



Tokens como Valores Mobiliários

Regulação

- Análise feita **caso a caso**
- Regulamentação **esparsa**: muitas vezes, decisões de órgãos reguladores, assim como *guidelines* e comunicados, são utilizados como base.
- Caráter experimental e abstrato:

*“Even if a utility token isn’t a “security” under the Howey Test, or otherwise triggers the criteria set out in the SEC’s DAO determination, it may still fall within CFTC jurisdiction. **A utility token might be classified by the CFTC as a currency, or a contract for the future exchange of services, rights or interests, and thereby subject to the jurisdiction of the CEA.** Utility token issuers would undoubtedly challenge such an interpretation (and would argue their offering is akin to a **prepaid** service or expense). Nevertheless, there are no bright lines in the primer --only general guidance that the CFTC considers cryptocurrencies to be commodities and that it is actively monitoring this market. This approach has been described as **“making policy about financial technology through enforcement actions rather than traditional rulemaking”** and denying public notice and comment. This is not the first instance where the CFTC has been accused of regulating through the ‘backdoor.’”*

- Ryan Clemens - Assessing The Evolution of Cryptocurrency: Demand Factors, Value and Regulatory Developments (January, 2018)

Regulation of Cryptocurrency Around the World (June/2018)

Identificação de tendências

*“One of the most common actions identified across the surveyed jurisdictions is **government-issued notices** about the pitfalls of investing in the cryptocurrency markets. (...) Most government warnings note the added risk resulting from the **high volatility** associated with cryptocurrencies and the fact that many of the organizations that facilitate such transactions are **unregulated**. Most also note that citizens who invest in cryptocurrencies do so at their own personal risk and that **no legal recourse** is available to them in the event of loss.”*

Regulamentação como valor mobiliário ainda é recente

*“A **limited** number of the countries surveyed regulate initial coin offerings (ICOs), which use cryptocurrencies as a mechanism to raise funds. Of the jurisdictions that address ICOs, **some (mainly China, Macau, and Pakistan) ban** them altogether, while **most** tend to **focus on regulating** them. In most of these latter instances, the regulation of ICOs and the relevant regulatory institutions **vary depending on how an ICO is categorized**. For instance, in New Zealand, particular obligations may apply depending on whether the token offered is categorized as a debt security, equity security, managed investment product, or derivative. Similarly, in the Netherlands, the rules applicable to a specific ICO depend on whether the token offered is considered a security or a unit in a collective investment, an assessment made on a case-by-case basis”*

Classificação de Tokens

- **Substância > Forma:** a tecnologia, no caso, é um aspecto acessório da análise.
- Criptoativos podem ser utilizados de **diversas** formas, tais como meios de pagamento, tokens de troca (*exchange tokens*), tokens de uso (*utility tokens*) e valores mobiliários (*security tokens*).

Token types



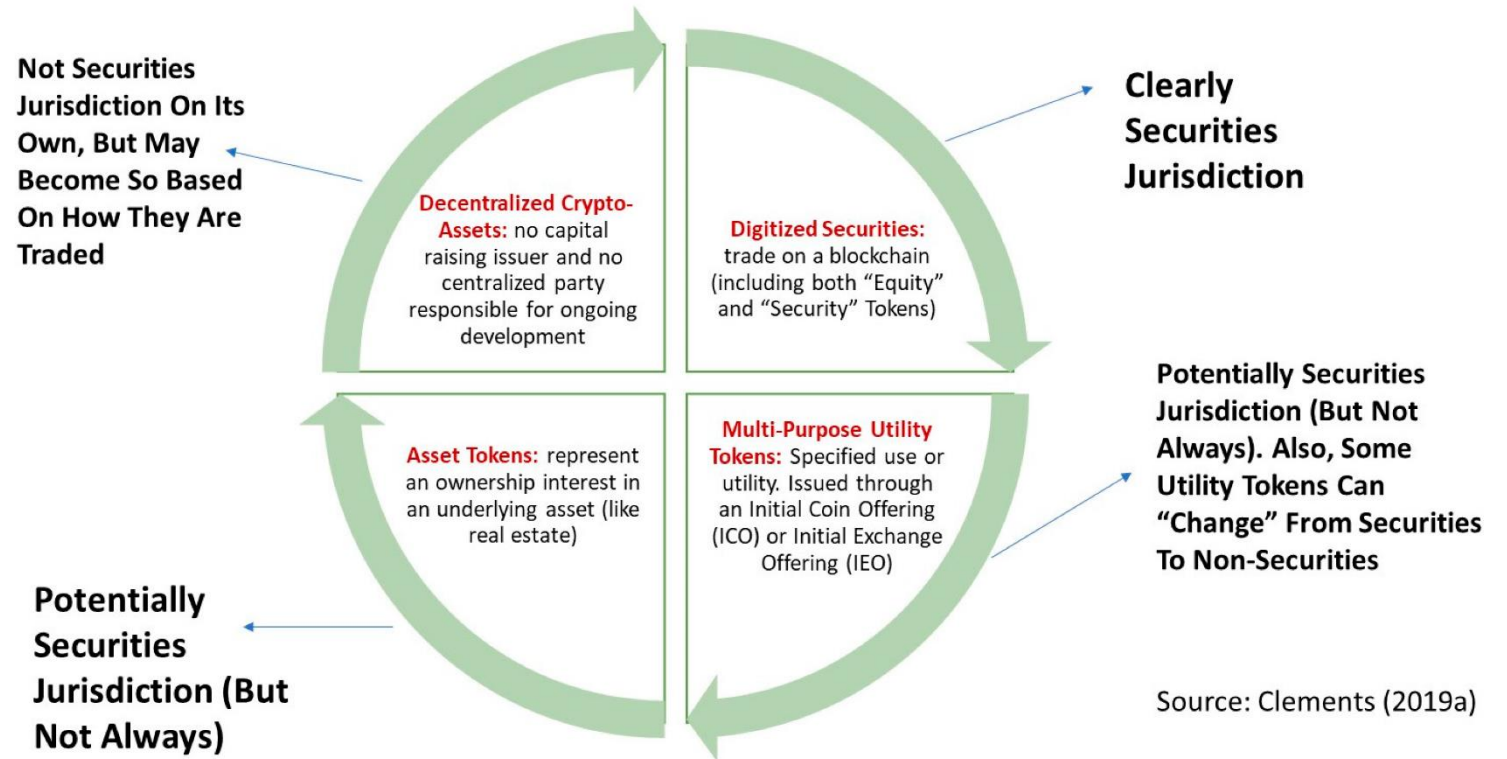
Token Type	Examples	Description
Coin / Currency	Ethereum, Bitcoin, Litecoin	Digital currencies like Bitcoin in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds. They are operating independently of a central bank.
Utility Token	Steem, BAT, Siacoin	The utility tokens are services or units of services that can be purchased. ICO of an utility token can be compared to a Kickstarter campaign to purchase products or services in advance.
Tokenized Securities	Trust Token	Tokens are representing shares of a business. Utility Tokens that can appreciate in value without the work of the token holder based on value created by others are classified as Tokenized Securities. ICO of a Tokenized Security has to follow the rules of financial regulators.

ICOs versus STOs

Initial Coin Offers

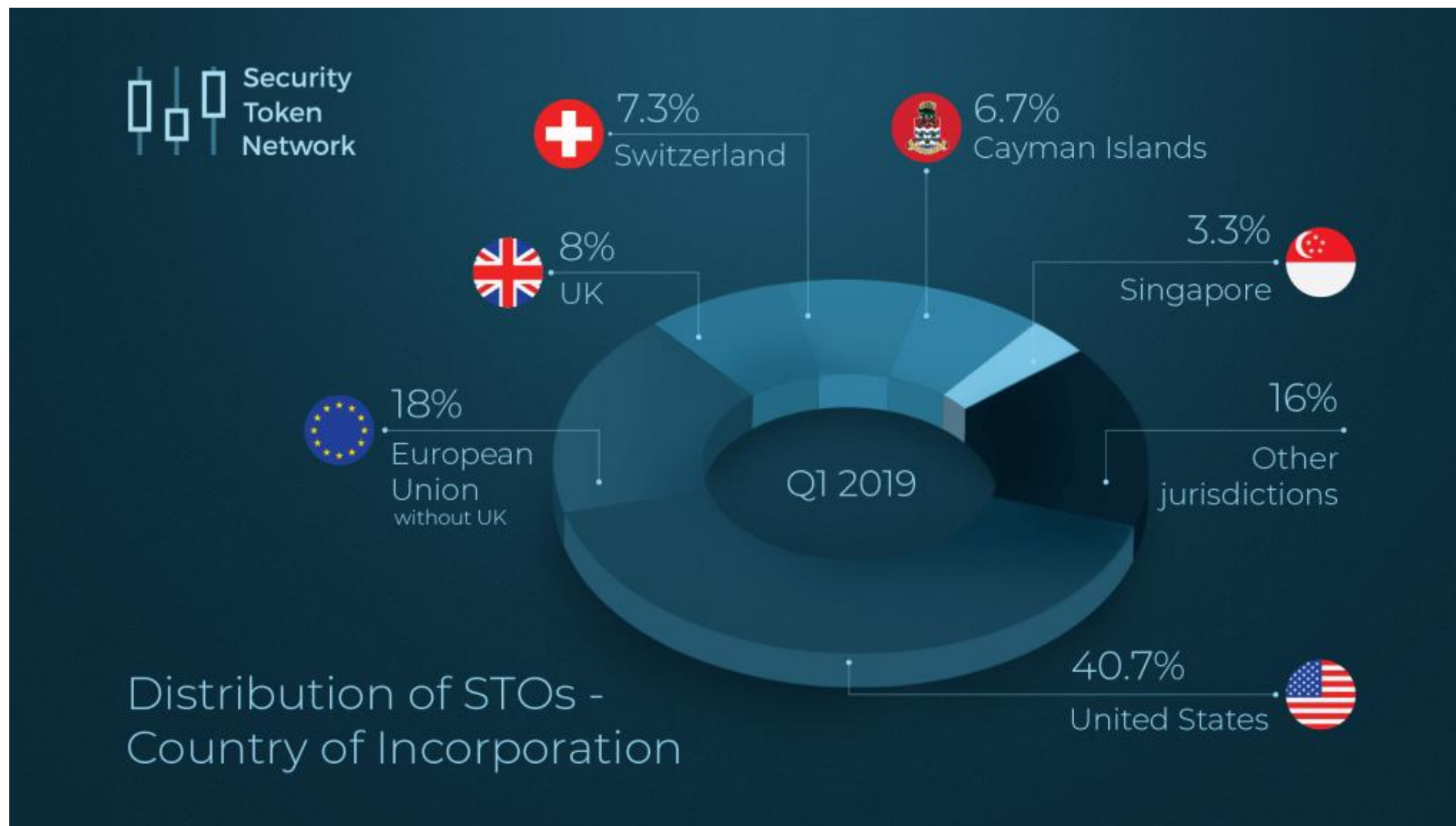
*“Initial coin offerings (ICOs) could be seen as a new form of **crowdfunding** in which participants **exchange** fiat currencies or existing cryptocurrency tokens for **entity-specific tokens**. (...) The issued tokens in an ICO do not grant the purchasers any form of equity or ownership interest in the issuing company. Instead, most ICOs issue some form of an application token or crypto-asset that has some utility within the software program being developed.”*

- Douglas J. Cumming, Sofia Johan and Anshum Pant - Regulation of the Crypto-Economy: Managing Risks, Challenges, and Regulatory Uncertainty



<https://www.mdpi.com/1911-8074/12/3/126/htm>

STOs - Emissão por País



<https://token.security/stn/article/analysis/state-of-the-security-token-ecosystem-part-1-security-token-offerings-q1-2019/>

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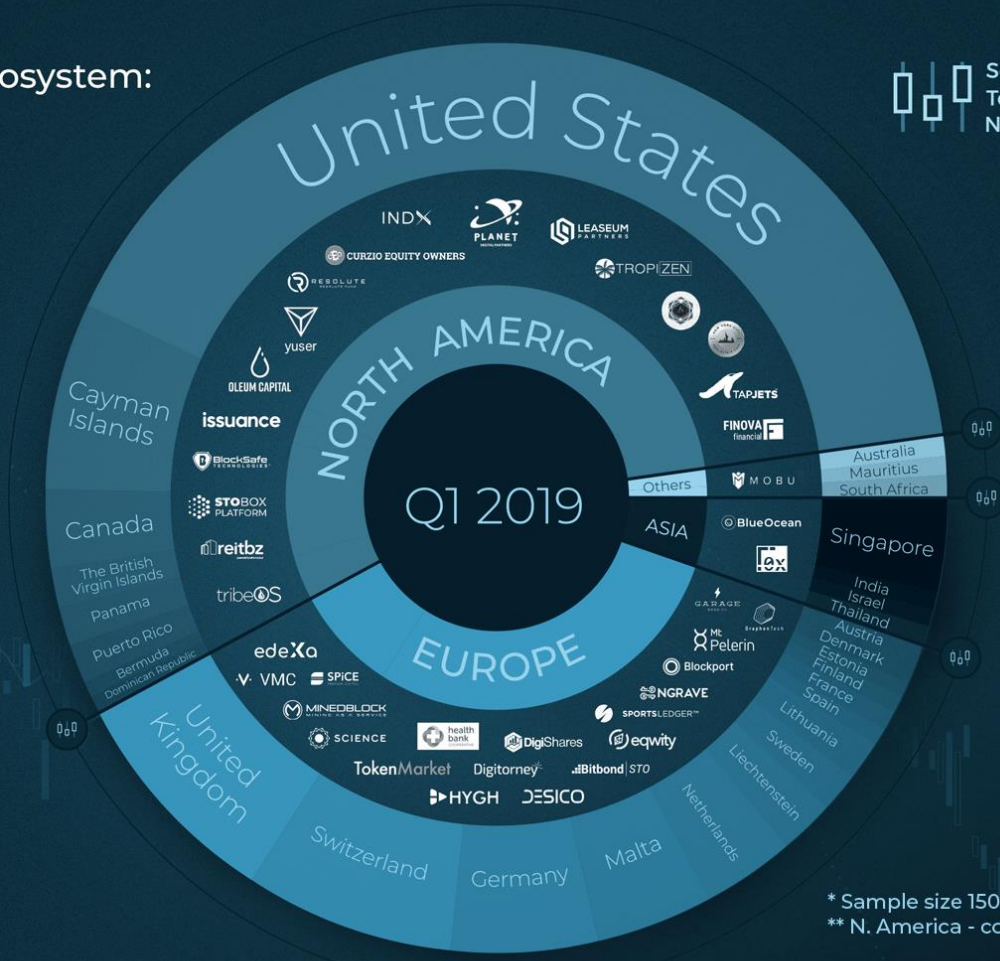
The State of the Security Token Ecosystem:
Security token Offerings



Security Token Network

Security Token Network is the gateway to the Security Token ecosystem providing in-depth industry research for institutional finance and investors.

- www.token.security
- [@SecTokenNetwork](https://twitter.com/SecTokenNetwork)
- [security-token-network](https://www.linkedin.com/company/security-token-network)
- hello@token.security



* Sample size 150 STOs
** N. America - continent

<https://token.security/stn/article/analysis/state-of-the-security-token-ecosystem-part-1-security-token-offerings-q1-2019/>

European Securities and Market Authority - ESMA

Análise por Características

- *Transferability* (Art. 2.1 (a) do *Prospectus Regulation*): refere-se à **possibilidade** de transferência. Restrições contratuais não são suficientes para descaracterizar a possibilidade de transferência, mas limitações operacionais (como *time lock*) podem ser suficientes.
- *Negotiable on the capital markets* (Art. 4(1)(44) do MiFID): refere-se à **viabilidade e facilidade**, de forma geral, de negociar os tokens em mercados (regulados ou não).

*“Whereas the transferability-criterion is concerned with the question whether a security can be transferred in the first place, negotiability on the capital market can be said to refer to the **ease of transferring** the security. In its implementing guidelines, the Dutch Authority for Financial Markets has stated that the negotiability requirement is satisfied where the security is generally traded on capital markets.”*

- Thijs Maas em *Initial Coin Offerings: When are Tokens Securities in the EU and US?*

European Securities and Market Authority - ESMA

Análise por Características

- *Standardization* (definição do MiFID): refere-se à fungibilidade e **padronização**, ainda que dentro de uma classe específica.

*“An instrument is only fungible when issued in multitudes while providing the same rights to equal investors. In other words, standardization is required across instruments to form a class of instruments. An issuance containing different classes of instruments does not result in lack of standardization as long as the different classes of instruments are clearly **identifiable**.”*

*Of course, almost all issued tokens fulfill this requirement, as without standardization, admittance to capital markets is impossible. In fact, any token that is negotiable (i.e. traded or capable of being traded on a crypto-exchange under a token-specific ‘ticker’ such as BTC or BTX for bitcoin) is by definition standardized. As such, the standardization requirement could be seen as a **sub criterion to negotiability** on the capital markets. Indeed, with regards to the criterion of standardization in practice, the ESMA’s survey shows that **most NCAs do not see standardization as a stand-alone criterion.**”*

- Thijs Maas em *Initial Coin Offerings: When are Tokens Securities in the EU and US?*

Análise por Equivalência

Markets in Financial Instruments Directive – MiFID

Artigo 4(1)(44) do MIFID II define ‘transferable securities’ como ‘those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

- a) shares in companies and **other securities equivalent to shares** in companies, partnerships or other entities, and depositary receipts in respect of shares;*
- b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;*
- c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.*

*“The main characteristics of shares are generally understood to be comprised of **equity** rights, rights to **dividends** and **governance** rights. (...) We can also deduce from the MIFID definition of transferable securities that the legal nature of the issuer of the token is of no importance.”*

*- Thijs Maas em *Initial Coin Offerings: When are Tokens Securities in the EU and US?**

Framework for ‘Investment Contract’ Analysis of Digital Assets (April, 2019)

“More specifically, the information contained in this framework may apply to entities conducting the following activities related to digital assets:

- offering, selling, or distributing*
- marketing or promoting*
- buying, selling, or trading*
- facilitating exchanges*
- holding or storing*
- offering financial services such as management or advice*
- other professional services”*

https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn14

Howey Test e The DAO (July, 2017)

Investment of Money

The DAO and associated entities and individuals violated federal securities laws with unregistered offers and sales of DAO Tokens in exchange for "Ether," a virtual currency.

Expectation of Profit

*the various **promotional materials** disseminated by Slock.it and its co-founders informed investors that The DAO was a for-profit entity whose objective was to fund projects in exchange for a return on investment.*

*[35] That the “projects” could encompass **services** and the creation of goods for use by DAO Token holders does not change the core analysis.*

Howey Test e Framework

Common Enterprise

Revak v. SEC Realty Corp., 18 F.3d. 81, 87-88 (2d Cir. 1994):

Horizontal commonality as "the tying of each individual investor's fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits" and two variants of vertical commonality, which focus "on the relationship between the promoter and the body of investors"

Reliance on the Efforts of Others

SEC v. Glenn W. Turner Enter., Inc., 474 F.2d 476, 482 (9th Cir.), cert. denied, 414 U.S. 821, 94 S. Ct. 117, 38 L. Ed. 2d 53 (1973)

the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise

Outros Julgados Relevantes

United Housing Foundation v. Forman

“people who intend to acquire only a residential apartment in a state subsidized cooperative, for their personal use, are not likely to believe that, in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock. . . . [T]he inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply.”

Silver Hills Country Club v. Sobieski (Risk Capital Test)

“funds for a business venture or enterprise; an indiscriminate offering to the public at large where the persons solicited are selected at random; a passive position on the part of the investor; and the conduct of the enterprise by the issuer with other people’s money. (...) focuses retrospectively on what the investor stands to lose rather than prospectively on what he expects to gain”

Comparação EUA x Reino Unido

	Utility Tokens	Security Tokens
Essence	A tool for driving human behavior using incentives within a blockchain ecosystem.	An investment contract that represents legal ownership of a physical or digital asset that has been verified on the blockchain.
Connection Between Token & Company	The token's value doesn't necessarily have a direct connection to the company's value and success.	The token represents true ownership of the company and is directly related to the growth of the company.
Scam Potential	Many scammers found this opportunity to raise money and exit without building the product they promised to develop.	Companies that release security tokens must go through significantly higher regulatory hurdles. This naturally reduces the potential for scams.
Regulations	There are still significant difficulties for creating true regulations for ICO's.	The company and the investors must meet the strict conditions of the SEC (The Howey Test).

CryptoPotato

Guidance on CryptoAssets (FCA, January 2019)

“Utility tokens: these tokens grant holders **access to a current or prospective product or service** but do not grant holders rights that are the same as those granted by Specified Investments. Although utility tokens are not Specified Investments, they might meet the definition of e-money in certain circumstances (as could other tokens), in which case activities in relation to them may be within the perimeter.”

“Security tokens: these are tokens with specific characteristics that mean they meet the definition of a **Specified Investment** like a share or a debt instrument (described in more detail in Chapter 3) as set out in the RAO, and are within the perimeter.”

<https://cryptopotato.com/security-vs-utility-tokens-the-complete-guide/>
<https://www.fca.org.uk/publication/consultation/cp19-03.pdf>

Comissão de Valores Mobiliários - CVM

Nota sobre ICOs (Outubro de 2017)

Tais ativos virtuais, por sua vez, a depender do **contexto** econômico de sua emissão e dos direitos conferidos aos investidores, podem representar valores mobiliários, nos termos do art. 2º, da Lei 6.385/76.

Lei 6.385/76

Art. 2º São valores mobiliários sujeitos ao regime desta Lei:

(...)

IX - quando **ofertados publicamente**, quaisquer outros **títulos** ou contratos de investimento coletivo, que gerem **direito de participação**, de parceria ou de remuneração, inclusive resultante de prestação de serviços, cujos rendimentos advêm do **esforço do empreendedor ou de terceiros**.

Comissão de Valores Mobiliários - CVM

Nota CVM (Março de 2018)

“Em todo caso, as análises e decisões tomadas pela CVM **não ratificam** ou recomendam uma oferta de valores mobiliários. Estas e outras ações têm como objetivo verificar se as operações de ICOs estão enquadradas nas definições de oferta pública de valores mobiliários estabelecidas nos normativos da CVM para que, quando a resposta for positiva, sejam tomadas as medidas cabíveis.”

Comissão de Valores Mobiliários - CVM

Ofício circular SIN nº 11/2018

Busca esclarecer consultas sobre o investimento indireto em criptoativos pelos **fundos** regulados pela Instrução CVM 555.

Ofício Circular CVM/SER 02/19

Se referentes a valores mobiliários, ICOs devem se sujeitar às Instruções Normativas 400/2003 ou 588/2017 (**crowdfunding**)

Instrução Normativa CVM 588/2017

Limite de captação de BRL5mi em 180 dias, com restrições ao valor por investidor (exceto líder, qualificado ou conforme renda)

Considerações Finais

- **Fomentar** a economia e, ao mesmo tempo, **proteger** o mercado e a poupança popular.
- **Compreender** a tecnologia descentralizada/distribuída: *enforcement* diferente, critério geográfico.
- **Priorizar** as estratégias: atuação reativa ou preventiva?
- **Padronizar** operações: regulação ou autorregulação?
- **Endereçar** as assimetria: prospecto, maior transparência, auditoria.
- **Reter** talentos e recursos, tanto financeiros quanto intelectuais, e **desenvolver** tecnologia nacional competitiva.

Comentários: anne@eadvisor.com.br



anne@eadvisor.com.br