

Explanations

Regarding CMTA's model prospectus for the public offering of
tokenized shares

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1. INTRODUCTION

In October 2018, the CMTA published a blueprint for the tokenization of shares of Swiss corporations, using the distributed ledger technology. The document provides a step-by-step process allowing Swiss corporations to raise capital through the issuance of equity securities twinned with digital tokens, so that the transfer of the digital tokens necessarily triggers a transfer of the shares associated with them and vice-versa.

Because they do not involve taking deposits from the public, equity offerings do not require any authorization from the Swiss Financial Market Supervisory Authority ("**FINMA**") or any governmental authority in Switzerland. Because equity securities are typically not payment means, their issuers are in principle not required to affiliate themselves with FINMA or a self-regulated organization recognized by FINMA under the Swiss regulations against money laundering.

An important element of capital raising through the issuance of tokenized equity securities, however, is that the issuer is required to publish an offering prospectus if the relevant equity securities are being offered to the public and that to exemption is available. Offering prospectuses are important documents, because any person who participates in their preparation or publication is personally liable towards investors for the damage caused to them as a result of inaccurate, misleading or incomplete statements therein.

Under the Financial Services Act ("**FinSA**") that was adopted in June 2018, prospectuses for the public offering of securities also need to be approved by a reviewing body (a private entity authorized by FINMA and vested with certain regulatory powers). The new prospectus regime enters into force 6 months after the authorization of the first reviewing body.

To facilitate the issuance of tokenized shares, the CMTA has prepared a model prospectus, which lists the key information that is to be included in such document, and provides indications about how the relevant information can be presented. CMTA's model prospectus can be obtained at the following address: <https://www.cmta.ch/content/224/cmta-model-prospectus-pdf.pdf>. The document has been prepared to help Swiss corporations achieve legal compliance when offering equity securities to the public in Switzerland. Although the new prospectus regime of FinSA is only expected to become effective later in 2020, CMTA's model prospectus has been prepared with a view to facilitating compliance with this legislation. In particular, the structure of CMTA's model prospectus follows the structure of Annex 1 to the Ordinance of the Federal Council on Financial Services, which sets forth the minimum contents for prospectuses prepared under FinSA for the public offering of equity securities in Switzerland.

In this document and unless specified otherwise, the terms "equity securities" and "shares" are used indistinctly to designate both voting shares (*actions / Aktien*) and non-voting shares (*bons de participation / Partizipationsscheine*) issued by Swiss corporations. The Swiss corporation that issues the tokenized shares is referred to indistinctly as the "issuer" or the "company". The masculine form has been used throughout this document for ease of reading, but refers to any gender.

2. ISSUERS SHOULD SEEK PROFESSIONAL ADVICE BEFORE USING CMTA'S MODEL PROSPECTUS

CMTA has prepared a model prospectus to facilitate the work of issuers willing to raise capital through the issuance of tokenized shares. The document was prepared with the participation of reputable experts, and the CMTA believes its contents to be appropriate. The CMTA does however not provide consulting or other forms of advisory services, and CMTA's model prospectus must not be construed as legal or any other form of advice for the offering of securities. The tokenization of shares and the public offering of tokenized shares involve many complex steps and issues. It also

involves the use of computer codes that may cause serious damage to the issuers and investors involved in the event of errors or failures. Companies willing to raise capital through the issuance of tokenized shares should not use CMTA's model prospectus without appropriate professional advice.

3. RELEVANCE OF CMTA'S MODEL PROSPECTUS

Capital raisings can be structured in many different ways. CMTA's model prospectus has been prepared assuming that the relevant equity offering would have certain key characteristics, which are outlined below. CMTA's model prospectus can also be helpful for transactions that do not have these characteristics. Its contents may however need to be supplemented or changed for such transactions.

§ 3.1 Use of CMTA's tokenization model

CMTA's model prospectus assumes that the offered shares will be tokenized using CMTA's tokenization model, as outlined in CMTA's "Blueprint for the tokenization of shares of Swiss corporations" dated October 2018. This implies, among other things, that the offered shares are being issued by a Swiss corporation (*sociétés anonymes / Aktiengesellschaften*) within the meaning of Articles 620 *et seq.* of the Swiss Code of Obligations and that the digital tokens will be created using the public version of the Ethereum blockchain.

§ 3.2 Public offering in Switzerland

CMTA's model prospectus assumes that the shares are being offered to the public in Switzerland, and that no exemption from the duty to publish a prospectus is available or used.

This assumption is a significant one. FinSA lists several circumstances in which securities can be offered without a prospectus. This is in particular the case when securities are being offered to less than 500 investors, or when the expected proceeds do not exceed CHF 8 million over a 12-month period. When an exemption is available, the offering can be made without a prospectus. If a marketing document is produced under such circumstances, it does not need to be approved by a reviewing authority.

CMTA's model prospectus can also be used to market tokenized shares offered in so-called "private placements" (*i.e.* without a public offering). Voluntarily providing the information required for a public offering in a private placement has advantages. It protects the issuer against claims that the materials used for the marketing of the shares were incomplete. To avoid any confusion, it is advisable in such a case to characterize the document as an "offering memorandum" rather than a "prospectus".

§ 3.3 Offering limited to non-voting shares

Offering shares to the public has important consequences for an issuer. When voting shares are held by a large number of persons, it is often no longer practical to have all shareholders present at general meetings. Shareholder meetings must consequently be convened in compliance with the requirements of Swiss corporation law. In particular, the minimum notice period of 20 calendar days must be complied with, and decisions can in principle only be passed on the agenda items mentioned in the invitation to the meeting. In addition, because the Swiss takeover laws only apply when an issuer has shares listed on a Swiss stock exchange – and that such listing is currently not possible for tokenized shares – the acquisition of a company that has voting shares in the public may create practical difficulties.

For these reasons, CMTA's model prospectus assumes that only non-voting shares will be offered to the public, and that the voting shares will remain in the exclusive ownership of the company's existing shareholders.

Swiss company law recognizes the right of a holder of non-voting shares to subscribe to any issuance of new shares by preference. CMTA's model prospectus assumes that the articles of association of the issuer limit the preferential subscription right of existing shareholders to shares of the class that they already hold (*i.e.* that the preferential subscription right of holders of non-voting shares is in principle limited to non-voting shares, and that the subscription right of holders of voting shares is in principle limited to voting shares). Such a limitation is however only possible when the number of voting and non-voting shares is being increased simultaneously in the same proportion. If this is not the case (*e.g.* if new non-voting shares are being issued without a proportional number of voting shares being issued at the same time), the preferential subscription right of the shareholders who are not being offered new shares must be excluded, which under Swiss law is only possible under a limited set of circumstances.

§ 3.4 Primary shares only

CMTA's model prospectus assumes that only non-voting shares are being offered to the public. This implies that the offering will generally be limited to new shares, and will not extend to existing shares of the company (which will generally be voting shares). Transactions in which both existing and new shares are to be offered are possible, but involve disclosures that deviate significantly from those contemplated in CMTA's model prospectus.

§ 3.5 Subscription of the new shares by the issuer or by one of its existing shareholders

When new shares of a Swiss issuer are being offered to the public, the new shares must – as a practical matter – be validly issued before they can be delivered to investors. A process in which each investor would be required to subscribe and pay for the new shares acquired in the offering would create logistical difficulties in practice. Therefore, newly issued offered shares are generally subscribed by a nominee, acting in a fiduciary capacity for the account of the acquirers. In a "traditional" share offering (*i.e.* when the relevant shares are not tokenized and are expected to be deposited with professional custodians), the new shares are typically subscribed by the bank or securities dealer that carries out the offering. In addition to making sure that the offered shares have been validly issued, this regime facilitates the deposit of the offered shares with a central securities depository ("**CSD**"), a necessary step to have the (non-tokenized) shares transferred on securities accounts maintained by professional custodians.

This process is however often inadequate for an offering of tokenized securities. One of the key characteristics of tokenized securities is that they are not held solely through professional custodians as is the case for "traditional" securities. The so-called "non-custodian wallet providers", which enable investors to use their tokens, are not custodians as defined by Swiss law. They do not keep a record of their clients' trades or securities ownership. They only provide an interface that makes it possible for users to interact with the blockchain on which the relevant tokens are recorded and to "read" the information stored on that (decentralized) support. The information displayed on the application that provides the wallet reflects data on the blockchain, not on the wallet provider's systems.

Given that custodians are no longer needed to hold tokenized shares, a regime in which offered shares are being subscribed by a bank or securities dealer makes less sense in an offering of tokenized shares than in a "traditional" share offering. Even if it will often be advisable for the issuer to hire a financial advisor in the context of the offering, this subscription will not necessarily need to be carried out by a bank or securities dealer. It will often be more simple – and cost-effective – for the issuer or its shareholders to subscribe the offered shares themselves before transferring such

shares to investors. This is permissible under Swiss law provided that the person subscribing the offered shares does not do so in a capacity as a professional service provider.

For this reason, CMTA's model prospectus assumes that the issuer will be assisted by a financial advisor for the purpose of the offering, but that the new shares will be subscribed either by the issuer itself or by one of its existing shareholders – acting in its own name, but for the account of the investors – before being allocated and transferred to the investors upon completion of the offering.

In many jurisdictions, the public offering of securities (and in particular of equity securities) involves obligations for the issuer, such as the publication of an offering prospectus, and may require the prior approval of governmental or regulatory authorities. Violation of the relevant laws or requirements may have serious legal consequences, and may under certain circumstances constitute a criminal offence. It is consequently important to secure professional advice before offering tokenized shares outside of Switzerland. If such an offering is considered, the offering prospectus may have to be supplemented and an approval from local governmental or regulatory authorities may be required.

§ 3.6 No listing on a stock exchange or admission to trading on an MTF, but trading on a Swiss OTF

No trading platform – stock exchange or multilateral trading facility – is currently admitting tokenized shares to trading in Switzerland. CMTA's model prospectus reflects this situation. It however assumes that the offered shares will be admitted to trading on an organized trading facility (OTF)¹ operated by a bank or securities dealer.

§ 3.7 Lock-up undertakings for the issuers' main shareholders, board members and executive officers

In the context of equity offerings, it is customary that the issuer's main shareholders and the members of the issuer's board of directors and executive management undertake during a certain period of time not to sell, pledge or otherwise transfer the economic risk relating to some or all of the shares that they hold in the company (so-called "lock-up undertakings"). Even if such lock-up undertakings are not required by law, CMTA's model prospectus assumes their existence and describes their main terms. Since it is assumed that the tokenized shares offered to the public will be subscribed by the issuer or by one of the issuer's existing shareholders, rather than by a financial intermediary (see § 3.5 above), it is assumed that the lock-up undertakings will be given to the issuer itself. The issuer itself will consequently not be in a position to enter into a legally binding lock-up undertaking. Although various scopes and durations can be contemplated in individual transactions, CMTA's model prospectus assumes a 12-month lock-up for all shares held by persons owning 5% or more of the Company's voting rights, and a 6-month lock-up for the non-voting shares allocated in the offering to members of the board of directors and executive management of the company.

§ 3.8 No stabilization or over-allotment option

Absent an admission of the offered shares on a trading platform, CMTA's model prospectus assumes that no manager will take action to stabilize their market after completion of the offering. The model prospectus similarly assumes that the issuer will not grant any over-allotment option (so-called "greenshoe") to the offering's manager. Greenshoe options are generally granted to allow

¹ Within the meaning of Articles 42 *et seq.* of the Swiss Financial Market Infrastructure Act. Contrary to what is the case under the European Directive 2014/65/EU (MiFID II), equity securities can be traded on OTFs under Swiss law.

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an offering's manager to cover the short positions resulting from an over-allotment of offered shares when the offered shares are trading above the issuance price, and that the manager can consequently not cover its short position through market purchases as part of the stabilization process. Because over-allotment options are functionally linked to stabilization measures, the absence of stabilization implies an absence of such options as well.
