Crypto Valley

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Consultation on the amendment of the Banking Act (implementation of the measures from the Federal Council's report on banking stability and the report of the Parliamentary Investigation Committee)
Comments on the new FINMA supervisory instruments, the audit reforms and the corporate governance measures

Dear Ladies and Gentlemen,

We refer to the consultation on the amendment of the Banking Act (**BA**) opened by the Federal Council on 12 August 2026, including the amendments to the Financial Market Supervision Act (**FINMASA**) and the accompanying explanatory report (**Explanatory Report**) (together the **Consultation Draft**), and thank you for the possibility to take part in this consultation process. Draft provisions are referred to as D-BA and D-FINMASA.

The Crypto Valley Association (**CVA**) is Switzerland's leading blockchain & crypto ecosystem. A non-profit and non-governmental organization fostering growth, collaboration and integrity in the global blockchain economy since 2017. The association is solely funded by membership fees. CVA has more than 41,000 ecosystem members – individuals and corporations alike. Our members are executives, innovators & subject matter experts across the crypto & blockchain sector and leading companies of the industry, such as Bitcoin Suisse, Bancor, Sygnum Bank, Amina Bank, PwC, Kraken, CME Group, and more. CVA has partnerships with leading institutions such as ETH Zürich, HSLU, IDAXA, and more.

Many CVA members are directly supervised by the Swiss Financial Market Supervisory Authority (**FINMA**), including banks with a crypto focus, holders of a fintech licence pursuant to Article 1b BA, securities firms, managers of collective assets and fund management companies as well as operators of financial market infrastructures such as DLT trading facilities. Further members are small portfolio managers and trustees licensed under the Financial Institutions Act and supervised by a supervisory organisation (**SO**). A large proportion of CVA members are affiliated as financial intermediaries with a self-regulatory organisation (**SRO**) under the Anti-Money Laundering Act; they may fall within FINMA's competence where other financial market acts apply to their activities. The vast majority of these institutions are small and medium-sized enterprises without any systemic relevance. While the Consultation Draft has been designed primarily to strengthen the too-big-to-fail framework in the wake of the Credit Suisse crisis, a considerable number of the proposed measures would apply to all supervised entities within the meaning of Article 3 FINMASA. CVA therefore appreciates the opportunity to state its view on those parts of the Consultation Draft that are relevant to its members. We refrain from commenting on measures that apply exclusively to systemically important banks

(**SIBs**), such as capital requirements, stabilisation and resolution planning or the malus and clawback rules, and state our view as follows:

1 General Remarks

1.1 Support for the objectives, but need for a proportionate scope

CVA supports the objectives of the Consultation Draft to strengthen financial stability, to protect clients and to enable FINMA to enforce supervisory law effectively. A strong and credible supervisor is in the interest of the entire Swiss financial centre, including the crypto and fintech industry. However, CVA is concerned that instruments developed in response to the failure of a global systemically important bank are extended to all supervised entities without sufficient differentiation. In particular, we see the following key concerns:

a. The principle of proportionality and the risk-based approach, which are cornerstones of Swiss financial market regulation, are not sufficiently reflected
b. FINMA already has a comprehensive and well-functioning toolkit for non-systemically important institutions
c. Several new instruments raise concerns regarding legal certainty and procedural guarantees, in particular in view of their criminal character within the meaning of Article 6 of the European Convention on Human Rights (**ECHR**)
d. The audit reforms impose a disproportionate burden on small institutions and on a highly specialised audit market

1.2 Proportionality and risk-based approach

The Explanatory Report states that the proposed measures are to be introduced specifically for SIBs and that individual measures apply to further banks and financial institutions only where a limitation to SIBs would not be expedient and would be difficult to justify in view of equal treatment. For the new FINMA supervisory instruments, the Federal Council examined and rejected a limitation to SIBs, arguing that such a limitation would weaken the preventive effect and lead to an unjustified unequal treatment and a distortion of competition.

CVA does not share this view. The principle of equal treatment requires that like cases are treated alike, but equally that unlike cases are treated differently. A small portfolio manager, a fintech licence holder or a financial intermediary affiliated with an SRO does not pose risks to clients, to the functioning of the financial markets or to financial stability that are comparable to those of a SIB. The well-established Swiss principle of “same business, same risks, same rules” therefore calls for a risk-based calibration of supervisory powers. The fact that the Federal Council introduced a threshold of 250 full-time equivalents for the accountability regime demonstrates that such a differentiation is both possible and appropriate. The Federal Council’s argument that proportionality is ensured by linking the amount of sanctions and coercive fines to the operating income of the supervised entity is not sufficient, as it only addresses the amount and not the question of whether such instruments are necessary at all for a given category of market participants.

Proportionality and the risk-based approach are of particular importance for the large number of CVA members that are affiliated as financial intermediaries with an SRO. While these members are not prudentially supervised by FINMA, FINMA is competent where their activities fall under other financial market acts, e.g. the derivatives trading obligations or the prohibitions of insider trading and market manipulation under the Financial Market Infrastructure Act, the adviser registration requirement and

the rules of conduct under the Financial Services Act, or the licensing requirements under the BA. With regard to insider trading and market manipulation, the draft explicitly extends the new coercive fine to all persons violating these provisions (Article 145 D-FMIA). Moreover, according to the Explanatory Report, the term “supervised entity” also covers institutions that illegally carry out an activity requiring a licence. For small SRO-affiliated financial intermediaries, which frequently operate in areas of legal uncertainty regarding licensing requirements, this would mean exposure to instruments designed for SIBs. CVA therefore requests that the dispatch clarify that, for violations of other financial market acts by small, non-licensed market participants, FINMA primarily applies its existing instruments, in particular the restoration of compliance with the law, and that pecuniary administrative sanctions and coercive fines are reserved for serious and intentional violations.

At the same time, CVA acknowledges that a risk-based calibration cannot be based on size alone. Operators of DLT trading facilities, for example, hold a comprehensive licence as financial market infrastructures and cannot generally be considered low-risk business models. Within this category, however, the risk profile differs considerably between B2B models, in which only regulated financial institutions are admitted as participants, and B2C models with direct retail access. The legislator already recognises such differentiation, e.g. by empowering the Federal Council to provide for relief for small DLT trading facilities. Any threshold for the application of the new instruments should therefore take into account not only the size of the institution, but also its business model, its client base and, in particular, whether retail clients have direct access to its services.

The same applies to the numerous small portfolio managers and trustees among CVA’s members, which are licensed under the Financial Institutions Act and supervised by an SO. CVA welcomes that the Consultation Draft exempts them from the approval requirement for audit firms, the ban on non-audit services and the mandatory rotation. However, they remain fully subject to the new pecuniary administrative sanctions, coercive fines, the mandatory naming and the stricter industry ban, and the duty to provide information to the SO is extended to all of their employees. For small portfolio managers with only a few employees, the cumulative effect of these measures is disproportionate to the risks they pose. CVA therefore requests that SO-supervised portfolio managers and trustees be exempted from these new instruments as well or, at a minimum, that they be covered by a risk-based threshold.

1.3 FINMA’s existing toolkit is sufficient for non-systemically important institutions

Under the current FINMASA, FINMA already has a broad set of instruments at its disposal, including the restoration of compliance with the law (Article 31 FINMASA), declaratory rulings (Article 32 FINMASA), industry and activity bans (Articles 33 and 33a FINMASA), the publication of supervisory rulings (Article 34 FINMASA), the confiscation of profits (Article 35 FINMASA), the appointment of investigating agents (Article 36 FINMASA) and, as ultima ratio, the withdrawal of the licence (Article 37 FINMASA). For small and medium-sized institutions, these instruments have proven effective: the withdrawal of the licence, the appointment of an investigating agent and the reputational impact of enforcement proceedings already constitute existential threats that ensure a high degree of compliance.

According to the Explanatory Report, the Credit Suisse crisis showed that FINMA’s instruments reached their limits, in particular in relation to an institution that was not willing to cooperate with FINMA. This finding relates to a global systemically important bank, for which the withdrawal of the licence is not a realistic option. It cannot be transferred to small institutions, in relation to which FINMA has credible and effective means of enforcement. CVA therefore requests that the new instruments – in particular pecuniary administrative sanctions, coercive fines and the mandatory

naming of institutions – be limited to SIBs or, at a minimum, be subject to a risk-based threshold comparable to the one of the accountability regime, taking into account the size, the business model and the client base of the institution.

2 New FINMA Supervisory Instruments (FINMASA)

The following instruments apply to all supervised entities within the meaning of Article 3 FINMASA and are therefore of direct relevance to all FINMA-supervised CVA members.

2.1 Pecuniary administrative sanctions (Articles 37a, 37b and 37d D-FINMASA)

Pursuant to Article 37a D-FINMASA, FINMA may impose a sanction of up to ten per cent of the average annual operating income of the last three financial years on supervised legal entities and partnerships that seriously violate the FINMASA or a financial market act. The sanction is to be determined according to the size of the supervised entity and the seriousness of the violation, may not be so high as to threaten its immediate insolvency, and the proceedings must be opened within seven years of the violation.

Primarily, CVA requests that pecuniary administrative sanctions be limited to SIBs. Should this request not be followed, CVA requests the following amendments:

Legal certainty: The sanction is linked to a “serious” violation of any provision of the FINMASA or a financial market act, which according to the Explanatory Report also includes ordinances, FINMA circulars and self-regulation recognised by FINMA. As the Explanatory Report itself acknowledges, the sanction is of a criminal nature within the meaning of Article 6 ECHR. A sanction of a criminal nature requires a sufficiently precise legal basis. Circulars and self-regulation are not legislation in the formal sense and should therefore not serve as a basis for sanctions. In addition, the criteria for a “serious” violation and the principles for calculating the sanction should be set out in the law itself and not only in an ordinance of the Federal Council (Article 37d D-FINMASA).

Fault: According to the Explanatory Report, FINMA does not need to prove that a natural person violated the law; it suffices that the objective elements of the violation are fulfilled. Such strict liability is not appropriate for a sanction of a criminal nature. CVA requests that a sanction may only be imposed if the violation is attributable to an organisational deficiency of the supervised entity, comparable to the concept of corporate criminal liability under Article 102 of the Swiss Criminal Code.

Ne bis in idem: The new sanctions may coexist with existing criminal provisions, in particular with the administrative criminal proceedings conducted by the FDF. To avoid a double burden, the law should explicitly provide that a sanction imposed in one proceeding is credited in the other and that parallel proceedings concerning the same facts are coordinated. Reliance on the general cooperation provision of Article 38 FINMASA is not sufficient.

Separation of functions: In the current enforcement system, FINMA investigates, decides and publishes. With the introduction of sanctions of a criminal nature, the decision on the sanction should be taken by a body that is independent of the investigating unit, e.g. a separate sanctions committee, in order to comply with the requirements of Article 6 ECHR.

Cooperation and self-incrimination: CVA welcomes that a supervised entity may refuse to admit a violation and that admissions may not be used for the sanction without its consent (Article 37b D-FINMASA). However, the general duty to provide information and documents remains unaffected. It

should be clarified that information obtained in the ongoing supervision before the opening of a sanction proceeding may not be used for the sanction either. Moreover, the reduction of the sanction for cooperation beyond the legal obligations (Article 37a para. 3 D-FINMASA) should be specified in the law, e.g. by percentage ranges.

Small institutions: The limitation that the sanction may not lead to "immediate" insolvency offers little protection. For a small institution, a sanction that does not cause immediate insolvency may nevertheless force it to exit the market. The sanction should not jeopardise the ability of the institution to continue to meet its licensing requirements, in particular its minimum capital requirements.

2.2 Settlement (Article 37c D-FINMASA)

CVA welcomes the introduction of a formal legal basis for settlements, which can significantly accelerate proceedings and reduce costs for both FINMA and the supervised entities. However, the draft provides that a settlement includes a waiver of appeal and that proceedings concluded by a settlement are published as well. To make settlements attractive, the supervised entity should have a right to request settlement negotiations, the reduction of the sanction should be determined in the law and the publication of a settlement should be limited to an anonymised summary, at least for non-systemically important institutions.

2.3 Coercive fines (Article 32a D-FINMASA)

Under Article 32a D-FINMASA, FINMA may order a coercive fine of up to five per cent of the average daily operating income for each day of non-compliance with an enforceable ruling, for a maximum period of six months. Over six months, this may add up to approximately nine average daily operating incomes, i.e. roughly 2.5 per cent of the annual operating income. A limitation to SIBs was examined but rejected.

CVA requests that coercive fines be limited to SIBs. In the alternative, coercive fines should only be imposed once the underlying ruling has become final or where the suspensive effect of an appeal has been withdrawn. Further, according to the Explanatory Report, once the imposition of a coercive fine is challenged, no further appeals may be lodged against the underlying ruling. This restriction of legal protection should be abandoned. Finally, the fine should not accrue for periods in which the supervised entity cannot comply for reasons beyond its control, such as dependencies on third parties or technical constraints.

2.4 Mandatory publication of enforcement rulings (Article 22 D-FINMASA)

Under Article 22 para. 1bis D-FINMASA, FINMA shall inform the public about its final rulings in enforcement proceedings opened under Article 30 FINMASA. Legal entities are named, while natural persons are anonymised. The publication takes place when the ruling is issued and not when it becomes legally binding. A publication only after the ruling has become final was rejected because it would allegedly incentivise appeals aimed at delaying the publication.

For small and medium-sized institutions, the publication of their name is regularly more severe than any financial sanction. Banking partners, audit firms, insurers and clients will often terminate business relationships immediately. If the ruling is subsequently annulled by the courts, the damage cannot be reversed, and a subsequent information about the annulment is no adequate remedy. Legal protection is only provided ex post via Article 25a of the Federal Act on Administrative Procedure. This is difficult to reconcile with the presumption of innocence and the guarantee of access to the courts.

CVA therefore requests that (i) the name of a supervised entity is only published once the ruling has become final, (ii) the supervised entity is granted the right to be heard on the content of the publication before it is published and (iii) for non-systemically important institutions, the publication is anonymised unless there is a specific supervisory need in the sense of Article 22 para. 2 D-FINMASA. This is in line with the principles CVA has advocated with regard to warning lists in other jurisdictions: a publication should only occur where there is a minimum threshold of reasoned suspicion, after the right to be heard has been granted and subject to appeal.

Furthermore, Article 22 para. 2 D-FINMASA allows FINMA to inform about ongoing investigations, proceedings and measures where there is a special supervisory need, thereby codifying its current practice regarding the warning list. As this concerns, in particular, crypto and fintech business models in grey zones of the licensing requirements, CVA requests that such information only be given after the affected entity has been heard, except in cases of particular urgency.

2.5 Duty to provide information and to report (Articles 29 and 38a D-FINMASA)

The duty to provide information is extended to all employees of supervised entities, and the duty to report is explicitly extended to all persons who must provide a guarantee of irreproachable business conduct. The personal reporting duty of fit and proper persons creates considerable individual risks, in particular in combination with the stricter industry ban. Its scope should therefore be specified, and it should be clarified that the duty is fulfilled if the person reports internally to the competent body or to the compliance function, which then reports to FINMA. CVA welcomes Article 38a D-FINMASA, according to which self-incriminating statements obtained under threat of a criminal sanction may not be used in criminal proceedings against the respective natural person. However, this protection should explicitly also cover administrative criminal proceedings conducted by the FDF, and employees requested to provide information should be informed of their rights and be entitled to legal counsel.

2.6 Industry ban and activity ban (Articles 33 and 33a D-FINMASA)

Under the draft, FINMA may impose an industry ban also for serious violations of internal rules relevant under supervisory law, and the ban may be imposed permanently in repeat cases instead of for a maximum of five years as under current law. CVA considers the extension to internal rules problematic. Internal rules are drafted by the institution itself, and institutions with stricter internal standards would expose their managers to higher risks. This may create a disincentive for robust internal standards, especially in smaller institutions. The term “internal rules relevant under supervisory law” should therefore be defined in the law and limited to rules implementing explicit statutory requirements. A permanent ban should only be possible in case of repeated, serious and intentional violations.

2.7 Confiscation of profits (Article 35 D-FINMASA)

The draft extends confiscation to all employees of a supervised entity who have made a profit or avoided a loss through a serious violation of supervisory law. CVA does not oppose this extension in principle, but requests clarification that only the profit actually and personally obtained by the employee may be confiscated and that amounts already reclaimed by the employer, e.g. variable compensation, are credited.

3 Audit Reforms (FINMASA and Auditor Oversight Act)

The audit reforms are intended to apply to all supervised entities and not only to SIBs. According to the regulatory impact assessment, the estimated costs for portfolio managers amount to up to CHF

472,000 initially and up to CHF 301,000 per year, which is substantial for small institutions. CVA welcomes that portfolio managers and trustees supervised by an SO are excluded from the approval requirement, the ban on non-audit services and the mandatory rotation. The same reasoning applies to other small institutions, such as fintech licence holders, small securities firms and small managers of collective assets.

3.1 Ban on non-audit services (Article 24 para. 6 D-FINMASA)

Audit firms shall no longer be permitted to provide services to the supervised entity that are not related to audit activities. The market for audit firms with expertise in crypto-assets, DLT and fintech business models is very small. For small institutions, the audit firm is often one of only a few providers with the required specialist knowledge, for example regarding AML, DLT technology or token classification. The ban would force these institutions to procure such expertise from a very limited number of other providers, thereby increasing costs. CVA requests that the ban be limited to SIBs and large institutions or, alternatively, that non-audit services be permitted subject to disclosure to FINMA and a fee cap, similar to the regimes in the EU and the UK.

3.2 Approval of the selection and change of the audit firm (Article 28a D-FINMASA)

Every selection and change of the audit firm shall require FINMA's prior approval, with an application at least six months before the beginning of the audit year and a decision by FINMA within two months. For start-ups and newly licensed institutions as well as for institutions whose audit firm terminates the mandate at short notice, these deadlines are hardly practicable. FINMA can already today order a change of audit firm in justified cases (Article 28a para. 2 FINMASA). CVA therefore proposes replacing the approval requirement by a notification requirement combined with a right of FINMA to object within a short period, at least for non-systemically important institutions.

3.3 Maximum term of audit mandates (Article 28b D-FINMASA)

The term of an audit mandate shall be limited to fourteen years, with exceptions only in case of mergers or crisis situations. Due to the very limited number of audit firms with crypto and DLT expertise, a mandatory rotation may lead to situations in which no suitable alternative audit firm is available. CVA requests an additional exception where no adequate alternative audit firm is available and that small institutions be exempted from the mandatory rotation. Further, the risk-based determination by FINMA of the date of the first mandatory change should be based on transparent criteria.

3.4 Direct audits by FINMA (Article 23 D-BA)

FINMA shall be able to conduct direct audits at banks at any time and without restriction. CVA requests that such direct audits be risk-based, that duplications with the audits of the audit firm be avoided and that any costs charged to the institution be transparent and proportionate.

4 Corporate Governance and Early Intervention (Banking Act)

The following measures apply to banks, including CVA members with a banking licence. CVA requests that the dispatch clarify to what extent these provisions apply to holders of a fintech licence pursuant to Article 1b BA, and that they apply to them, if at all, only in a proportionate manner.

4.1 Accountability regime and duty of care (Articles 3c, 3d and 37n D-BA)

CVA welcomes that the accountability regime will only apply to SIBs and banks with at least 250 full-time equivalents, as the benefits for smaller banks with clearer structures would be disproportionate to the costs. However, FINMA may designate further banks to be subject to the regime. The criteria for such a designation should be set out in the law to ensure legal certainty. The duty of care applies to the fit and proper persons of all banks, and a serious breach entitles FINMA to apply the supervisory instruments of the FINMASA. As the duty of care largely overlaps with the existing guarantee requirement, its independent scope and the threshold of a "serious" breach should be specified to avoid a double sanctioning of the same conduct.

4.2 Compensation principles (Article 5c D-BA)

CVA welcomes that the specific requirements on deferral, malus and clawback will only apply to SIBs. The general compensation principles for all banks should be implemented in a proportionate manner, taking into account company size and risks, and should not lead to a de facto extension of the FINMA circular on remuneration schemes to small banks.

4.3 General corporate governance requirements (Articles 3 et seqq. D-BA)

According to the regulatory impact assessment, the elevation of existing corporate governance requirements to the level of the law does not entail any material changes or additional costs. CVA takes note of this and requests that the implementing ordinances and FINMA circulars maintain the existing differentiation by bank categories and do not introduce new material requirements through the back door.

4.4 Early intervention and withdrawal of suspensive effect (Articles 19, 24 and 52f D-BA)

Under Article 19 D-BA, FINMA may already intervene in the ongoing supervision if a bank could violate organisational requirements "in the foreseeable future", i.e. before any violation of supervisory law has occurred, and may, inter alia, restrict the business activities of the bank. Appeals against such measures shall have no suspensive effect for all banks. CVA considers this combination problematic. A preventive intervention based on a forecast, combined with immediate enforceability, leaves the affected bank without effective legal protection, in particular where business restrictions concern innovative business models such as crypto custody or staking. The withdrawal of the suspensive effect was originally intended for SIBs only, owing to the potential impact on financial stability. CVA therefore requests that the withdrawal of the suspensive effect be limited to SIBs and that the intervention criteria under Article 19 D-BA be specified in the law.

5 No-Action Letters (Article 56 paras. 2 and 3 D-FINMASA)

CVA expressly welcomes the introduction of time-limited guarantees for the suspension of enforcement (no-action letters). According to the Explanatory Report, this instrument is intended, in particular, for smaller market participants and for situations in which enforcement would be inexpedient or contradictory, e.g. in view of an imminent change in law or unintended gaps in the law. This is particularly relevant for innovative business models in the crypto and DLT sector, which frequently face regulatory uncertainties. However, the draft provides that there is no right to a no-action letter and that the decision lies solely within FINMA's discretion. CVA requests that supervised entities and industry associations be entitled to submit a reasoned request, that FINMA decide on such requests within a reasonable period and that no-action letters be published in anonymised form so that other market participants in the same situation can rely on them.

6 Summary

In summary, CVA requests the following:

a. Limitation of pecuniary administrative sanctions, coercive fines and the mandatory naming of institutions to SIBs or, at a minimum, introduction of a risk-based threshold taking into account size, business model and client base;

b. Clarification that, for violations of other financial market acts by small market participants, including SRO-affiliated financial intermediaries, FINMA primarily applies its existing instruments; exemption of SO-supervised portfolio managers and trustees from the new sanction instruments or, at a minimum, their coverage by the risk-based threshold;

c. If pecuniary administrative sanctions are retained: a precise legal basis in the law, the requirement of an organisational deficiency, coordination with administrative criminal proceedings and a decision by an independent body;

d. Publication of enforcement rulings naming the institution only once the ruling has become final and after the right to be heard has been granted;

e. No coercive fines before the underlying ruling has become final, and no restriction of appeals against the underlying ruling;

f. Exemption of small institutions from the ban on non-audit services, the approval requirement and the mandatory rotation of audit firms, in line with the exemption for SO-supervised portfolio managers and trustees;

g. Limitation of the withdrawal of the suspensive effect to SIBs and specification of the early intervention criteria in the law;

h. A right to request no-action letters and their publication in anonymised form.

We hope that we can contribute with these statements to the consultation and to a proportionate and risk-based further development of the Swiss supervisory framework. Please do not hesitate to contact us if you have any questions or wish to discuss our comments further.

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Kind regards,

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