FINMA的分类体系

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FINMA于2018年2月16日发布了ICO指南，至今未予撤回。它仍是瑞士每一次分类工作的参照点，其影响也远远超出瑞士国界，波及其他监管机构。[1]该指南按经济功能区分三种类别。

支付型代币“等同于加密货币”，旨在现在或将来用作购买商品或服务的支付手段，或用作货币或价值转移的手段。它们不产生针对发行人的任何债权。比特币和以太币是典型。FINMA认为其发行不受证券法约束，但受反洗钱法约束，因此以职业方式出售支付型代币的发行人，属于《瑞士反洗钱法》意义上的金融中介机构。

实用型代币旨在借助基于区块链的基础设施，提供对某一应用程序或服务的数字访问。只有当实用型代币在发行时具有投资目的，FINMA才会将其视为证券。决定性的问题在于：代币出售时，该应用程序是否已经存在且可以使用。用FINMA的话说，为开发一个尚不存在的平台而出售的代币具有投资功能，在平台上线之前被视为资产型代币。

资产型代币代表各类资产，例如针对发行人的债权或股权、未来公司收益或未来资本流的份额，或对实物资产的权利。当资产型代币标准化并适合大规模交易时（几乎所有资产型代币都是如此），FINMA将其视为《金融市场

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基础设施法》（FinfraG/FinMIA）意义上的证券。其后果包括：《金融服务法》（FIDLEG/FinSA）下的招股说明书义务；中介机构可能需要取得证券公司牌照；以及自2021年起可采用《瑞士债务法》第973d条及以下规定的账本证券形式。

混合型代币兼具多种功能。FINMA累积适用各类别的要求。既是支付手段又是访问权的代币，因其支付功能而受《瑞士反洗钱法》约束，并可能因其中的投资成分而构成证券。指南指出，这些类别"并不相互排斥"，这在实践中意味着由适用的最严格制度来规管。[2]

FINMA在2019年9月11日针对稳定币发布的补充指引中，增加了第四个分析步骤。该补充指引并未创设新的类别，而是将现有三种类别适用于与底层资产挂钩的代币，并得出结论：分类取决于底层资产和赎回权。可向发行人赎回法定货币的代币，属于银行法意义上的存款。代表为持有人管理的一篮子资产的代币，属于集体投资。代表某种商品的代币，则视持有人享有的是物权还是合同债权而分别处理。[3]

注释

1. FINMA，Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)，2018年2月16日（FINMA同日新闻稿）。该指南作为法律渊源在第E部分第I章中讨论。 ↩
2. FINMA ICO指南，2018年2月16日，第3.1节最后一段（混合型代币；累积适用各项要求）。 ↩
3. FINMA，Supplement to the guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)，2019年9月11日（FINMA同日关于稳定币的新闻稿）。本部分第IV章及第E部分第VII章。 ↩

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