

# Regulation of Cryptoassets in Switzerland

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COLADE 2022, 3 October 2022

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# Agenda

1. Introduction
2. Structure and Principles of Swiss Financial Market Legislation
3. Regulatory Qualification of *Tokens*
4. Regulatory Qualification of the *Pursued Activity*
5. Conclusion – Key Takeaways

# 1. Introduction

- Crypto Nation Switzerland

# Crypto Nation Switzerland

- Switzerland as “Crypto Nation”; Canton of Zug as “Crypto Valley”
- Digitalisation of financial services as a chance and a challenge
- Legislator and regulator (FINMA) want to encourage innovative business models and reduce regulatory obstacles
- This creates tension with the general aims of financial market regulation:
  - Protection of investors
  - Ensuring transparency and the proper functioning of the market
- Violations of financial market regulations may result in criminal sanctions
- The question is: How do new technologies, namely cryptoassets, fit into Swiss regulation?

## 2. Structure and Principles of Swiss Financial Market Legislation

- Basics of Swiss Financial Market Regulation - Principle of Technology Neutrality
- Architecture of Swiss Financial Market Regulation

# Basics of Swiss Financial Market Regulation

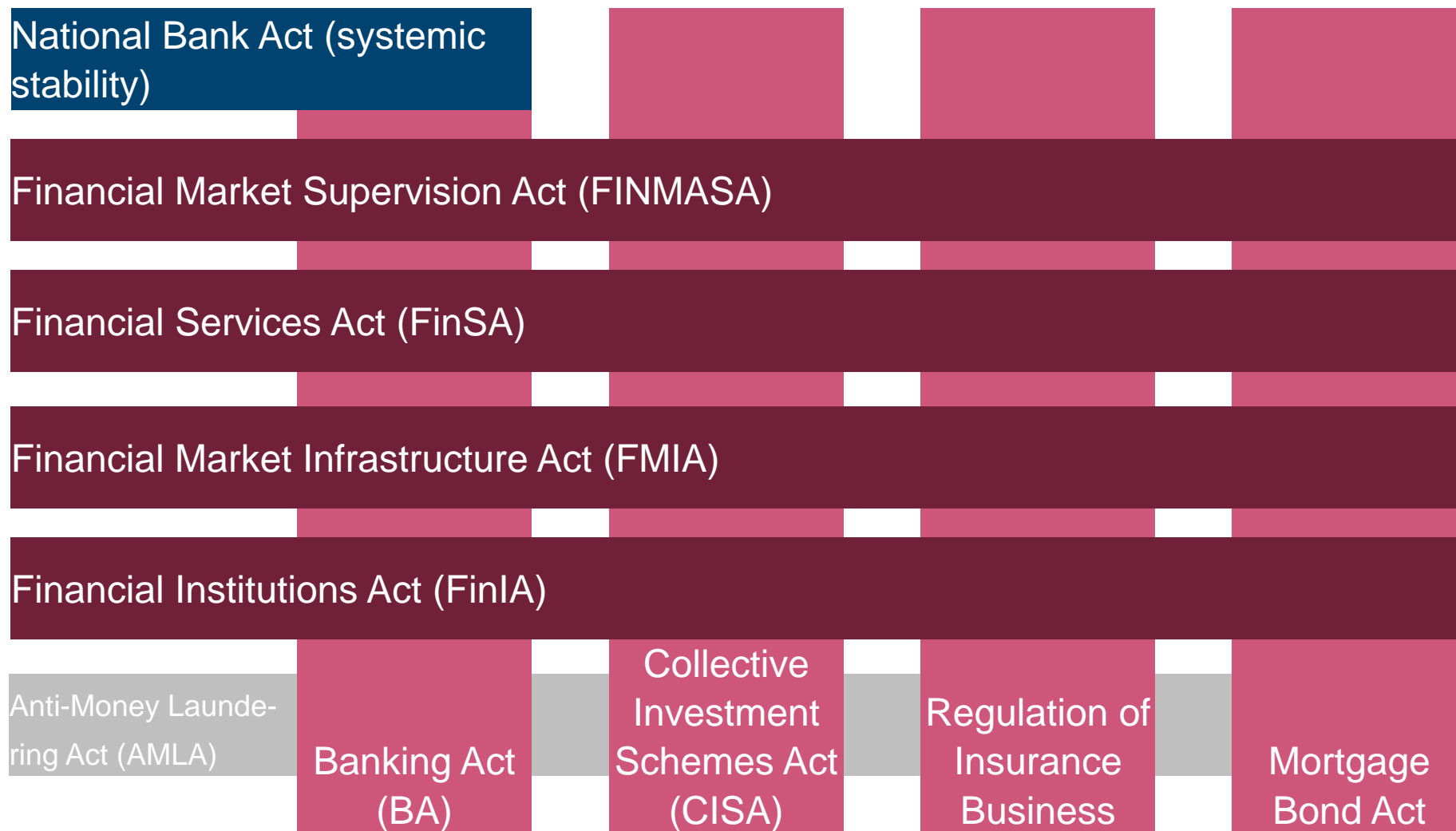
## Principle of Technology Neutrality

- There is no complete and separate regulation of blockchain or cryptos that only applies to blockchain or ICOs, i.e. no blockchain or cryptocurrency act, but legislator has enacted some special rules
- Instead Swiss financial market regulation follows the so-called *principle of technology neutrality*: «same business, same risks, same rules»
- Consequently, namely the following acts apply to cryptos, ICOs and the like:

**AMLA**  
**BA**  
**FMIA**

**CISA**  
**FinIA**  
**FinSA**

# Architecture of Swiss Financial Market Regulation



based on Federal Department of Finances

### 3. Regulatory Qualification of *Tokens*

- Types of Tokens under Swiss Regulation – *Trinity* – Regulatory Consequences
- Tokens as *Chameleons*
- Payment Tokens – Overview of Obligations under AMLA
- Asset Tokens – Overview of Prospectus Requirements under FinSA



# Types of Tokens under Swiss Regulation - *Trinity*

Payment  
Token

Utility  
Token

Asset  
Token

Note: The distinction between the different types of tokens is not expressly laid down in Swiss law but based on the regulator's interpretation thereof!

# Types of Tokens – Regulatory Consequences

## Payment Token

Crypto currencies / means of payment for the purchase of goods and services from third parties or for value transfers; e.g. Bitcoin oder Ether

Regulatory qualification: Means of payment pursuant to AMLA → (i) **KYC checks** and (ii) **affiliation with a self-regulatory organization (SRO)**

## Utility Token

Access to a digital use that already exists at the time of the issuance of the token; e.g. the right to access a platform on a blockchain

**Service of the real economy (as opposed to financial services)**: In principle, neither AML obligations nor obligation to publish a prospectus

## Asset Token

Claim against the issuer of the token / investment character; e.g. equity or debt token

Security pursuant to article 2 letter b FMIA/article 3 letter b FinSA, if requirements are met (namely: fungibility): **obligation to publish a prospectus**



*Chimeras, i.e. combinations of different types of tokens, are possible!*

# Tokens as *Chameleons* – Qualification of Tokens during the development of the respective Blockchain

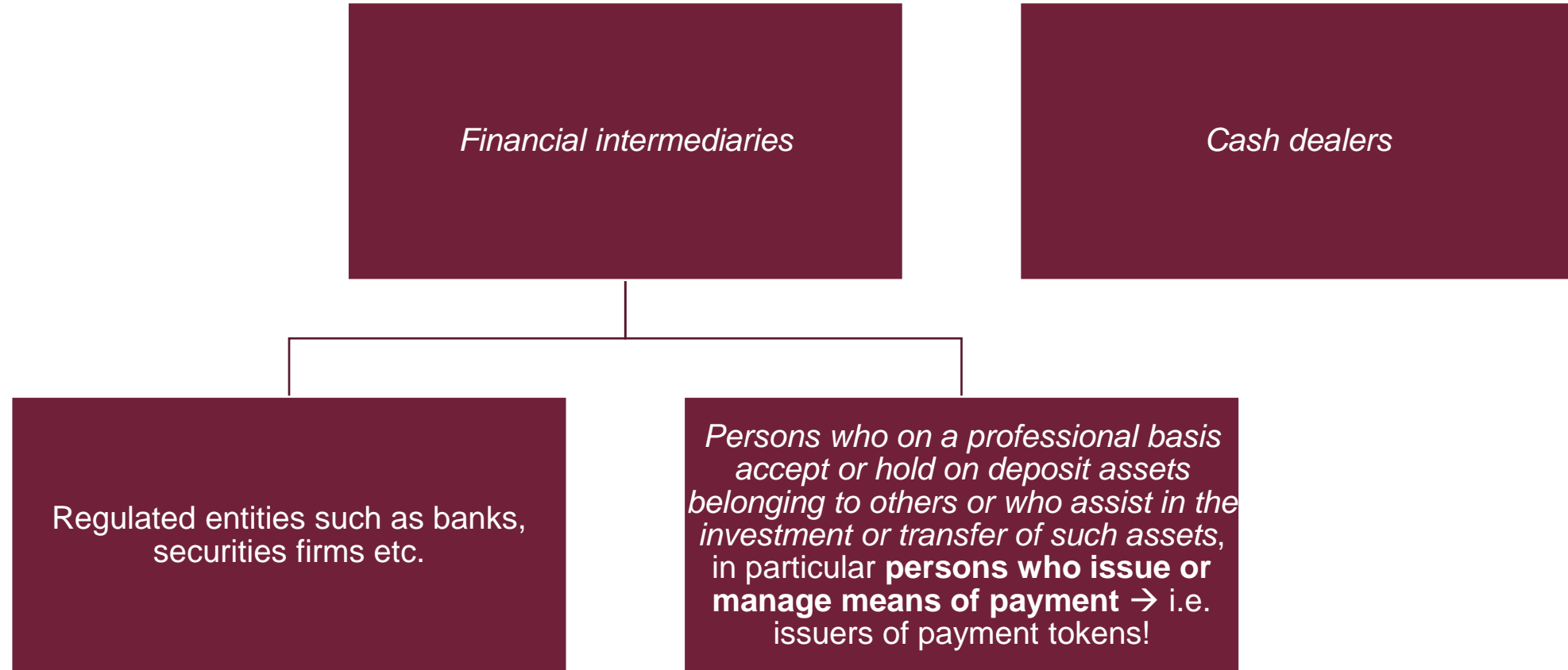
Pre-Financing	Pre-Sale (Voucher-Token)	Pre-Functional	ICO/TGE
Sale of tokens which do not yet exist	Sale of tokens which provide the entitlement to the real tokens at the ICO	Sale of tokens which are not yet functional	Sale of tokens which are fully functional
Forward / other derivative?  → Asset token = Security under FMIA/FinSA?	Derivative?  → Asset token = Security under FMIA/FinSA?	Derivative?  → Asset token = Security under FMIA/FinSA?	Qualification as payment, utility or asset token depending on ist functionality
→ Obligation to publish a prospectus?			
→ No applicability of AML rules because at this stage payment tokens do not exist yet		→ Applicability of AML rules if token qualifies as a payment token	

# Tokens as *Chameleons* – Challenges for Cryptoprojects after «Going Live»

- Goal: Development of a payment token
- Situation at launch:
  - if all developments are completed ➡ Payment token ➡ AML obligations
  - but if further developments of the blockchain infrastructure are envisaged ➡ Asset token
    - Obligation to publish prospectus?
    - Licensing of exchange?
- If at a later point in time it is decided to develop the blockchain infrastructure further:
  - if this decision is kept confidential ➡ Payment token ➡ AML obligations
  - but if these plans for further development are announced publicly ➡ Return of asset token?
    - Obligation to publish prospectus?
    - Licensing of exchange?
- If these further developments are completed ➡ «Return» of the payment token? ➡ AML obligations

# Payment Tokens – Overview of Obligations under AMLA

## Scope of Application of AMLA



# Payment Tokens – Overview of Obligations under AMLA

Main obligations for financial intermediaries under AMLA

## Due Diligence

- KYC
- Identification of the beneficial owner

## Duties in the event of a suspicion of money laundering

- Duty to report
- Freezing of assets
- Prohibition to inform

## Duty to provide information

- Upon request of the Money Laundering Reporting Office Switzerland

## Duty to affiliate with a self-regulatory organization

- SRO as "extended arm of the regulator"

# Asset Tokens – Overview of Prospectus Requirements under FinSA

- The obligation to prepare and publish a prospectus is provided for exclusively in FinSA with further details in the Financial Services Ordinance

## Two step process

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graph TD; A[Two step process] --> B[Preparation]; A --> C[Review];
```

### Preparation

Whoever makes a public offer in Switzerland for the acquisition of securities or seeks the admission of securities to trading on a trading venue must first publish a prospectus. This duty applies by analogy to the admission of "DLT securities", i.e. crypto assets to trading on a DLT trading facility (article 35 FinSA).

### Review

The prospectus must be reviewed for completion, coherence and understandability by reviewing body prior to publication (article 51 FinSA).

# Asset Tokens – Overview of Prospectus Requirements under FinSA

## Certain **exemptions** to the duty to publish a prospectus, namely

- by type of offer (e.g. only to professional investors or to fewer than 500 investors)
- by certain types of securities
- for certain constellations in connection with the admission to trading

## Prospectus must **contain the essential information** for the investor's decision on

- issuer, guarantor and security provider
- securities to be offered or admitted to trading, in particular rights, obligations and risks
- offer, in particular type of placement and estimated net proceeds

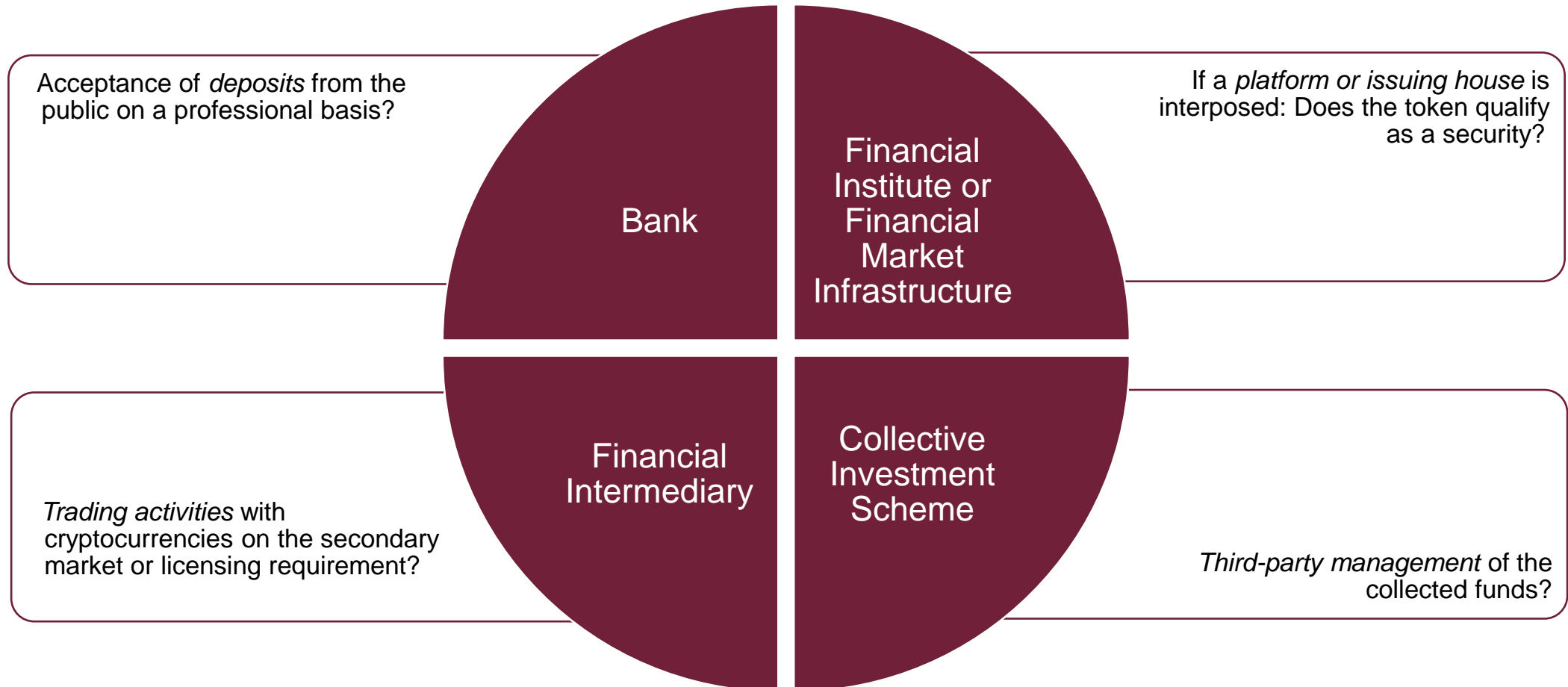


## 4. Regulatory Qualification of the *Pursued Activity*

- Basics
- Banking Regulation
- Regulation of Securities Trading
- Regulation of Collective Investment Schemes
- Regulation of Financial Market Infrastructures

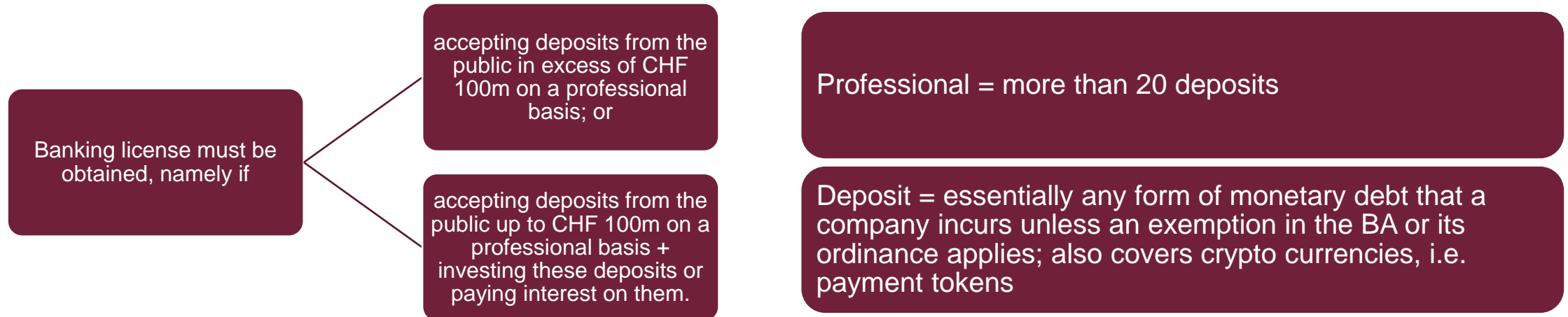
# Basics

## Regulatory Qualification of the Pursued Activity



# Banking Regulation

- Core of classic banking business: interest margin business, i.e. receiving interest on loans given > paying interest on deposits received



- Provisions of the BA apply mutatis mutandis namely if someone accepts deposits from the public in the form of crypto assets but does not invest these deposits nor pays interest on them → aims more at custody business than on interest margin business

# Regulation of Securities Trading

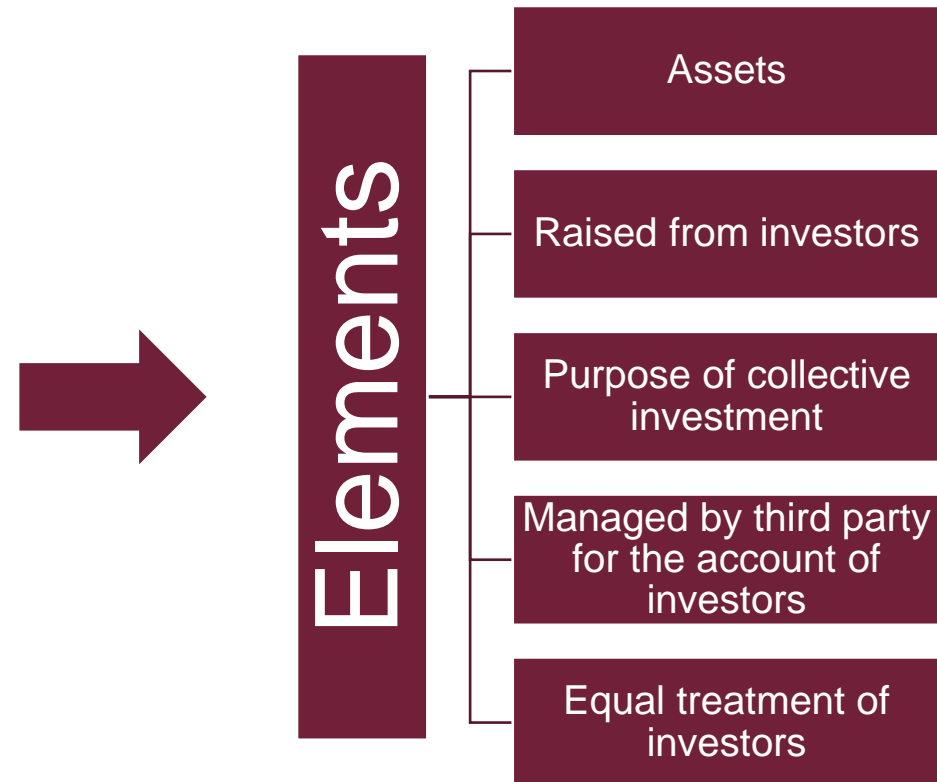
- Securities = standardised certificated and uncertificated securities, in particular ... ledger-based securities in accordance the requirements of the Swiss Code of Obligations, as well as derivatives and intermediated securities, which are suitable for mass trading
  - In the same structure and denomination publicly offered or placed with more than 20 clients
  - Not tailor-made for a specific client
  - I.e. asset tokens, e.g.
    - Tokens representing equity like shares, participation certificates etc.
    - Tokens representing debt, like bonds
    - Derivative tokens, like stable coins
    - What about NFTs?
- Newly introduced category of DLT securities (*distributed ledger technology securities*)

# Regulation of Securities Trading

- Securities firms require a license from FINMA
- Securities firms pursuant to article 41 et seq. FinIA: Entity that, on a commercial basis:
  - trades in securities in its own name for the account of clients (**client dealer**);
  - trades in securities **for its own account on a short-term basis**, operates primarily on the financial market and
    - could thereby jeopardise the proper functioning of the financial market; or
    - is a member of a trading venue; or
    - operates an organised trading facility pursuant to FMIA; or
  - trades in securities for its own account on a short-term basis and publicly quotes prices for individual securities upon request or on an ongoing basis (**market maker**)
- Furthermore, only licensed securities firms or banks may:
  - **underwrite securities** issued by third parties and offer these to the public on the primary market on a commercial basis; or
  - **create derivatives** in the form of securities and offer these to the public on the primary market on a commercial basis.

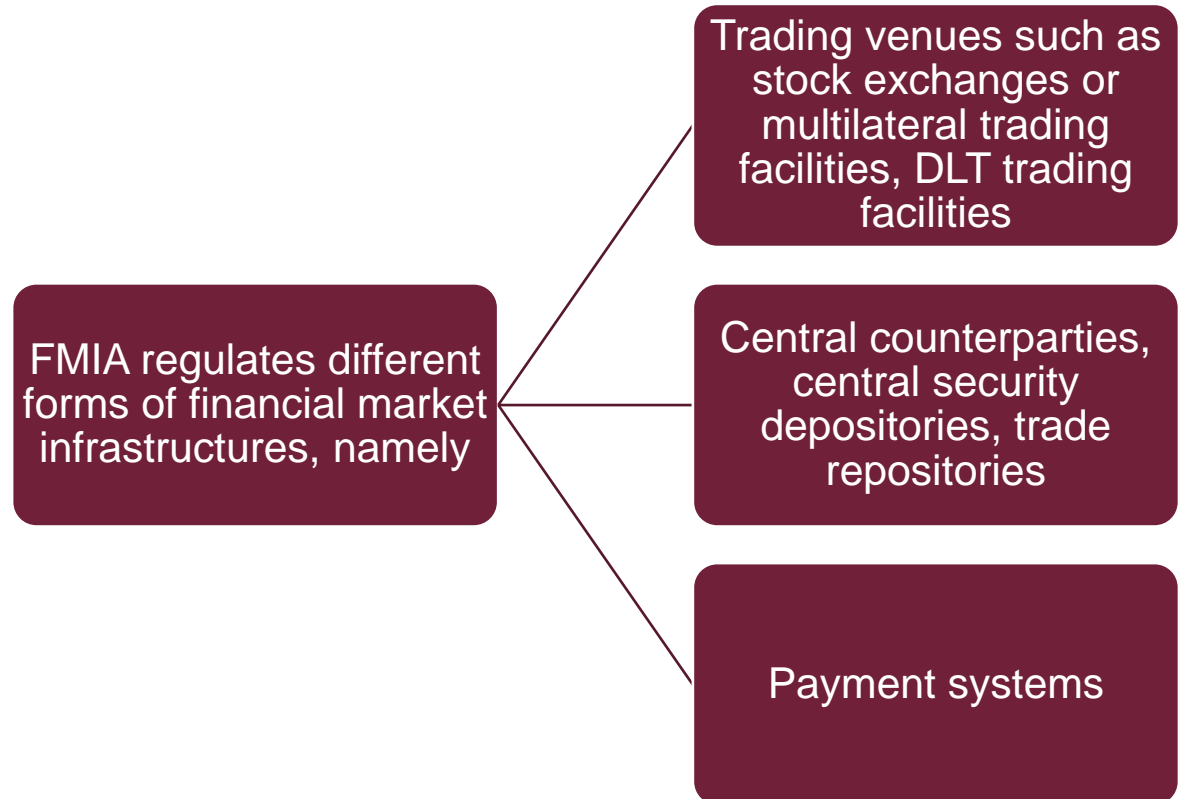
# Regulation of Collective Investment Schemes

Definition of collective investment scheme = assets raised from investors for the purpose of collective investment and which are managed for the account of such investors. The investment requirements of the investors are met on an equal basis (article 7 CISA) → must be licensed by FINMA



- Collective investment schemes may invest in crypto assets → question of relevant investment guidelines
- Offering of an asset token may qualify as offering of shares in a collective investment scheme if money is raised by investors to be invested on their behalf (i.e. equity)

# Regulation of Financial Market Infrastructures



## Typical cases of applicability with respect to crypto assets

- Trading platforms for asset tokens
- Payment systems, e.g. Libra by Facebook (payment systems only need a license if this is necessary for the proper functioning of the financial market or the protection of its participants)

# 5. Conclusion

- Key Takeaways



# Conclusion – Key Takeaways

- Crypto assets are a moving target → Regulation develops alongside the crypto assets
- Lack of a “Blockchain and Crypto Act” does not mean that crypto assets are unregulated → Unless there are crypto specific provisions the general regulations apply due to the *principle of technology neutrality*
- Regulation may apply on two levels: the qualification of the *token* and the qualification of the *pursued activity*
  - The qualification of the token may change over time and may lead to AML obligations or the obligation to publish a prospectus
  - The qualification of the pursued activities may lead to licensing requirements as a bank, securities firm, collective investment scheme, etc.
- Violations of financial market regulation may lead to criminal sanctions: Every business model must be assessed anew, no two business models are alike

Thank you very much for your  
attention!

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