer and sell without registering them as securities with the SEC. In reaching that position, the SEC noted the following regarding TKJ's token and program:

- TKJ will not use any funds from token sales to develop its platform, network, or app, and each of those will be fully developed and operational at the time any Tokens are sold;
- the tokens will be immediately usable for their intended functionality (purchasing air charter services) at the time they are sold;
- TKJ will restrict transfers of tokens to TKJ wallets only, and not to wallets external to the platform;
- TKJ will sell tokens at a price of one USD per token throughout the life of the program, and each token will represent a TKJ obligation to supply air charter services at a value of one USD per token;
- If TKJ offers to repurchase tokens, it will only do so at a discount to the face value of the tokens (one USD per token) that the holder seeks to resell to TKJ, unless a court within the United States orders TKJ to liquidate the tokens; and
- The token is marketed in a manner that emphasizes the functionality of the token, and not the potential for the increase in the market value of the token.

The SEC's letter is careful to state that "[a]ny different facts or conditions might require" a different conclusion, and that the letter does not express a legal conclusion. Nevertheless, practitioners are looking to the letter as helpful guidance in determining what the SEC may or may not consider to be a security when it comes to cryptocurrency. The attorney who communicated with the SEC on TKJ's behalf to obtain the ruling noted that it involved an extensive letter

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writing campaign between himself and the SEC, along with numerous long calls. The letter can be read here: <https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm>.

If the ICO involves a security, then the offering will either need to be registered with the SEC or exempt from registration. A registered offering (also known as a public offering) requires, under the Securities Act of 1933 (Securities Act), as amended, the issuer to file a registration statement with the SEC before it offers its securities for sale. The issuer is prohibited from actually selling the securities until the SEC staff declares the registration statement “effective.” Registration statements have two principal parts. Part I is the prospectus, the legal offering or “selling” document. The issuer of the securities must describe in the prospectus important facts about its business operations, financial condition, results of operations, risk factors, and management. It must also include audited financial statements. The prospectus must be delivered to everyone who buys the securities, as well as anyone who is made an offer to purchase the securities. Part II contains additional information that the company does not have to deliver to investors, but must file with the SEC, such as copies of material contracts.

If an issuer seeks to rely on an exemption from registration, the level of disclosure required to be made to prospective investors will depend heavily on whether the prospective investors qualify as “accredited investors.” For individual investors, an investor will be considered an “accredited investor” if he or she: (1) earned income that exceeded USD \$200,000 (or USD \$300,000 together with a spouse) in each of the prior two years, and reasonably expects the same for the current year, or (2) has a net worth over USD \$1 million, either alone or together with a spouse (excluding the value of the person’s primary residence). If non-accredited investors are involved, the issuer must disclose certain

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information about itself, including its financial statements, similar to what would be required for a registered offering. If an issuer is selling only to accredited investors, the issuer disclosure obligations are more limited. Issuers relying on a Regulation D exemption, which is set forth in the Securities Act, are required to file a document called a Form D with the SEC no later than 15 days after they first sale of the securities in the offering. The Form D will include brief information about the issuer, its management and promoters, and the offering itself. The issuers will also be required to make notice filings, as required by the laws of the individual states within the U.S. in which their investors reside. State notice filings, and the associated fees that must be paid in connection therewith, differ on a state-by-state basis.

FinCEN also may regulate ICOs and Token Sales if the sales involve a “virtual currency.” FinCEN defines a “virtual currency” as a “medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction.” Under FinCEN regulations, if a person is engaged in the business of issuing (putting into circulation) a virtual currency, and the person has the authority to redeem (to withdraw from circulation) such virtual currency, the person is considered a currency or virtual currency “administrator,” and must register with FinCEN as a “money transmitter,” unless an exemption from registration is available. Note, FinCEN also requires registration if the person is an “exchanger”--a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currencies.

To the extent the ICO or Token Sale involves a “commodity,” the CFTC has jurisdiction, although it may be limited to situations involving fraud and manipulation. Since 2015, the CFTC has considered bitcoin and other virtual currencies to be commodities.

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The DOJ can regulate ICOs and Token Sales by prosecuting violations of U.S. federal civil and criminal laws. For example, the DOJ could prosecute persons for failing to comply with FinCEN regulations or engaging in mail, wire, or securities fraud.

Finally, individual states within the U.S. may have jurisdiction to regulate ICOs and Token Sales, depending on each state's laws. It is common for individual states to regulate securities purchased or sold and currencies exchanged within their state borders.

**5** Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.

The SEC has been moving aggressively to regulate this space. In July 2017, the SEC issued an Investigative Report on The DAO. In its report, the SEC concluded that tokens issued by The DAO were, in fact, securities, and warned that other coins and tokens could be considered securities under the U.S. federal securities laws. Since then, the SEC has: (1) halted trading in securities of certain publicly-traded companies due to concerns about the companies' claims regarding their involvement in the cryptocurrency space; (2) launched an Enforcement Initiative to Combat Cyber-Based Threats and Protect Retail Investors by targeting, among other things, violations involving ICOs; and (3) filed enforcement actions to shut down ICOs that failed to comply with U.S. federal securities laws. It should be noted that U.S. regulators and law enforcement often work collaboratively and sometimes conduct parallel investigations. As a result, understanding the interplay among the various agencies is important.

**6** Please identify a point of contact at your firm for cryptocurrency-related matters.

**Christopher Trowbridge Chris** is a commercial litigator with extensive experience in securities litigation, FINRA and other arbitrations, and broker-dealer industry and customer disputes. Chris and his team have advised cryptocurrency investors in disputes, including the MtGox bitcoin exchange bankruptcy pending in Japan and the related bitcoin bankruptcy proceeding pending in Texas.

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