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**Via electronic mail**

**Federal Department of Finance**  
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Geneva, 2 February 2021

**Re: Consultation regarding the Ordinance on the adaptation of federal law to developments in the distributed electronic ledger technology**

Ladies and Gentlemen,

Reference is made to the consultation that the Federal Department of Finance initiated on 19 October 2020 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. Our organization is therefore particularly interested in the implementation of the new Federal act on the adaptation of federal law to developments in the distributed electronic ledger technology. We thank you for giving us the opportunity to participate in the consultation of the implementing ordinance regarding this new law.

Generally, our association welcomes the proposed regulations, which contribute to providing clarity and predictability to the new legislative framework. We are however of the view that, in one particular respect outlined below, the proposed rules fail to reach their objective – and could have significant adverse unintended consequences.

## Anti-money laundering ordinance

The draft amendment to the Swiss Anti-Money Laundering Ordinance of 11 November 2015 contemplates expanding the definition of payment services contemplated in Article 2, para. 3, lit. b of the Federal Act on Combating Money Laundering and Terrorist Financing ("**AMLA**"), to cover services that "facilitate the transfer of virtual currencies to third parties, provided that [the service provider] has an ongoing business relationship with the counterparty and does not provide the service to financial intermediaries only" ("permet le transfert de monnaies virtuelles à un tiers pour autant qu'il entretienne une relation d'affaires durable avec le cocontractant et ne fournisse pas le service exclusivement à des intermédiaires financiers").

The explanatory report of the Federal Department of Finance (the "**Department**") clarifies that the purpose of this wording is to ensure that certain service providers – in particular those that keep private keys in safe custody and those that are capable of interacting with or have sufficient control over a smart contract to allow or block the transfer of digital currencies on a blockchain – are subject to the anti-money laundering regulations.

The proposed wording is however so broad that it captures activities that have nothing to do with those mentioned in the Department's report, and relate to services for which subjection to the AMLA would not be desirable or even practically possible. This could in particular be the case of:

- programmers who provide the code of the smart contracts that are used to transfer payment tokens; or
- IT service providers that assist in deploying such smart contracts on a blockchain.

Considering the broad and imprecise nature of the term used in the draft provision ("permet" / "ermöglicht"), even advisers such as lawyers or other consultants could arguably be captured by the definition. The Department's explanatory report makes it clear that this is not the intended result. An excessively broad wording would nonetheless be a source of significant and durable uncertainty, as it would open the door to more extensive interpretations in the future. Such a situation would be highly prejudicial. It could inhibit the development of the distributed ledger technology ("**DLT**") in the Swiss financial sector, and therefore run directly against the stated purpose of the new law.

Our association believes that it is of key importance to avoid such an outcome, and consequently to adopt a text that more accurately reflects the intended scope of the AMLA. In this respect, we believe that the aim should be to align Switzerland's anti-money laundering standards with those recommended by the Financial Action Task Force on Money Laundering ("**FATF**") and implemented in the European Union. We would therefore

suggest that the wording of the relevant paragraph of Article 4 of the Swiss Anti-Money Laundering Ordinance be aligned with the EU Directive 2015/849 "on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing", as it was amended by the Directive (EU) 2018/843 of 30 May 2018.

Such an alignment with the EU regime would result in the proposed new provision of the Swiss Anti-Money Laundering Ordinance being drafted as follows:

**Article 4, para. 1, of the Anti-Money Laundering Ordinance of 11 November 2015**

*"There is a payment service within the meaning of Article 2, para. 3, lit. b, AMLA in particular when the financial intermediary:*

- a. [...];
- b. provides services to third parties to assist in the transfer of virtual currencies, in a manner which involves control over the virtual currencies or the transfer process;
- c. [...]
- d. [...]"

Services that do not involve any access to private keys or other form of control (power of disposal) over digital assets of third parties should not be subject to anti-money laundering rules. Absent contractual relationship with the owner of the private keys, service providers would have no possibility to identify the beneficial owners of the relevant digital assets. The reference in the text proposed by the Department to "on-going business relationships with the counterparty" is unclear, as it does not indicate who the "counterparty" would be in this context.

Subjecting activities that do not involve any access to private keys to the AMLA would amount to imposing obligations on service providers that are generally impossible to comply with, and would de facto result in an outright prohibition of the relevant activities. There is no reason why Switzerland should go beyond the recommendations of the FATF or the EU regulations in this respect. Doing so would create the risk of undermining the main benefits that the Swiss Parliament tried to secure with its prompt adjustment of the Swiss financial market rules to the DLT.



We thank you for your consideration of the above.

Yours sincerely,

**Capital Markets and Technology Association**

s/ Jacques Iffland

Dr. Jacques Iffland  
Chairman

s/ Fedor Poskriakov

Fedor Poskriakov  
General Secretary