capital markets
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Via electronic mail

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Geneva, 6 February 2019
9989.335 / BENHA

Re: Consultation regarding the draft Ordinance on Financial Services (OSFin/FIDLEV)

Ladies and Gentlemen,

Reference is made to the consultation that the Federal Department of Finance initiated on 24 October 2018 on the subject referred to above.

The purpose of the Capital Markets and Technology Association is to promote the development of new technologies in the field of capital markets. One of our association's main objectives is to facilitate the issuance and trading of securities using the distributed ledger technology. The provisions of the Financial Services Act of 2018 (LSFin/FIDLEG) (the "**FinSA**") regarding prospectus requirements are therefore of particular relevance to us.

In this respect, our association would like to make the following comments on the draft Ordinance on Financial Services (the "**D-OSF**").

1. Article 74 D-OSF. Guarantee of equal treatment of all applicants by the authorities licensed to review prospectuses

Under the FinSA, prospectuses will for the first time in Switzerland be subject to an *ex ante* approval by an authority in the event of a public offering of securities. Article 52 FinSA does not require that the approval of offering prospectuses be carried out by securities exchanges. However, it is expected that SIX Swiss Exchange and BX Swiss will apply to be appointed as approval authorities.

Should the responsibility to approve offering prospectuses be effectively granted to a securities exchange, this would place these organisations in a situation of conflict of interest. Securities exchanges derive their profits from securities traded on their markets. This could create situations in which they have an incentive to prioritize the processing of prospectuses relating to securities that are expected to be listed or admitted to trading on the platform they operate.

Article 74 para. 2 lit. d D-OSF already requires that the set-up of the organisations licensed to review prospectuses makes it possible to "prevent conflicts of interests", in particular with the revenue-generating activities of the relevant organisation. An explicit duty to treat all applicants equally is, however, not mentioned.

We would consequently recommend that **Article 74 para. 2 D-OSF be supplemented** to clarify that the organisation of the bodies licensed to approve prospectuses must **guarantee an equal treatment of all applicants** in the review of the prospectuses relating to their securities.

2. The information that the D-OSF requires to be included in prospectuses is often inadequate for securities that are not listed on a stock exchange or traded on an MTF

The various appendixes to the D-OSF (which outline the information that needs to be provided in prospectuses) have been essentially taken over from the various "listing schemes" incorporated in the listing rules of SIX Swiss Exchange. These schemes, however, have been conceived for securities that are to be listed on a securities exchange. They are not necessarily appropriate for securities that – although being offered to the public – are not to be listed on a securities exchange or traded on an MTF. This is in particular the case for the following items of Annex 1 to the D-OSF:

Section	Topic	Issue
2.6.10	Significant shareholders	The reference to Articles 120 *et seq.* FMIA (LIMF/FINFRAG) is only relevant for the equity securities of listed issuers. For non-listed issuers, it should be replaced by a reference to "persons holding equity securities representing more than 3% of the issuer's voting rights, to the extent known to the issuer".
2.6.12	Public takeover offers	The reference to Article 135 *et seq.* FMIA and to "opting-out" and "opting-up" provisions are only relevant for listed issuers.

3. Clarifications of certain specific disclosure requirements

The appendixes to the D-OSF are based largely on the current listing requirements of SIX Swiss Exchange ("**SIX**"). SIX's prospectus requirements could however be clarified or improved on various points. Also, the order in which the information is to be presented is not always logical. Some specific examples of this are set forth below.

3.1 Annex 1

Section	Topic	Issue
2.1	Risks	The reason why the risks relating to the issuer are separated from the risks relating to the securities (Section 3.1) is unclear. Such a separation makes the prospectus needlessly difficult to read, and is inconsistent with the manner in which risk factors are being generally presented in practice. Annex 1 to the D-OSF should provide that all risk factors must be found in a single section that is clearly identified for this purpose.
2.3.3	Proceedings and convictions	It should be clarified explicitly that 5-year lookback period applies also to proceedings having led to

		sanctions imposed by governmental or regulatory authorities (including trade bodies), and not only to criminal proceedings.
2.3.4 (1)		The reference to the "number of securities" ("[n]*ombre de valeurs mobilières*") should be replaced by a reference to the "number of equity securities or conversion or option rights". The reference to the "subscription rights ("droits de souscription") should be deleted, as these would be covered by the reference to the broader and better-known concepts of conversion and option rights.
2.4.1(2)	Main activities	The references to "new products" and "new activities" should be clarified to make it clear that this section refers to planned future products and activities (the current activities being covered by Section 2.4.1(1)).
2.4.4	Patents and licences	This section should be clarified, because it is unclear as to whether it applies only to a dependency relating to intellectual property and know-how, or to all agreements on which the issuer depends. If the section only refers to intellectual property and know-how, the reference to a dependency to "industrial, commercial or financial agreements" (*contrats industriels, commerciaux ou financiers*) should be removed. These references also partially overlap with the financial disclosures contemplated in Section 2.6.5. If the section refers to all agreements on which the issuer depends, its title should be amended accordingly. Also, the reference to the "new manufacturing processes" should be deleted. If the processes were made available by third parties, then this would be done through an agreement, which would already be covered by the rest of Section 2.4.4. If, on the contrary, these manufacturing

		processes were the product of in-house work of the issuers they would be covered by the description of the issuer's main activities (Section 2.4.1).
2.6.5	Conversion and option rights, borrowings, credits and other ongoing contingent liabilities	The reference to "other" ongoing contingent liabilities ("*autres" engagements conditionnels*) should be deleted, since the other liabilities mentioned (*e.g.* borrowings and credits) are not contingent.
2.6.5(1)		To be consistent with the reference made in this section to "option rights", the reference to "convertible loans" (*emprunts convertibles*) should be replaced by a reference to "conversion rights" (*droits de conversion*).
2.6.5(2)		The reference to "existing borrowings" (*emprunts en cours*) should be replaced by a reference to "outstanding bonds" (*obligations en circulation*). The information on other forms of borrowings is already required in Section 2.6.5(3) and should consequently not be repeated here.
2.6.6	Capital and indebtedness	The reference to "capital" should be removed, since the point is already addressed at Section 2.6.1 (capital structure).
2.6.11	Cross-shareholdings	It should be clarified whether the 5% limit must be calculated by reference to the issuer's share capital or voting rights.
2.8.1(1)	Annual accounts	The second sentence ("*Font exceptions les sociétés dont la durée d'existence avec une substance économique est plus courte …*") is redundant with the requirement set forth in Section 2.8.2 and should therefore be removed.
2.8.2(1)	Current balance sheet	The reference to Section 2.8.2 *et seq.* should be a reference to Section 2.8.1 *et seq.*
2.8.4	Reference date	This provision does not express a disclosure requirement, but a substantive rule. This rule should

		by mentioned in the body of the ordinance, and not in its Annex 1.
3.4.2	Trading restrictions	The "selling restrictions imposed by foreign laws" (*restrictions de vente relevant du droit étranger*) mentioned in the second sentence are unrelated to the "trading restrictions" mentioned in the first sentence. The reference is out of place and should be removed.
3.5.7	Public purchase or exchange offers	There is no objective reason to include information on the public purchase or exchange offers carried out during the last fiscal year, but to omit other similar transactions such as statutory mergers or significant asset deals. The scope of that particular disclosure should be extended to cover all forms of business combinations.

3.2 Annexes 2 and 3

To the extent relevant, the comments made to Annex 1 apply by analogy to the Annexes 2 and 3.

3.3 Annexes 4 and 5

Annex 4 (content of the prospectus for real estate companies) and Annex 5 (content of the prospectus for investment companies) to the D-OSF do not only identify the disclosure items that are specific to real estate and investment companies. Instead, those annexes restate all the information set forth in Annex 1 for industrial or commercial issuers, with some deviations designed to capture the specificities of real estate or investment companies.

This presentation is non-transparent and unhelpful. It does not permit to easily determine the items for which the disclosure requirements applicable to real estate and investment companies deviate from those applicable to industrial or commercial issuers. A general reference to Annex 1, with a list of the disclosure items that are specific to investment companies, would be more helpful.

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We have reflected the comments above in the attached feedback form (in French).

We hope the above is helpful, and remain at your disposal for any clarification that you may wish.

Sincerely yours,

Capital Markets and Technology Association

s/Jacques Iffland *s/Morgan Lavanchy*

Jacques Iffland
Chairman

Morgan Lavanchy
Member of the Committee

Enclosure