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The SIX Swiss Exchange Implements New Regulations Governing the Listing on the SIX Swiss Exchange

Reference: CapLaw-2009-39

On 1 July 2009 a complete new set of rules governing the listing of securities on the SIX Swiss Exchange (Listing Rules) will enter into force. These new rules will replace the old listing rules dating back to 1996, which have since then been amended several times but only partially. The main goal of the overhaul was to streamline and simplify the structure of the current regulations, to bring them in harmony with legislative developments since 1996, and to introduce further or alternative regulations reflecting today's practice in international capital markets.

The authors participated in a working group that was entrusted with the revision of the Listing Rules and all ancillary regulations. With this insight as to the work undertaken we wish to highlight some particular features of the revisions and to direct readers to particular novelties that may be of interest to capital market specialists in Switzerland and abroad. But we also wish to put these developments into a wider perspective – the formation of SIX Group.

By René Bösch / Philippe Weber / Thomas Reutter

1) Organizational Changes at the SIX Swiss Exchange

In 2008 the SIX Group was formed to combine the SWX Swiss Exchange (today called SIX Swiss Exchange), SIS (the Swiss clearing and settlement system), and Telekurs (the Swiss financial news provider) under one roof to form a powerful group with international standing in the competing market for exchanges and clearing and settlement services. The SIX Group is offering the entire value chain of the financial market infrastructure whose core element is the Swiss value chain. The securities trading business field comprises the cash and derivative markets, distribution information products, index calculation and the development and calculation of electronic trading platforms. The SIX Swiss Exchange serves as the listing and securities trading platform within the SIX Group.

After the formation of the SIX Group, the group decided to realign its organizational structures and to more clearly distinguish rule setting competencies from tasks relating to surveillance and enforcement. Therefore, the Admission Board which was responsible for listing and admission to trading of securities as well as the supervision of the issuers has been replaced by two separate bodies, the Regulatory Board that will act as the rule and policy setting body, and the SIX Exchange Regulation, which will be responsible for the listing of securities as well as the surveillance and enforcement. In yet a further important step towards the repositioning of the SIX Group, it had been decided to repatriate the trading in Swiss blue-chip shares that was, since June 2001, effected on a UK trading platform operating under the name virt-x and later as

SWX Europe. The trading in these Swiss blue-chip shares was repatriated to Switzerland with effect as of 4 May 2009. Since then all shares of Swiss companies that are listed at the SIX Swiss Exchange are again traded on the SIX Swiss Exchange platform in Switzerland. As a result, those Swiss companies that were previously admitted to trading on the EU compatible segment of the SWX Europe are no longer subject to the EU Prospectus Directive, the EU Transparency Directive and the EU Market Abuse Directive, unless the shares of such company continue to be admitted to trading on one of the European stock exchanges.

All these changes necessitated a general overhaul of the existing Listing Rules, but as mentioned above it was also time to reflect on more than ten years practice with the 1996 Listing Rules and to adapt those to recent developments in legislation and market practices, and to give regard to some novel features in international capital markets. Moreover, it was the goal to streamline the current codification of rules which was spread out in Listing Rules, additional listing rules, guidelines, circular notices, notices etc.

The concept of the new Listing Rules is rather easy:

- The main body of the new rules is embedded in the Listing Rules of the SIX Swiss Exchange. This document is the centerpiece of the new legislation and contains general provisions on issuers, on the maintenance of listing as well as on sanctions. In addition, it contains all rules pertinent to the listing of equity securities, including procedural aspects.

- Rather than also including particular rules on the listing of debt securities or derivatives in that document as well, it was decided to split out those rules into sets of Additional Rules, *i.e.* Additional Rules for the listing of Bonds and Additional Rules for the listing of Derivatives.

- The Listing Rules and the Additional Rules are supplemented by Directives which set forth detailed implementation rules about particular rules that are contained in the Listing Rules. For instance, the Listing Rules do contain general provisions about the free float of equity securities required for a listing of such securities at the SIX Swiss Exchange, the pertinent Directive contains then detailed rules as to the computation of that free float and particular situations such as spin-offs etc.

This three-part approach allows practitioners a rather easy access to the pertinent rules: the Listing Rules will form the centerpiece, and practitioners will find particular rules on the listing of the type of securities concerned in one coherent set of rules, be it as one integral part in the Listing Rules or be it in one of the Additional Rules. And finally, the regulatory segments that were developed over the last few years have been abolished so that in the future there is only one segment for listing and trading at the

SIX Swiss Exchange. Within the equity market, however, it now must be distinguished between new regulatory standards: the regulatory standards will determine the various rules that will be applicable to particular issuers of equity securities rather than the securities themselves. It must be distinguished between the Main Standard, the Domestic Standard for smaller Swiss companies, the Standard for Investment Companies and the Standard for Real Estate Companies. In each of these regulatory standards specific additional rules will apply.

2) Summary of the Most Important Changes

The amendments made to the Listing Rules relate to various aspects of issuers, the requirements on securities for their admission to listing, requirements for prospectuses, requirements for the maintenance of listing, as well as sanctions. Herein we shall only mention a few significant changes which may be of general importance and relevance for Swiss and international issuers as well as their advisors:

– ***Languages***

From July 1 onwards all communication with the SIX Swiss Exchange (be it with the Regulatory Board or be it with the SIX Exchange Regulation) may be in German, French, Italian ***or English.*** This means that from then on all documents to be prepared in connection with the listing or the maintenance of the listing as well as all related correspondence may be in English only, without the need to prepare any documents in German, French or Italian. This is in particular relevant with respect to the prospectus and listing notices.

– ***Listing Prospectus***

Under the new rules it will be permissible to prepare a two-part listing prospectus for equity securities. The idea is to have a near to final prospectus where only the information about the issue price and the volume is not yet contained. Provided that such prospectus contains information about the determination of the volume as well as pricing and the timing of the issue, it is permissible to add a supplement to this first part of the prospectus containing only the information about volume and pricing. These two documents then form the listing prospectus for purposes of a listing of equity securities at the SIX Swiss Exchange.

The provisions about prospectuses for bond and derivative issuances have also been revised, in particular in relation to issuance programs. In the future the three-part prospectus will no longer be permissible, but rather just the stand-alone prospectus or a base prospectus set up in accordance with the pertinent EU regulations.

Since a few years incorporation by reference is permissible for prospectuses in relation to bond issuances. In the future, however, incorporation by reference will generally be permissible under the Listing Rules for all kinds of prospectuses, provided however, that the range of documents that may be incorporated by reference is limited in line with the pertinent standards of applicable EU law.

– ***Disclosure Schemes***

The disclosure schemes that determine the exact information that must be contained in a prospectus have been overhauled and streamlined. Several disclosure items that were required so far have been deleted, whereas some new requirements have been introduced. For instance, in relation to equity securities it will now be required that significant risk factors be presented in a prominent place. Moreover, all listing prospectuses will need to contain information about legal proceedings and convictions against members of the administrative, management or supervisory bodies.

– ***Publication of Listing Prospectuses***

In the future it will be permissible to publish the listing prospectus on the issuer's website rather than to provide for hardcopies in all instances. However, even in case of a publication on the website of the issuer must investors still be able to demand a printed version free of charge on request. Further, the Listing Rules will allow in the future that the SIX Swiss Exchange will publish admitted listing prospectuses for archive purposes on its website, but the date on which this service may be introduced has not been yet determined.

– ***Listing Notices***

The requirement to publish listing notices for debt and derivative securities was already abolished last year. In relation to the listing of equity securities, however, the requirement to publish listing notices will continue to apply. But such listing notices may in the future be published in English only and they may be published by electronic means at a central location, for instance on the SIX Swiss Exchange website.

– ***Issuer Declaration***

All issuers, whether already listed at the SIX Swiss Exchange or whether applying for a listing in the future, must sign a separate declaration of consent in respect of legal proceedings provided for in the Listing Rules, in particular the arbitration clause. The SIX Swiss Exchange will recommend that this declaration be in a particular form, which will also be made available on the SIX Swiss Exchange. It is noteworthy that the SIX Swiss Exchange has already addressed or will address all issuers of currently listed securities on the SIX Swiss Exchange and will submit

them such new consent form for execution. For the future listing of securities of a new issuer, this form will need to be submitted in addition to the other listing documentation.

– ***Corporate Calendar***

For issuers of equity securities that are listed on the SIX Swiss Exchange it will now be required that they publish on their website a corporate calendar that contains information about important dates, specifically the date of the annual general meeting and already scheduled dates on which financial information will be published.

– ***Sanctions***

The range of potential sanctions has been substantially widened so that in the future fines will be possible up to a maximum of CHF 10,000,000 (currently CHF 200,000). Whereas the distinction will now be made between negligent violations of the Listing Rules in which case the maximum of the fine will be up to CHF 1,000,000, and intentional violation of the Listing Rules which may trigger fines up to CHF 10,000,000.

Additional amendments relate to the approval procedure or to some more technical aspects.

3) Outlook

The undersigned believe that the new regulations should meet widespread expectations of market participants. In particular we believe that investor protection on the one hand and flexibility in the listing process on the other hand have been put into the right balance and that important novelties in the international capital markets have been adequately reflected in the new Swiss Listing Rules. Also, the form of the new regulations which contain cross references to other applicable provisions as well as the easily maneuverable documentation on the SIX website will facilitate the understanding and application of the new rules quite significantly. To that extent the new rules deserve applause at this point in time, but also will need to face the challenge in their application in a fast moving environment.

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Minimum Offer Price Requirements—FINMA Backs Takeover Board's Decision to Deviate from Longstanding Liquid Market Test

Reference: CapLaw-2009-40

On 16 March 2009, the Swiss Takeover Board (TOB) ordered the bidder MMA to arrange for a valuation of the Harwanne-shares to determine the minimum offer price even though the target shares complied with the liquidity-criterion pursuant to the TOB's longstanding liquid market test. On 6 April 2009, FINMA dismissed MMA's appeal and held that the existence of particular circumstances of the case justified the application of additional test-criteria and TOB's decision. This article analyzes the FINMA decision of 6 April 2009 and explores whether the FINMA decision implies a general change of the liquid market test or merely constitutes an exception to the main rule.

By Lorenzo Olgiati / Martin Weber

1) Facts

Harwanne Compagnie de participations industrielles et financières SA, Geneva, (Harwanne or Target) is a Swiss corporation listed at the SIX Swiss Exchange, with a share capital of CHF 53,000,000 divided into 53,000,000 bearer shares (Target Shares).

MMA Vie SA, Le Mans (MMA), is a private corporation incorporated under French law.

On 30 January 2009, MMA announced the recent conclusion of several share purchase agreements at the price of CHF 3.45 per share which increased MMA's participation in Harwanne from 20.14% to 62.42% of the share capital and voting rights. At the same time, MMA published the prior announcement for a public takeover offer for all outstanding shares of Harwanne for the price of CHF 2.60 per share.

By decision 403/01 of 26 February 2009 the Takeover Board (TOB) held that MMA's public takeover offer was compliant with the Stock Exchange Act (SESTA).

On 23 and 26 February 2009 respectively, Amber Master Fund (Cayman) SPC (holding 10.6% in Harwanne) (Amber) and Serdac SA (holding 6.61% in Harwanne) (Serdac) claimed party status to the pertinent takeover proceedings. These petitions were granted by the TOB on 3 March 2009.

On 16 March 2009, following individual appeals from the qualified shareholders Amber and Serdac which challenged the offer price of CHF 2.60 by alleging a violation of the relevant minimum price rules due to illiquidity of the Target Shares, the TOB reversed its first decision. It ordered the bidder MMA to engage the review body (*Prüfstelle;* article 25 SESTA) to value the Target Shares for the determination of the minimum price to be applied to MMA's public takeover offer (TOB decision 403/02).

In its decision, the TOB considered that during the relevant VWAP-Period (*i.e.* the 60 trading-day period prior to the bid during which the Volume Weighted Average Price (VWAP) of all on-exchange transactions executed is determined) the trading volumes were very low, in particular, if only the trades of trading parties independent from the target Harwanne (which accounted for 68.1% of the trades) and from MMA were factored in. The TOB also took into consideration that Harwanne, a holding company without SIX Swiss Exchange-investment company status but whose assets were 82% liquid, had not disclosed any information to the capital market since the publication of its semi-annual report on 16 September 2008. According to the TOB, under these circumstances and in view of the current financial crisis, a formation of a stock market price reflecting a reliable value for the Target Shares had not been possible. The TOB concluded that these particular circumstances as a whole called for an extension of the liquidity-test and declared the Target Shares illiquid.

On 23 March 2009 MMA filed an appeal with the Swiss Financial Market Authority FINMA (FINMA) requesting the annulment of the TOB decision 403/02. MMA disputed the TOB's considerations and argued *inter alia,* that the TOB had violated the constitutional freedom of commerce by considering the Target Shares not to be liquid; in that context, MMA further challenged the TOB's narrow interpretation of article 40 FINMA Stock Exchange Ordinance (SESTO-FINMA) and claimed, in addition, that the said provision had no sufficient legal basis. MMA reiterated that the shares of Harwanne were liquid pursuant to the criterion set by the TOB in its Communication no. 2, since the Target Shares were traded on 47 out of 60 trading days during the VWAP-period. According to MMA, the Swiss concept of liquidity was unclear and needed to be defined in a way that provided a bidder with a clear situation prior to the launch of a bid and ensured that the majority of the equity securities being part of the Swiss Performance Index (SPI), among them Harwanne, would not be considered as illiquid. Finally, according to MMA, in decision 403/02 the TOB had changed its longstanding practice and had thereby violated the principles of equality before the law and legal certainty to the detriment of MMA.

Upon FINMA's invitation, Harwanne, Serdac, Amber and the TOB each commented extensively on MMA's appeal on 31 March 2009 and petitioned to reject the appeal.

2) Considerations of FINMA

The main question presented to FINMA was whether, under the specific circumstances, the Target Shares were to be considered 'liquid' (as alleged by MMA), with the consequence of MMA's offer price of CHF 2.60 to be confirmed, or 'illiquid' (as determined by the TOB in its decision of 16 March 2009 and alleged by the qualified shareholders and by the Target), triggering the duty of the bidder MMA to arrange for a valuation of the Target Shares.

FINMA first examined the applicable legal framework and addressed the question of how to interpret the Communication no. 2 of the TOB dated 3 September 2009 in relation to article 40 (4) SESTO-FINMA:

Article 40 (2) SESTO-FINMA provides that the 'stock market price' (in the sense of article 32 (4) SESTA) shall equal the VWAP of all on-exchange transactions concerning the Target Shares executed during the VWAP-period. However, if the Target Shares are 'illiquid' prior to the bid, article 40 (4) SESTO-FINMA requires that the review body *(Prüfstelle)* must make a valuation of the Target Shares.

As to the definition of 'liquidity', FINMA held that the Banking Commission (FBC), as the former supervisory authority of the TOB, had expressly allocated the competence to define 'liquidity' to the TOB for publication in its official 'Communications' *(Mitteilungen).* The corresponding TOB Communication no. 2 of 3 September 2007 provides that equity securities are only qualified as 'liquid' if they were traded on at least 30 days out of the 60 trading days prior to the launch of the bid; it further specifies that, if justified by particular circumstances, the 30/60 trading-day rule would not be the only criterion to assess the liquidity of the Target Shares, but that namely the trading volume during the VWAP-period would constitute an additional criterion.

The FINMA then examined the question whether in the light of the particular circumstances of the case the application of additional criteria would justify to reverse the presumption of liquidity of the Target Shares even though they had been traded on 47 out of 60 trading days.

Inter alia, the FINMA held that

- the TOB had explicitly reserved the right to use other criteria than the 30/60 trading days-criterion for the liquidity assessment and that the TOB did, therefore, neither breach the Communication no. 2 nor article 40 (4) SESTO-FINMA;
- the daily average trading volume during the VWAP-Period of 20,905 Target Shares which ranked at 89th position out of 225 SIX Swiss Exchange listed companies was not material as it corresponded to a daily turnover of merely CHF 49,754 which is equal to 0.039% of the share capital;
- MMA's argument that a qualification of Harwanne's share as illiquid (despite its mid-range ranks among the 225 SIX Swiss Exchange listed companies) would mean that the shares of most of the companies listed on the SIX Swiss exchange would consequently also have limited liquidity, was of little importance. [...]. The rationale of the regulator had been to protect an equitable exit for the minority shareholders and not to ensure the liquidity of the shares listed on the SIX Swiss Exchange.

According to FINMA, it is, in any case, notorious that most issuers listed on the SIX Swiss Exchange had only a low liquidity; and

– the special circumstances of the case at hand justified applying additional criteria to assess the liquidity of the Target Shares: the specifics of the balance sheet and the business activities of Harwanne, the lack of publicly available information on Harwanne's financials during a major financial crisis and the fact that more than 68% of the shares traded during the VWAP Period were traded by the Target itself, which, in the opinion of FINMA, created a distortion of the liquidity parameters.

On that basis, FINMA concluded that the market of the Target Share of Harwanne had not been liquid. It held that the TOB in its decision 403/02 had not violated the constitutional freedom of commerce, had not applied arbitrarily article 40 SESTO-FINMA and the Communication no. 2 and had not effected an illegitimate change of practice and that MMA's claims were, thus, unfounded and rejected.

3) Conclusions and Outlook

The MMA bid for Harwanne is the first case under the revised 2009-takeover regulations in which qualified shareholders (article 56 (3) SESTO-FINMA) have exercised their rights as parties to the takeover proceedings. The case shows that the impact of qualified shareholders on an offer may be significant and have the potential to substantially change the planning of the bidder in terms of timing, transaction costs and substance of the offer. As a consequence, while the protection of the qualified shareholders has been increased, the course of a takeover bid will, particularly for the bidder, be less predictable.

While the decisions of the FINMA and the TOB in the Harwanne case under the highly specific circumstances appear to be equitable, potential bidders and their advisors are left in the dark, slightly perplexed and in search of guidelines for future transactions. As the two decisions lack any rules or criteria establishing how to deal with future cases, the question is whether the decisions of FINMA and/or TOB imply a general change of TOB's longstanding liquid market test or merely constitute an exception to the main rule.

A reading of the TOB decision 403/02 seems to suggest that the TOB perceives the case as an exception; it is clearly emphasized that only the particular circumstances taken as a whole led the TOB to deviate from the consistently applied 30/60 trading-day criterion. In contrast, FINMA's statement that it is, in any case, notorious that most issuers listed on the SIX Swiss Exchange have only a low liquidity is questionable in the given context. It raises concerns that equity securities of a substantial number of issuers in future takeover bids could be qualified as illiquid despite their compliance with the 30/60 trading-day requirement pursuant to Communication no. 2 and, pos-

sibly, even without the existence of justifying particular circumstances. In such a situation, the question also arises as to whether potential bidders should as a matter of precaution and partial protection consider, in doubtful cases, arranging for pre-bid fairness opinions in relation to the offer, a costly measure however, aiming to counter allegations from the authorities or involved parties as to the existence of price-relevant special circumstances.

With MMA's appeal to the Federal Administrative Court on 15 April 2009, it appeared that the court would have the opportunity to clarify the situation. However, on 18 June 2009 MMA withdrew its appeal. The appeal became baseless after MMA—apparently as a reaction to the FINMA decision—increased its offer price to CHF 3.45 for all shareholders on 14 April 2009, an offer price which was found to be in line with the required valuation report of 18 May 2009 and approved by the TOB on 29 May 2009 (decision 403/06)).

Decision of the FINMA Takeover Committee of 6 April 2009 relating to TOB decision 403/02 of 16 March 2009 (Harwanne) (see *http://www.takeover.ch*).

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Share Buy-back: Revision of Communication No. 1

Reference: CapLaw-2009-41

The Takeover Board is proposing a revision of Communication No. 1 dealing with share buy-backs. The main changes include the abolishment of the general exemption of buy-backs of up to 2%, the limitation to 25% of the volume of the relevant trading day or the preceding trading day, ways to avoid suspension of buy-backs during black-out periods, the adoption of restrictions on repurchases of more than 10% of the share capital (thereby generally imposing its controversial practice regarding Partners Group) and, in addition to the 10% limitation, a limitation of the notification procedure to purchases of up to 20% of the free-float.

By Dieter Gericke

1) Background

a) Introduction

On 24 April 2009, the Takeover Board published a draft revision of Communication No. 1 (Comm 1), dealing with share buy-backs of companies listed at a Swiss stock exchange. The revised communication would take the form of a 'circular' and be named Circular No. 1 (the draft of the Takeover Board being hereinafter referred to as Draft-

Circ 1). The proposed Circular No. 1 does not follow the wording and structure of Comm 1 and would replace Comm 1 in its entirety. The commenting period ended on 7 June 2009. At the date of this manuscript, the comments were not yet published by the Takeover Board.

b) Legal Nature of the Proposed Circular No. 1

The legal nature of a circular is (like the nature of the former 'communication') unclear. Typically, government agencies use circulars in order to communicate to the regulated subjects the future path of their practice in specific matters in a general way. While, strictly speaking, listed companies are only obliged to observe the relevant statutory law and ordinances, such circulars enjoy law-like effect and enforceability. This is problematic under a rule of law standpoint, even more so as a circular is not binding on the agency itself (cf. *Dieter Gericke, Funktioniert der Rechtsstaat im Kapitalmarkt?, in: von der Crone/Forstmoser/Weber/Zäch (Hrsg.), Aktuelle Fragen des Bank- und Finanzmarktrechts, Festschrift für Dieter Zobl zum 60. Geburtstag, Zürich 2004, 359, 366*). DraftCirc 1 explicitly states that it may not be relied upon, as compliance with it creates a mere rebuttable presumption (DraftCirc 1, no. 3). Furthermore, legal provisions to be enacted by the Takeover Board would require formal approval by Swiss Financial Market Supervisory Authority (FINMA) (article 23 (2) Stock Exchange Act (SESTA)). Unfortunately, recent revisions of takeover laws and ordinances and of the SIX Listing Rules did not include a formal implementation of rules for share buy-backs.

c) Legal Basis of the Regulation of Share Buy-backs

While it seems appropriate to regulate share buy-backs by listed companies in order to ensure market transparency, the legal basis for the regulation of share buy-backs as applied and envisaged by the Takeover Board is not evident. Given the lack of specific regulations of share buy-backs, the Swiss Federal Banking Commission (now FINMA) declared public offers of a company for its own shares to be public offers within the meaning of the SESTA *(Order of 4 March 1998 re Pharma Vision/BK Vision/Stillhalter Vision, EBK-Bull. 38/1998, 38).* The Takeover Board deems any public announcement of the intention to purchase own shares to be a public offer for shares, which, as a rule, would need to comply with takeover regulations (Comm 1, section I). As the takeover regulations seem too onerous and not adequate for a standard buy-back program (in particular, they do not fit a buy-back through the stock exchange), the Takeover Board, based on its power to grant exemptions from the takeover regulations (article 4 Takeover Ordinance (TOO)), issued Comm 1 in order to provide for a general exemption for repurchases of up to 2% and for a simplified notification procedure and a more adequate framework for repurchases between 2% and 10% of the share capital (see also *BSK BEHG-Tschäni/Jffland/Diem, 2nd ed. Basel 2007, Art. 22 no. 16*). Given this justification, share buy-backs that are *not publicly announced* are not, and will not be pursuant to DraftCirc 1, regulated by the Takeover Board.

However, the public announcement of the intention to purchase shares over the stock exchange has always been a shaky justification for the regulation. A general announcement of potential purchases, without indication of terms, in particular a purchase price, is not an offer in the first place. Technically, the announcement of a share buy-back over the stock exchange is an announcement of upcoming private purchases of shares over the market, which serves transparency and does not enable tenders of shares by the public. Likewise, the announcement of an upcoming buy-back of shares through the issuance of put options, through a tender offer, through a Dutch auction, or the like is not a public offer for shares (usually, subject to article 53 TOO, only formal pre-announcements or offers trigger the application of takeover regulations). Once launched, however, these latter types of share buy-backs do meet the criteria of a public offer for shares and are, therefore, subject to the Takeover Board's authority.

As the Takeover Board's jurisdiction is limited to public offers (article 23 (3) SESTA), it has, in principle, no jurisdiction in questions of corporate law or stock exchange law and regulations (other than those governing public offers). Therefore, some of the proposals made in DraftCirc 1 may go beyond the Takeover Board's authority (see in particular sections 2 b, d and h below).

2) Select Provisions of Draft Circular No. 1

a) No De Minimis Exemption

Unlike Comm 1, DraftCirc 1 does not provide for a general exemption of all repurchases of shares of up to 2%. Typically, such small buy-backs are not publicly announced and, therefore, do not fall under the regulation in the first place. Nevertheless, as this exemption did not result in material abuses, it seems unnecessary to require a formal exemption procedure for such de minimis programs. Without such exemption, likely no company would announce such small programs anymore. With a view to market transparency, this would be an undesirable effect.

b) No Violation of Minimum Free-float Requirements (DraftCirc 1, No. 8)

DraftCirc 1 provides that the execution of a share buy-back program may not result in minimum thresholds stated by applicable listing rules no longer being met. According to the report of the Takeover Board on DraftCirc 1 (*Takeover Board, Rapport sur le projet de Circulaire no 1 de la Commission des OPA: exonération des programmes de rachat d'actions, Zurich, 24 April 2009, Cm 8;* the TOB Report) this means, for companies listed at the SIX Swiss Exchange, that a program that could lead to the free-float dropping below 25% or such free-float no longer representing a capitalization of CHF 25 million (article 17 former SIX Listing Rules, article 19 revised SIX Listing Rules—in force as of 1 July 2009), would not be permitted at all or not be exempted from the regular takeover regulations or at least not in a simplified procedure.

While such restrictions may arguably be for the benefit of shareholders (not of those selling shares, but of those not selling), it is not within the powers of the Takeover Board to enforce compliance with listing rules. To the contrary, this would create confusion. For example, the SIX Listing Rules do not require an issuer to observe the above minimum-thresholds *after* the listing (article 75 former SIX Listing Rules, article 26 revised SIX Listing Rules). Thus, the Takeover Board would take a stricter stance than the competent authority and its regulations.

c) No Purchase of Shares outside the Buy-back Program (DraftCirc 1, No. 10)

DraftCirc 1, no. 10, says that, during a buy-back program, a company is not entitled to buy shares that are the object of such buy-back program *outside* such program. The meaning of this provision is unclear. In particular, the following questions arise:

(i) whether the restriction only affects share purchases for the purposes mentioned in the notice of the buy-back program,

(ii) whether it also prohibits unannounced buy-backs, and

(iii) what is considered a purchase 'outside the program'.

The TOB Report, Cm 10, seems to imply that no share purchases, whatsoever, are allowed outside the program, *i.e.* the answer to i would be no, and the answer to ii yes.

While there may be reasons to prohibit share purchases for the purpose announced in connection with the buy-back program (*e.g.* the cancellation of the shares) outside the program, a restriction of parallel (unannounced) buy-backs for *other purposes* (*e.g.* the delivery of shares to an employee for stock options) would have no evident justification. Such prohibition of share purchases outside the program would also conflict with regular takeover rules and the respective Takeover Board practice, which do allow for purchases of target shares outside the public offer *(Recommendation of August 24, 2005, re Leica Geosystems Holdings AG, consid. 7.3.).* Moreover, the legal basis seems too weak for the Takeover Board to actually prohibit share purchases by a company and, a fortiori, unannounced share purchases (cf. section 1 c above).

However, the actual impact of these restrictions strongly depends on the answer to question (iii). Given that DraftCirc 1, no. 34, would explicitly allow for block trades outside the stock exchange in case of share buy-back programs for repurchases through the stock exchange, it seems clear that the restriction does not aim at the manner in which shares are repurchased (stock exchange, off-exchange transaction, put option, etc.). Rather, it seems that the Takeover Board desires that the framework applicable on the share buy-back—*e.g.* regarding prices that may be paid, restrictions during black-out periods, etc.—must be observed with regard to any share purchases during the term of a buy-back program. Based on this understanding, DraftCirc 1 would not

actually prohibit share purchases, but it would submit all share purchases effected by the company during the term of an announced buy-back program to the rules governing such buy-back program. While this would be more acceptable than an actual prohibition, the rationale is unclear: The shareholders have no reason to believe or to be protected in their belief that the company observes the rules of the announced buy-back program in any other context.

d) Restriction of Purchases Leading to more than 10% Share Ownership (DraftCirc 1, No. 12)

In its recent decision regarding a share buy-back by Partners Group Holding AG *(Order 408/01 of the Takeover Board of 2 April 2009, re Partners Group Holding AG),* the Takeover Board held that the 10% limitation set out in article 659 Code of Obligations (CO) is a fundamental provision of mandatory corporate law for the protection of creditors. Therefore, the Takeover Board concluded that a share buy-back that leads to a company owning more than 10% of its own shares constitutes a clear violation of corporate law and that the company is not entitled to continue the program, unless the company has undergone all material steps of a capital reduction procedure with respect to such shares (notification of creditors, two-months waiting period, auditors' certificate, shareholder approval, etc.).

This decision is a good example of why it is dangerous if the Takeover Board extends its jurisdiction to fields of law that are within the competence of other authorities: Pursuant to precedents of competent courts and the majority of legal scholars, the 10% limitation is not an enforceable provision, but only a so-called *'Ordnungsvorschrift'.* Its violation does not, as a rule, affect the validity of a share purchase *(BSK OR II-Lenz/von Planta, 3rd ed. Basel 2008, Art. 659 no. 11; Werlen/Sulzer, Erwerb eigener Aktien, in: Vogt/Stupp/Dubs (Hrsg.), Unternehmen – Transaktionen – Recht, Liber Amicorum für Rolf Watter, Zürich 2008, 493, 498).* Furthermore, by imposing its view, the Takeover Board goes beyond the means of creditor protection provided by article 659 CO (freely disposable reserves in the amount of the purchase price and creation of a special reserve) and article 680 CO. The question of admissibility under corporate law is not a preliminary question that needs to be answered by the Takeover Board in order to be able to address the questions arising under takeover laws and ordinances. It is therefore doubtful that the Takeover Board has authority to restrict share buy-backs by which a company could pass the 10% limitation set out in article 659 CO. In any case, such restrictions should not be included in DraftCirc 1 as a general rule (cf. also *Romerio/Lambert, Vernehmlassungsantwort vom 5. Juni 2009, C. forthcoming*).

e) Limitation of 3 Years (DraftCirc 1, No. 22)

DraftCirc 1 limits the duration of buy-back programs to 3 years. Such limitation may prevent abusively long buy-back programs. In light of the positive experience with Comm 1 that did not provide for such restriction, it may, however, be superfluous.

f) Permission of Blind Purchases during Black-out Periods (DraftCirc 1, No. 27 ss.)

As a welcome addition, DraftCirc 1 includes the practice of the Takeover Board on exemptions from the rule that a market buy-back has to be suspended during black-out periods, in particular, during periods of a postponement of the publication of price-sensitive facts (cf. in particular, *Recommendation of the Takeover Board of 27 March 2008, re Swiss Life Holding*).

Although not explicitly mentioned in DraftCirc 1, no. 29, a company must, prior to the start of the share buy-back, be able to provide a framework of price limitations and other parameters to be observed by the bank mandated with the share buy-back (cf. also *proposal Romerio/Lambert, op. cit., E.*).

g) Limitation on Stock Exchange Buy-backs to 25% of the Daily Volume (DraftCirc 1, No. 33)

Pursuant to Comm 1, only buy-backs through the regular trading line (rather than a separate trading line) are restricted in volume. The wording of DraftCirc 1 seems to extend the volume restriction to buy-backs through a separate trading line. The TOB Report, No. 33, is somewhat unclear and may imply that the restriction is still meant to refer to trades over the regular trading line only. Given the transparency of trades over a special trading line, at which only the company may act as buyer, there is less need to restrict the volume on the separate trading line.

While Comm 1 restricts trades through the regular trading line to 25% of the average daily trading volume during the last 30 trading days, DraftCirc 1 would prohibit trades of more than 25% of the trading volume on the day of purchase or on the preceding trading day. Both rules have their flaws: The 30-trading-day average may be too restrictive at the time of the purchase, while the same-day or preceding-day volume may mean that the company, rather than creating market liquidity on trading days with poor or no volumes, may add to the illiquidity of its shares by not executing any purchases. Therefore, a mix of the two approaches may be preferable, *i.e.* that a company could buy up to the higher of 25% of the 30-trading-day average volume, the purchase-day volume and the preceding-day volume.

h) No Simplified Exemption in Case of Programs for more than 20% of the Free float (DraftCirc 1, No. 49)

If the size of the buy-back program exceeds 20% of the free-float, the notification procedure will, according to DraftCirc 1, no longer be available. Pursuant to the TOB Report (No. 49), the rationale for this new rule is the danger of material effects on the liquidity of the shares. It seems, however, unclear what the Takeover Board would or could do in case of such danger, as it is not its task to ensure market liquidity. A restriction of a share buy-back for market liquidity reasons would certainly not be within the powers of the Takeover Board. Given that this concern needs to be dealt with by FINMA and the stock exchanges as the competent authorities, it should not be addressed by the Takeover Board.

3) Outlook

Generally speaking, despite its questionable legal basis and nature, Comm 1 has been well respected by the legal community and by listed companies as a necessary and adequate regulation of share buy-backs which was sensibly applied by the Takeover Board. DraftCirc 1 will likely be received with the same acceptance, with some exceptions such as indicated above. However, the practice introduced with the Takeover Board's order re Partners Group Holding AG relating to buy-backs in excess of 10% share ownership (see 2 d above), and the proposed hard-wiring and general application of this practice as envisaged by DraftCirc 1, as well as certain other proposals (see 2 b and h above) go too far. In the absence of effective judicial control (cf. *Gericke, op. cit., 369s*), it is to be hoped that the Takeover Board will reconsider those proposals that go beyond the needs of its supervision—not so much because the relevant proposals may be inadequate, but, as a matter of principle, in order to safeguard the division of powers and the rule of law.

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Minimum Standards for Self-regulatory Provisions in the Asset Management Industry

Reference: CapLaw-2009-42

Effective as of 1 January 2009, FINMA has adopted a new circular 'Benchmarks for Asset Managers'. The circular sets benchmarks regarding minimum standards for self-regulation in the asset management industry. The circular also provides for procedural provisions pursuant to which a self-regulatory regime may be recognized by FINMA. By publishing the circular, FINMA has addressed a long-standing market request to achieve a certain degree of equivalence in the industry, and FINMA has already recognized several self-regulatory regimes of different SROs under the circular.

By Petra Ginter

1) Existing Framework

By way of introduction, it is important to note that under Swiss law independent asset management services are not subject to the supervision by the Financial Market Supervisory Authority FINMA (FINMA). For instance, the self-regulatory provisions in the asset management industry, such as the 'Code of Ethics and Professional Conduct of Independent Asset Managers' promulgated by the Swiss Association of Asset Managers (SAAM) as of 26 March 1999, are only binding to members who have voluntarily joined the respective self-regulatory organization (SRO). SAAM is one of several SROs in the asset management industry which all use different approaches providing for varying code of conduct standards.

Conversely, asset managers that are entrusted with the management of Swiss collective investment schemes pursuant to the Collective Investment Schemes Act (CISA) are subject to supervision by FINMA und must adhere to a comprehensive statutory code of conduct. If asset managers only manage foreign collective investment schemes, the CISA provides them with a right to choose whether or not they would like to submit to FINMA supervision.

Based on article 7 (3) of the FINMA Act, FINMA has discretion to recognize industry codes of conduct as minimum standards which need to be complied with for purposes of proper conduct by market participants. It has done so by FINMA Circular 08/10 *(http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-10.pdf)* as of 1 January 2009 with respect to the self-regulatory provisions issued by the Swiss Fund Association (SFA), and in particular the 'Code of Conduct for Asset Managers of Collective Investment Schemes' and the 'Code of Conduct for the Swiss Fund Industry'. Furthermore, self-regulatory standards may also be relevant in connection with certain exemptions and safe-harbor rules under CISA. For instance, investors are deemed 'qualified' under CISA if they have concluded a written contract with an independent asset manager being subject to the Anti-Money Laundering Act (AMLA) and a code of conduct that has been recognized by FINMA as a minimum standard. An offering of foreign collective investment schemes exclusively to 'qualified investors' is deemed to be a private placement and, therefore, exempt from licensing or approval requirements otherwise applicable under CISA with respect to public offerings of foreign collective investment schemes.

Asset managers operating as banks or securities dealers are and remain supervised by FINMA as a consequence of their existing bank or securities dealer license. The Swiss Bankers Association has issued Portfolio Management Guidelines in 2005 (being currently under revision) which codify a code of conduct for *licensed banks and securities dealers conducting asset management services.* The Portfolio Management Guidelines have also been recognized as minimum standard by FINMA (FINMA Circular 08/10) as of 1 January 2009.

2) New FINMA Circular: 'Benchmarks for Minimum Standards'

Effective as of 1 January 2009, FINMA has adopted the circular 'Benchmarks for Asset Managers' (Circular) which sets minimum standards for the asset management industry organizations. The Circular can be downloaded from he website of FINMA under *http://www.finma.ch/d/regulierung/Documents/finma-rs-2009-01.pdf.* The minimum standards are designed as guidelines for market participants to draft their own self-regulatory provisions. The Circular also provides for procedural provisions pursuant to which a self-regulatory regime may be recognized by FINMA. The Circular applies to banks, securities dealers, licensed institutions and their agents under the CISA, such as fund management companies, SICAVs, partnerships, SICAFs, custodian banks, asset managers, etc. It defines minimum requirements, in particular with respect to form and content of asset management agreements, duties of loyalty, due diligence and information provision obligations, in addition to remuneration criteria of asset managers.

The new FINMA standards are intended to form a benchmark, *i.e.* minimum standards, with the aim to eventually improve the degree of equivalence in these standards. Industry organizations will have to adhere to these new benchmarks in order to have their self-regulatory asset management standards recognized by FINMA. Accordingly, the FINMA standards are said to be a 'minimum standard for minimum standards'. The respective SROs remain in charge to monitor compliance of their codes of conduct as well as to sanction any breaches by their members. To the extent that the Stock Exchange Act (SESTA) and CISA and their implementing ordinances provide for stricter rules, these rules will prevail.

Finally, the Circular requires a change in the regulation of the Swiss Bankers Association which will have to amend its provisions on the remuneration of asset managers.

3) Recognition of Particular Self-regulatory Provisions

Based on the Circular, FINMA has already recognized seven self-regulatory codes of industry organizations representing ***independent assets managers,*** including the 'Code of Ethics and Professional Conduct of Independent Asset Managers' issued by SAAM dated 26 March 1999 (for further recognitions, see
http://www.finma.ch/e/aktuell/Pages/aktuell-selbstregulierungen-20090518.aspx and
http://www.finma.ch/e/aktuell/Pages/aktuell-selbstregulierungen-20090427.aspx).

With regard to the management of collective investment schemes, FINMA has recognized the SFA's 'Code of Conduct for Asset Managers of Collective Investment Schemes' dated 31 March 2009 and 'Code of Conduct for the Swiss Fund Industry' dated 30 March 2009. Consequently, these rules are binding for all licensed asset managers of collective investment schemes and compliance is examined by audit firms. The same applies to asset managers organized as banks and securities dealers.

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Debtor Protection—FINMA Updates FAQ

Reference: CapLaw-2009-43

After introducing a new regime regarding debtor protection in Switzerland, FINMA has further updated its FAQ list and thereby has clarified in which cases FINMA permits exemptions from the new requirement to hold receivables that are domestically secured or other assets within Switzerland to an extent of 125% of the amount of privileged deposits.

By Benjamin Leisinger

1) Change in the Depositor Protection Regime

On 20 December 2008, a new regime regarding debtor protection entered into effect (see CapLaw-2009-8). Among other features, article 37b (5) Banking Act (BA) has introduced the obligation for Swiss banks to permanently hold receivables that are domestically secured or other assets within Switzerland to an extent of 125% of the amount of privileged deposits. Pursuant to the same provision, the Swiss Financial Market Supervisory Authority FINMA (FINMA) was granted authority to increase this percentage or to allow exemptions in individual cases.

2) Clarifications (FAQ) by FINMA

a) FAQ Published in January

After the new article 37b (5) BA had entered into effect, FINMA clarified the requirements set forth by article 37b (5) BA by publishing a list of frequently asked questions (FAQ) on its website. In this FAQ, FINMA, for example, has clarified which assets may be counted as coverage under article 37b (5) BA and which generally may not.

b) Revision of 2 June 2009

On 2 June 2009, FINMA updated the FAQ with regard to the question of when exemptions are granted with respect to the 125% requirement (see *http://www.finma.ch/e/faq/beaufsichtigte/Documents/faq-einlagensicherung_banken-e.pdf).* Additionally, FINMA has clarified which receivables generally are recognized as coverage of privileged deposits. FINMA has done so with a view to its new practice with respect to applications for exemptions from this requirement.

i. General Recognition as Coverage

FINMA has clarified that ***receivables from banks and securities dealers supervised by FINMA*** may be counted as coverage under article 37b (5) BA, irrespective whether such receivables are secured, provided said receivables are ***in the form of deposits or investments.*** In the old version of the FAQ, securities dealers were not expressly included in this exemption. Furthermore, in the old version, amounts owed by banks only counted as coverage if they were either (i) deposits on transaction and clearing accounts that

were constantly and entirely available or (ii) receivables in Swiss Francs or other freely convertible currencies secured by domestically held assets.

With respect to receivables from other customers, the old FAQ only exempted receivables from the Federal Government, Swiss cantons and municipalities and receivables from other customers that were in Swiss Francs or other freely convertible currencies and secured by domestically held assets. FINMA has clarified that insurance companies supervised by FINMA also deserve a special treatment and that ***receivables from insurers supervised by FINMA,*** regardless of whether they are secured, also count as coverage provided said receivables are in the form of credit balances or investments.

FINMA has reiterated that receivables even when payable by banks, securities dealers or insurance companies supervised by FINMA do not count as coverage in the sense of article 37b (5) BA if such receivables are payable by group companies. FINMA, however, has clarified that there are exemptions to this rule. Pursuant to Section 6 FAQ, upon request, FINMA accepts receivables from domestic parent companies with the status of a bank as collateral, provided the parent company confirms to FINMA in writing that it is providing 125% coverage in the form of domestic assets for the privileged deposits of its subsidiary that cannot be covered by the subsidiary itself.

In the new version of the FAQ, FINMA explicitly accepts precious metals held in Switzerland for trading purposes or as financial investment as coverage under article 37b (5) BA. In the old version, precious metals were only covered by the heading and not by the text of the FAQ. This is no material change but rather further clarifies the old rule.

The same holds true with respect to the clarification that not only shares but also other equity instruments from group companies (not to mention debt instruments or other collateral which had also been covered in the old version) generally may not be counted as coverage. In the old version, 'equity participations' and 'shares' had been separately listed and 'equity instruments' have not been mentioned at all.

ii. Recognition as Coverage upon Request

In the revised FAQ, FINMA has clarified which receivables it may accept as coverage for privileged deposits if requested by the respective bank or securities dealer.

As has already been stated, despite the general rule that receivables from group companies are not accepted as coverage, ***receivables from domestic parent companies with the status of a bank can exceptionally be recognized as collateral,*** provided the parent company confirms to FINMA in writing that it is providing 125% coverage in the form of domestic assets for the privileged deposits of its subsidiary that cannot be covered by the subsidiary itself.

In addition, FINMA may exceptionally accept further receivables as coverage for the privileged deposits. In these cases, however, the privileged deposits must at least be 250% secured with these receivables. One category of these receivables are ***leasing receivables held at relevant specialized institutions payable by clients domiciled or resident in Switzerland,*** depending on the type of leasing receivable. This exemption, however, is subject to the sufficient quality of and granularity in these receivables at the relevant bank or securities dealer requesting the exemption. Another category refers to ***receivables from foreign banks that are not part of the same group.*** Here, FINMA requires that these receivables are sufficiently diversified and the time to maturity does not exceed three months. Because of the wording of the FAQ, it is unclear whether the receivables of the first and second category must always cover the privileged deposits by 'at least 250%' and whether in some cases even a higher percentage could be requested by FINMA, or whether the requested cover-percentage could also be reduced below 250% if the receivables are of high quality and granularity or, as far as receivables from foreign banks are concerned, satisfactorily diversified. The English version of the FAQ leaves some room for interpretation in the later sense. The English version, at least with respect to receivables from foreign banks, states in a separate sentence that 'the percentage depends on the level of diversification'.

iii. Reduction in Cover-Percentage upon Request

Upon request, ***FINMA may also reduce the cover-percentage*** required by article 37b (5) BA.

According to the FAQ, upon request, privileged deposits need to be only 100% secured (and not 125%) if the collateral consists of (i) cash or cash equivalents held in Switzerland, (ii) receivables due within three months at domestic banks, securities dealers, insurers, the Swiss National Bank (SNB) or Swiss Post, or (iii) eligible money market instruments with a time to maturity of no more than three months. These assets can be directly counted as 100% coverage for privileged deposits. In other words, if the privileged assets at a specific bank amount to CHF 100 million and the collateral described in (i) to (iii) above also amounts to CHF 100 million, the privileged deposits are held to be sufficiently secured if an exemption is granted by FINMA. If these assets are not sufficient to cover the whole amount of privileged assets hold by a bank or securities dealer, *i.e.,* in our example if the collateral only amounts to CHF 90 million, 125% coverage is still required on the remaining portion of privileged deposits that are not secured by this specific collateral.

Another example where the coverage percentage could be reduced upon request are privileged deposits held at foreign branches. Such privileged deposits may be exempted from the coverage requirement set forth in article 37b (5) BA, provided they are already covered by an equivalent local depositor protection scheme in the other country or have to be covered by the law of that country. The bank or securities dealer applying for this exemption must provide evidence of the equivalence of the collateral. While the wording of

the FAQ states: *'and/or have to be covered by the law of that country'*, such double protection cannot be required by FINMA. It should be sufficient if either an equivalent local depositor protection scheme exists, or the law of that country requires sufficient coverage and such protection can be evidenced by the applicant.

IV. Further Changes

By revising the FAQ, FINMA also ***took the opportunity to make some further changes.***

For example, when answering how the payment obligation for depositor protection must be booked and backed by capital, the old FAQ stated that the payment obligation has to be booked as an irrevocable commitment under the off-balance sheet transactions and that they must be backed by 'equity capital'. FINMA took the opportunity to clarify that the payment obligations for depositor protection must be backed by 'regulatory capital' rather than equity capital, which allows for some flexibility.

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EU Draft Directive on Alternative Investment Fund Managers

Reference: CapLaw-2009-44

On 29 April 2009, the European Commission published its draft Directive on Alternative Investment Fund Managers. The draft directive proposes to regulate all managers of alternative funds established in the EU. Such managers will need to be authorized in their home country to carry out their activity. The holders of such authorization will then be enabled to provide services and distribute the shares of alternative investment funds to professional investors in the entire EU.

By Stephanie Comtesse

1) Background

As a result of the financial crisis, the European Commission published a proposal to introduce harmonized regulation of alternative investment fund managers (AIFM) on 29 April 2009.

2) Scope

The draft Directive on Alternative Investment Fund Managers (Draft Directive) will apply to all AIFM established in the EU. For the purpose of the Draft Directive, alternative investment funds (AIF) are defined as all collective investment undertakings that are not subject to authorization pursuant to the UCITS Directive. Accordingly, not only managers of hedge

funds and private equity funds are concerned but also, for example, managers of real estate funds and commodity funds.

The following AIFM will, however, not be subject to the Draft Directive:

- AIFM whose assets under management, including those acquired by use of leverage, do not exceed 100 million Euro;
- AIFM whose assets under management are not leveraged and do not exceed 500 million Euro, under the condition that the relevant AIF cannot be redeemed for a period of five years following its constitution.

The Draft Directive applies regardless of whether the relevant AIFs are established within or outside of the EU.

3) Authorization

All AIFM subject to the Draft Directive will be required to obtain an authorization from the competent authorities of their home country in order to provide management services to AIF.

The operating conditions to be fulfilled by the applicant for an AIFM authorization include:

- ***Conduct of business rules***

  These rules pertain to, in particular, the avoidance of conflicts of interest and efficient internal risk management systems.

- ***Capital requirements***

  An initial capital of at least 125,000 Euro, increased by 2% of the amount by which the portfolios managed by the AIFM exceed 250 million Euro, is required.

- ***Organizational requirements***

  An independent valuator must be appointed to evaluate the assets and the shares of the AIF.

  The depositary must be a credit institution established in the EU. The liability of the depositary towards the AIFM and the investors has been specifically addressed in the Draft Directive.

– *Delegation*

The delegation of tasks incumbent upon the AIFM must be authorized by the competent authority of the home country.

The third party to whom functions are delegated must be creditworthy and experienced.

A delegation of the portfolio management or the risk management can only be approved if these tasks are entrusted to third parties authorized as an AIFM. This implies, in particular, that no delegation to asset managers outside of the EU is possible.

The tasks of the valuator and the depositary may not be delegated.

4) Transparency and Reporting

The Draft Directive is intended to increase the transparency level regarding the AIF by foreseeing harmonized disclosure duties:

The AIFM must issue an audited annual report for each managed AIF and make it available to both, the investors and the competent authorities, within four months of the end of the financial year.

Investors must be provided with various information pertaining to the investment strategy and to the objectives of the AIF prior to an investment. Such disclosures include the assets in which the AIF may invest, the techniques it may implement, the use and limitation of leverage as well as related risks.

The Draft Directive further foresees periodic reporting obligations regarding, in particular, the markets and instruments in which the AIF is engaged. Information regarding liquidity, the risk profile and asset categories of the AIF is also required, as are disclosures on the use of short selling.

Additional reporting and disclosure obligations are imposed upon AIFM which manage leveraged AIF and which acquire controlling influence in companies.

5) Provision of Services by AIFM

a) Marketing of AIF in the Home Country and in Other EU Countries

An authorized AIFM will need to notify the competent authority in its home country of its intention to market shares of AIF to professional investors (as defined in MiFID). Such authority must inform the AIFM within ten days following receipt of the notification whether it may proceed with marketing activities.

The Draft Directive foresees that the EU member states may allow AIF to be marketed to retail investors on their territory. To this effect, further requirements may be imposed upon the AIFM.

In order to market the AIF in another EU country, the AIFM must notify the competent authority of its home country. The notification must include, in particular, the indication of the host countries in which it intends to become active. Within ten working days, the notification will be conveyed to the competent authority in the relevant host country along with a confirmation that the AIFM is authorized. As soon as the competent authority of the home country has transmitted the information to the host country, it shall notify the AIFM. The AIFM may then immediately proceed with marketing in the host country.

b) Management Services

Authorized AIFM will be enabled to provide management services to AIF in all EU countries either directly or through a branch. A notification procedure similar to the one described above regarding marketing services has to take place if the AIFM wishes to provide management services to AIF in a host country.

6) Countries Outside of the EU (Third Countries)

a) Marketing in the EU of AIF Domiciled in Third Countries

The same notification procedure as for EU domiciled AIF applies with respect to the marketing of AIF established outside of the EU to professional investors in the EU by AIFM. Furthermore, an agreement must have been entered into between the third country and the EU member state regarding the exchange of tax information according to the OECD Model Tax Convention.

The provisions of the Draft Directive pertaining to third countries will only enter into force three years after its implementation. In the meantime, AIF domiciled in third countries may still be marketed in the EU pursuant to the relevant national legislation.

b) Marketing of AIF by AIFM Established in a Third Country

EU member countries are enabled by the Draft Directive to authorize AIFM established outside of the EU to market shares of AIF to professional investors in accordance with the Draft Directive under, in particular, the following restrictions:

- The legislation of the relevant third country regarding prudential regulation and ongoing supervision of AIFM is deemed equivalent to the Draft Directive.
- The relevant third country grants EU AIFM effective market access at least comparable to that granted by the EU to AIFM from that country.

- A cooperation agreement is entered into between the competent authority of the EU member country and the regulator of the AIFM ensuring the exchange of information to monitor the implications of the activity of the AIFM with regard to systemic risks and the orderly functioning of the relevant EU country's financial markets.
- The relevant third country has entered into an agreement with the EU member country concerning the exchange of tax information according to the OECD Model Tax Convention. Regardless of the above, AIFM established in third countries will not be allowed to market shares of AIF in the EU for a period of three years following the implementation of the Draft Directive.

7) Implementation

It is currently foreseen that the finalized directive could come into force in 2011.

8) Conclusion and Outlook

Within the EU, the Draft Directive is highly controversial. AIFM appear to be concerned that the implementation will be linked with substantial costs and administrative burdens. Critics complain that managers of all Non-UCITS funds are subject to the Draft Directive. For instance, private equity fund managers question why they should be treated identically to hedge fund managers although their activity does not entail systemic risks. Contrarily, supporters of higher levels of regulation criticize the fact that only the AIFM, but not the AIF themselves, would be regulated. They are opposed to the de minimis exemptions and call for higher capital requirements.

Outside of the EU—and in particular in Switzerland—, the Draft Directive raises concerns relating to future access to the EU market. The current version of the Draft Directive does appear to limit the possibility for AIF domiciled or managed outside of the EU to be marketed to professional investors in the EU. Furthermore, at this stage, prospects of AIFM outside of the EU to provide services (in particular asset management services) to AIF in the EU appear to be compromised.

In view of the controversies described above, numerous changes to the Draft Directive are to be expected in the course of the upcoming debates of the European Parliament and Council. Regardless of the outcome, it is already clear that the finalized directive will have a substantial impact on the fund management industry in and outside of the EU.

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Movements in the European Clearing Market

Reference: CapLaw-2009-45

Clearing has become increasingly important as the collapse of Lehman Brothers sparked concern about counter-party risks. A consortium of 11 banks and broker Icap PLC recently offered to buy LCH.Clearnet, a key European trading securities clearing house.

By Thomas Werlen / Stefan Sulzer

Clearing has become increasingly important in recent months as the collapse of Lehman Brothers in September 2008 sparked concern about counterparty risks. Financial regulators are particularly pushing for centralized clearing of insurance-like credit default swaps (see CapLaw-2009-22).

As a central counter-party (CCP), the clearing house sits in the middle of a trade, assuming the counterparty risk involved when two parties trade. When the trade is registered with a clearing house, it becomes the legal counterparty to the trade, ensuring the financial performance. If one of the parties fails, the clearing house steps in. Initial and variation margin (or collateral) is collected from CCP members and used to fulfill the obligations, should a party fail. By assuming the counterparty risk, CCPs underpin many important financial markets, facilitating trading and increasing confidence within the market.

On 8 May 2009, London-based LCH.Clearnet Group Ltd. (LCH.Clearnet), a key European trading securities clearing house, received a takeover bid for as much as USD 1.2 billion from a consortium of banks, including Deutsche Bank, JP Morgan Chase & Co., Nomura, Société Générale and UBS as well as London-based broker Icap PLC. LCH.Clearnet was formed through the merger of Clearnet SA and London Clearing House Ltd. in 2003. It is 73.3% owned by banks and brokers that use its services, 15.8% by Brussels-based Euroclear, the region's largest settlement agency, and 10.9% by exchanges.

The way to launch the takeover bid for LCH.Clearnet was cleared after U.S. Depository Trust & Clearing Corp. (DTCC) recently called off its pursuit of LCH.Clearnet. The bid is part of an effort to reduce the costs of trading stocks, bonds and derivatives, and to gain more control over a business believed to have significant earning potential. The board of directors of LCH.Clearnet has not yet decided on the takeover bid.

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First Insider Trading Case Regarding Credit Default Swaps

Reference: CapLaw-2009-46

The U.S. Securities and Exchange Commission recently brought the first U.S. insider trading case involving credit default swaps. According to the complaint, a credit default swap salesman with inside information regarding an upcoming bond offering improperly shared information about it with a portfolio manager for a hedge fund.

By Thomas Werlen / Stefan Sulzer

For the first time, the U.S. Securities and Exchange Commission (SEC) has recently brought an insider trading case involving the market for credit default swaps (CDS). *SEC v. Rorech and Negrin,* No. 09-Civ-4329 (5 May 2009). The SEC alleges that a CDS salesman learned inside information about a change to a proposed bond offering that was expected to increase the price of the CDS on these bonds. The CDS salesman shared the information with a portfolio manager for a hedge fund. Based on the information, the portfolio manager bought CDS referencing those bonds. When news of the restructured bond offering became public, the price of the CDS substantially increased, and the portfolio manager closed the CDS position at a profit of approximately USD 1.2 million. The SEC's complaint charges the CDS salesman and the portfolio manager with violations of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and SEC-Rule 10b-5 and seeks a final judgment ordering them to pay financial penalties and disgorgement of ill-gotten gains plus prejudgment interest.

The CDS market participants typically are sophisticated institutional players, and for those reasons, among others, it has historically not been a focus of SEC insider-trading enforcement activity. The case now brought by the SEC broadens the reach of SEC enforcement efforts against insider trading which is consistent with signals sent in recent speeches by SEC Chairman Mary Schapiro and Division of Enforcement Director Robert Khuzami, intending to expand and increase the SEC's enforcement activities in this area.

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Aquamit B.V. Publishes Tender Offer for Quadrant AG

Reference: CapLaw-2009-47

On 4 May 2009, Aquamit B.V., Amsterdam, pre-announced a public tender offer for all publicly held shares of Quadrant AG at an offer price of CHF 86 per share. Aquamit B.V. is a joint venture owned by Mitsubishi Plastics, Inc., Tokyo, and a group of board

members of Quadrant. On 29 May 2009, the Takeover Board ruled that the offer is in line with the statutory takeover provisions. The offer prospectus was published on 2 June 2009. The offer period will last from 17 June until 14 July 2009.

Swiss Prime Site Pre-announces Exchange Offer for Jelmoli

Reference: CapLaw-2009-48

On 2 June 2009, Swiss Prime Site AG pre-announced a public exchange offer pursuant to article 22 et seq. of the Stock Exchange Act for all publicly held shares of Jelmoli Holding AG, offering 7.7 shares of Swiss Prime Site per Jelmoli share. Prior to the pre-announcement, Swiss Prime Site had entered into a share purchase agreement with Pelham Investments SA to acquire 1 214 981 Jelmoli shares representing about 30% of the share capital of Jelmoli. On 11 June 2009, Swiss Prime Site increased the offer price to an exchange ratio of 8.1. While the initial offer was rejected, the board of directors of Jelmoli now recommends the improved offer to its shareholders for acceptance. According to the revised timetable dated 22 June 2009, the offer prospectus is scheduled to be published on 14 July 2009.

Swiss Financial Center—Perspectives and Risks in Advising Foreign Private Clients (Finanzplatz Schweiz – Perspektiven und Risiken bei der Beratung ausländischer Privatkundschaft)

Zurich, 30 June 2009, Educaris – Akademie der Treuhandkammer
(http://www.educaris.ch)

Repo-Symposium 2009, 10 Years of Repos (Repo-Tagung 2009, 10 Jahre Repo)

Lucerne, 2 July 2009, Swiss National Bank
(http://www.centralbank.ch/en/mmr/reference/finmkt_events_20090702/source)

12th Zurich Conference on Mergers & Acquisitions (12. Zürcher Tagung zum Thema Mergers & Acquisitions)

Zurich, 2 September 2009 *(http://www.eiz.uzh.ch)*

3rd Intensive Seminar Mergers & Acquisitions (3. Intensiv-Seminar Mergers & Acquisitions)

Lucerne, 22 September 2009 *(http://www.irp.unisg.ch)*

SFA Asset Management Conference

Zurich, 27 October 2009 *(http://www.sfa.ch)*