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Listed Issuer Considerations Before Thinking About an ICO

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Companies are raising millions of dollars in capital through Initial Coin Offerings, Token offerings and other cryptocurrency offering. Regulators are quickly catching on and are increasingly aware of the extent of and issues arising from this new, technologically driven trend.

At its most basic an ICO is an offering of a newly created cryptocurrency to the public. The “coin” or “token” may or may not be considered a security. If it is, the offering will fall under the securities laws of the jurisdiction in which the coin/token is offered. In some cases, the coin/token may not be a security, but it is a question of law and fact. Issuers should consult their legal counsel for advice. Some listed issuers on the TSX and TSX Venture exchanges (the “Exchanges”) have announced coin/token offerings. No formal guidance from the Exchanges has been provided for issuers considering ICOs. However, the Exchanges will require comprehensive disclosure of any proposed ICO. The following points should be considered prior to announcing an ICO until formal guidance is provided.

1. Issuers must address whether the ICO will be a security, and if the coin/token is a security, what exemption from the prospectus requirement will be relied upon. This analysis should be completed with the guidance and advice from legal counsel. On August 24, 2017, the Canadian Securities Administrators (CSA) issued a staff notice that is instructive.
2. Issuer should state all assumptions and risks associated with an ICO.
3. The Exchanges are particularly wary of Issuers offering ICOs as part of a cryptocurrency mining business model. Issuers should remember that projections and forecasts should always comply with Future Oriented Financial Information disclosure requirements under section 4N of NI-51-102.
4. Issuers should discuss whether and how the coin/token will be tradeable on a trading platform.
5. Issuers should identify who will handle and oversee logistics of coin/token distribution and how the issuer will monitor this. State who the Issuer is relying on for expertise, advise and direction with its cryptocurrency offering. A detailed explanation will likely be required especially where the logistics necessary are outside the current scope of the Issuer’s business.
6. Issuers should disclose feature and benefits of the coin/token. How will coins/tokens be distributed? Can they be redeemed for or converted into shares of the Issuer? What legal rights do coin/token holders have against the Issuer?



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7. If coins/tokens are asset backed, Issuers should disclose what assets of the company will be used to back the coins/tokens and how this impacts the equity shareholders.
8. Identify legal and financial implications to the Issuer if assets backing coins/tokens are not realizable.
9. Issuers should describe how funds flow to the Issuer on closing of the ICO.
10. Issuers should state the use of funds realized from the ICO and budget and capital allocation amounts to pursue any stated use of funds.
11. Issuers should consider whether the ICO and use of funds represents a Change of Business.
12. Issuers should address stated changes in use of proceeds from any prior financings

Issuers should always comply with the continuous disclosure requirements of NI 51-102 and the policies of the Exchanges. Extra consideration should be given if an Issuer is planning to announce an ICO given the extra scrutiny the Exchanges will give to any such announcement.

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