

**Date**

Zurich, 24. September 2012

**Cross-Border Debt Offerings by Foreign Issuers into Switzerland –  
An Overview**

**I Scope**

This Position Paper addresses the requirements under Swiss law applicable to cross-border offerings of debt securities, including convertible debt securities,<sup>1</sup> i.e., debt securities issued by issuers incorporated outside of Switzerland, but offered into Switzerland. It also discusses the delimitation of the terms public and non-public offerings in Swiss law.

This Position Paper does not address any requirements under the listing rules of the SIX Swiss Exchange Ltd. (the **SIX Swiss Exchange**) or any other Swiss exchange or regulated trading facility in Switzerland which would be applicable in case a listing of the instruments in Switzerland was sought. It also does not address the offering of structured products within the meaning of article 5 of the Swiss Collective Investment Schemes Act (**CISA**).<sup>2</sup> Depending on the specific legal set-up, certain structured debt securities can qualify as structured products rather than as bonds or notes.<sup>3</sup> Where this is the case, a different set of rules applies.

This Position Paper has been prepared with the sole purpose of expressing what, in the view of the authors, is the current standard for selling restrictions in the context of international offerings of debt securities into Switzerland. It does not constitute legal advice and may not be relied upon or used as a substitute for legal advice taken on a case by case basis.

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<sup>1</sup> Special rules apply if the debt security itself or the security into which the debt security can be converted qualifies as a unit of a collective investment scheme. Under the CISA, debt securities of foreign issuers may, under certain circumstances, be recharacterized as units of collective investment schemes, e.g., if the purpose of such foreign issuer consists of collective capital investment.

<sup>2</sup> With the exception of mentioning a few examples of structured products (capital protected products, capped return products and certificates), the CISA does not define the term structured product. A commonly held view, which is supported by the Swiss Structured Products Association, is that structured products are *financial instruments combining a derivative and a traditional financial instrument (such as a share or bond)*. The Swiss Bankers Association's Guidelines on informing investors about structured products, however, clarify that products where the primary focus is on financing purposes or a risk transfer in the narrow sense do not qualify as structured products. The same holds true for forward and options transactions, irrespective of their set-up.

<sup>3</sup> In practice, the terms "notes" and "bonds" are used interchangeably in Switzerland.

For purposes of this Position Paper we have assumed that the issuer is a company incorporated outside of Switzerland that intends to offer debt securities to investors in Switzerland, and that the offering has no connection to Switzerland other than in connection with the offer into Switzerland.<sup>4</sup>

## II Regulatory Framework - Overview

Switzerland's legal regime for inbound debt securities offerings is relatively permissive in international comparison. Switzerland is neither a member of the European Union nor a signatory to the European Economic Area Treaty and, therefore, none of the European directives (e.g., the Prospectus Directive or the Transparency Directive) apply in Switzerland. In contrast to other jurisdictions, the public offering of debt securities into Switzerland is not subject to any requirement of authorisation by, or registration with, any Swiss governmental or other authority or self-regulatory body. The same applies to the prospectus for a debt offering, except in case of a listing on the SIX Swiss Exchange (or any other Swiss exchange).

Notwithstanding the foregoing, public offerings of debt securities in or into Switzerland must comply with (i) the issue prospectus requirements set forth in the Swiss Code of Obligations (**CO**), and (ii) if the debt securities are to be listed on a Swiss exchange, the applicable listing rules. Accordingly, the determination of which prospectus requirements are applicable to a particular offering of debt securities depends on (i) whether the offering is considered public under the CO, and (ii) whether the debt securities will be listed on a Swiss exchange (such as the SIX Swiss Exchange). Moreover, Swiss law generally makes no distinction between low denomination and high denomination debt securities.

Non-public offerings of debt securities are generally not subject to the obligation to prepare a Swiss issue prospectus provided that the debt securities are not listed on any Swiss exchange or any other regulated market in Switzerland. However, special rules apply for private placements of debt securities of non-Swiss issuers that are denominated in Swiss francs and are governed by Swiss law.<sup>5</sup>

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<sup>4</sup> If such other connection existed, special rules or guidelines could apply (see for example the guideline described in footnote 5 below).

<sup>5</sup> The Swiss Bankers Association's "Guidelines Regarding Notes from Foreign Issuers" provide for a prospectus requirement if debt securities of non-Swiss issuers that are denominated in Swiss francs and governed by Swiss law are directly placed with the clients of Swiss banks involved in the issuance (*Syndikatsbanken*).

### **III Offerings of Debt Securities**

#### **A Bonds and other Forms of Debt Securities**

Whenever debt securities are publicly offered or submitted for public subscription or introduced on an exchange in Switzerland, the issuer must prepare a prospectus that complies with paragraph 2 of article 1156 CO.

Article 1156 CO purports to apply to "bonds" only. However, bearing in mind that the provision was enacted prior to the existence of other types of debt securities, it is generally held that article 1156 CO should be interpreted so as to apply to other forms of debt securities except, by reason of the explicit wording of article 5 CISA, for structured products.

#### **B Private vs. Public Offering**

The terms "public offering" and "public subscription" are not defined in the CO, except for the statement in article 652a(2) CO (which relates to equity offerings) pursuant to which any invitation for subscription is public unless addressed to a limited group of persons. As a result, and due to the lack of clear guidance by Swiss courts, the meaning of the term "public offering" for purposes of the CO has been and continues to be the subject of legal debate.

Generally speaking, a public offering is understood to be *an offering made to an indefinite number of investors or by means of a public advertisement (e.g., newspaper announcement, mass-mailings, web page with unrestricted access)*. By contrast, if issuers or placement agents solicit individually a limited number of selected investors, including by inviting them to roadshows or call this finite number of handpicked investors individually, the offering is considered to be private as long as there are no public advertisements or similar communications relating to the offering.

In any event, not every public advertisement or announcement of an offering is necessarily a "public offering". In our view, an offering should not be considered public if the announcement is made subsequently to the closing of the offering or if it does not contain an offer (explicit or implicit) or an invitation to make an offer to investors to purchase the debt securities. It is advisable to include certain disclaimers in such announcements so as to demonstrate and document the absence of such intent.

An offering published on the issuer's website may be considered "public", in particular if the content of the website is connected to Switzerland or the Swiss market or if such a connection could be established. Investors who are resident in Switzerland should, therefore, not have access to the relevant offering materials included on a website, if the issuer wishes to structure an offering as a non-public offering in Switzerland. If such a restriction is not feasible, suitable access restrictions have to be designed on a case-by-case basis.

A *qualitative approach* is generally considered appropriate to distinguish a public offering from a private placement. Such approach is not based on a specific number of offerees, but considers whether investors were selected based on objective criteria as opposed to a general solicitation to the public or whether the investors have a pre-existing specific relationship with the issuer (e.g., existing shareholders, existing employees). Given the need for numeric guidance, practitioners and commentators have developed a quantitative rule of thumb, which focuses on the number of offerees. The threshold between a private placement from a public offering has, based on this rule of thumb, traditionally been set at 20 investors<sup>6</sup>, although, following the practice established under the Prospectus Directive, there is a trend among practitioners to consider that the threshold is at 100 investors. Some practitioners recommend as an additional cautionary measure to limit an offering relying on this higher threshold to institutional investors and (possibly) high net worth individuals. Taking an even more permissive approach (which is also reflected in a legislative proposal for an amendment of Swiss stock company law pending in Parliament), *qualified investors* as defined in the CISA<sup>7</sup> should not be taken into account when calculating the relevant number of investors or when considering the question of whether the offer is public or not.<sup>8</sup> This last approach is appealing as it entails a uniform standard for the offering of securities throughout all product-types.

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<sup>6</sup> The threshold of 20 investors mainly has roots in the banking regulations and in the former Swiss regulation on investment funds.

<sup>7</sup> Qualified investors within the meaning of the CISA are: (i) regulated financial intermediaries, such as banks, broker-dealers or fund administrators; (ii) regulated insurance companies; (iii) public entities and pension funds with a professional treasury; (iv) corporations organized under private law having a professional treasury; (v) high net-worth individuals, provided they confirm in writing to a regulated financial intermediary or qualifying independent asset manager that they directly or indirectly have at least CHF 2 million in bankable assets; (vi) investors who have concluded a written discretionary asset management contract with a regulated financial intermediary with respect to the assets to be invested; and (vii) independent asset managers and investors who have concluded a written asset management contract with an independent asset manager, provided that the independent asset manager and the asset management meet certain requirements.

<sup>8</sup> Notwithstanding the foregoing, it must be noted that the number of 20 investors still plays an important role where Swiss subsidiaries or Swiss branches act as issuer. According to Swiss banking regulation, taking deposits (*Publikumseinlagen*) from more than 20 investors could trigger a licensing obligation. Bonds and other standardized debt instruments, however, do not qualify as deposits within the meaning of the Swiss Banking Act and Banking Ordinance if the investors are informed in a manner equivalent to that provided for in article 1156 CO with respect to public offerings of bonds.

There is no bright-line test with respect to on-selling of privately placed debt securities by the underwriters or initial investors. However, as a general rule, any subsequent investors do not have to be included in the calculation of the relevant number of investors for the determination of the nature of the offering, provided neither the issuer nor any underwriter was involved in such on-selling nor knew or should have known at the time of the private placement that the securities would (immediately) be sold on. In order to clarify this position, appropriate disclaimers or selling restrictions, such as the one set out in Annex A, should be included in the offering material and appropriate covenants should be included in the underwriting or subscription agreement.

We note that the more recent and more liberal statements presented in this Position Paper are *untested* in court and *there is no bright-line test for determining whether an offering is public*. Each offering should therefore be evaluated on a case-by-case basis, weighing in all the relevant facts (e.g., marketing, number and type of investors, nature of any on-selling). Nevertheless, once these facts have been taken into consideration, in the absence of any such characteristics of a public offering, the authors of this Position Paper take the view that if one were to set a numerical threshold in the first place, an offering to up to 100 or even more selected investors should qualify as a private placement. In specific cases, an offering may still be considered non-public even if made to a greater number of investors.

In any event, a debt offering is subject to the issue prospectus requirements of article 1156 CO irrespective of whether it is a public offering, if the debt securities are introduced on a regulated trading facility in Switzerland (such as the SIX Swiss Exchange).

## **C Consequences of a Public Offering**

### **1 Disclosure Items in the Prospectus**

If a public offering of debt securities is to be made into Switzerland, the issuer must prepare an issue prospectus which complies with articles 1156 and, by way of reference, 652a CO. Pursuant to these provisions, the issue prospectus must contain the following disclosure items:

- the contents of the issuer's entry in the commercial register, *e.g.*, name, domicile and purpose of the issuer, name, place of residence<sup>9</sup> and nationality of the members of the issuer's board of directors and the auditors, information on contributions in kind;
- the amount and structure of the issuer's share capital (*i.e.*, the number, par value and type of shares, including rights of holders of preferred stock (if any), rights of holders of bonus certificates (if any)), and a description of provisions in the issuer's articles of incorporation that authorize the board of directors to issue shares;
- the most recent audited *statutory and consolidated financial statements* of the issuer, and, if the issue prospectus is published more than nine months after the balance sheet date, *interim financial statements*;
- the issuer's *dividend history for the five years* preceding the issuance of the debt securities;
- the issuer's *resolution regarding the issuance of the debt securities*; and
- specific details on the *terms of the debt securities* (including maturity, conditions for early redemption, interest payments, security and representation of the holders).

Where a debt security is guaranteed, although not explicitly required by statutory law, it is generally held to be prudent and advisable that the information required with respect to the issuer is also provided for the respective guarantor(s).

In addition to article 1156 CO, a non-Swiss issuer of debt securities is advised to follow the prospectus requirements or other disclosure standards of the jurisdiction of the issuer, when making a public offering into Switzerland. This recommendation follows from the Swiss Federal Act on Private International Law (**PILA**) which provides that claims arising from the public issue of debt securities by means of a prospectus, circular or similar publication are governed by the law applicable to the issuer or by the law of the state where the offering was made (*i.e.*, Swiss law in case of an offering in Switzerland). This provision offers a potential plaintiff in a prospectus liability suit in Switzerland the right to choose the more favourable law.

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<sup>9</sup> The authors of this Position Paper believe that the business address (*i.e.*, address of the seat of the issuer) is sufficient instead of the private residence address.

## 2 Consequences of Non-Compliance with Swiss Statutory Prospectus Requirements

Non-compliance with Swiss statutory prospectus requirements in an offering prospectus for a public debt offering into Switzerland is enforced under Swiss law through civil prospectus liability. Such claims can be successful only if, *inter alia*, the plaintiff can establish causation. In other words, the plaintiff must show that the misstatement of information or the failure to provide certain information in the prospectus was an actual and adequate cause of the damage suffered. For example, if a prospectus does not record the dividend history of an issuer for the last five years, investors may only successfully recover damages from the issuer or anyone participating in the offering if they can prove:

- that they would not have bought the debt securities, or would have bought them at a different price, if they had known of the information in question; and
- that the failure to provide the information caused the damage in question.

If the misstatement or the failure to publish certain information does not constitute cause for the damage in question, there is no cause of action for prospectus liability.

## 3 Impact of Swiss Prospectus Requirements on International Offerings

If an issuer incorporated outside of Switzerland undertakes an offering that is also directed to, or open to, the Swiss market, such issuer typically will have prepared a comprehensive information document under the laws of its place of incorporation or the laws of its place of listing. We understand that in the member states of the European Union and in the United States of America, the requirements for the contents of a prospectus generally go beyond the statutory Swiss law requirements summarized above.<sup>10</sup>

However, as a matter of practice, certain information required to be disclosed under Swiss statutory law is often missing in international prospectuses. This is frequently the case in respect of:

- the five-year dividend history;
- contributions in kind; and
- the statutory (not consolidated) financial statements.

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<sup>10</sup> The situation may be different if, pursuant to local laws no prospectus at all or only a very brief disclosure document is prepared.

If one takes the view that Swiss law requires the disclosure of such information in case of an offering of debt securities into Switzerland by a non-Swiss issuer, Swiss prospectus liability would only arise if (i) the relevant information was incorrect or missing, (ii) the plaintiff can, *inter alia*, show that the failure to provide such information had an impact on his or her investment decision, and (iii) the plaintiff can show that the failure to provide (true and complete) information was the actual and adequate cause of the damage suffered. This will, in our view, typically not be the case provided the prospectus contains *all information allowing the investor to take an informed investment decision* as required by applicable rules in the European Union, United States or other countries with comparable prospectus disclosure requirements, so that any relevant information should in any event be directly or indirectly included in the prospectus.

## **D Non-Public Offerings**

A non-public offering of debt securities into Switzerland, which are not listed on any Swiss exchange or any other regulated market in Switzerland, is not subject to any requirements under the CO.<sup>11</sup> However, it is customary to include an appropriate Swiss disclaimer in the marketing materials (see the suggested template wording in Annex A hereto).

Credit Suisse AG

UBS AG

Baker & McKenzie

Bär & Karrer AG

Homburger AG

Lenz & Staehelin

Niederer Kraft & Frey AG

Pestalozzi Attorneys at Law Ltd.

Vischer AG

Walder Wyss Ltd.

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<sup>11</sup> See above at footnote 5.



## **Template Disclaimer for Non-Public Offerings of Debt Securities<sup>1</sup>**

### **Switzerland**

This document is not intended to constitute an offer or solicitation to purchase or invest in the [Notes] described herein. The [Notes] may not be publicly offered, sold or advertised, directly or indirectly, in, into or from Switzerland and will not be listed on the SIX Swiss Exchange or on any other exchange or regulated trading facility in Switzerland. Neither this [document] nor any other offering or marketing material relating to the [Notes] constitutes a prospectus as such term is understood pursuant to article 652a or article 1156 of the Swiss Code of Obligations *[[or a listing prospectus within the meaning of the listing rules of the SIX Swiss Exchange or any other regulated trading facility in Switzerland]<sup>2</sup> [or simplified prospectuses or a prospectus as such term is defined in the Swiss Collective Investment Scheme Act]<sup>3</sup>*, and neither this [document] nor any other offering or marketing material relating to the [Notes] may be publicly distributed or otherwise made publicly available in Switzerland.

*[Neither this [document] nor any other offering or marketing material relating to the offering, nor the [Company] nor the [Notes] have been or will be filed with or approved by any Swiss regulatory authority. The [Notes] are not subject to the supervision by any Swiss regulatory authority, e.g., the Swiss Financial Markets Supervisory Authority FINMA (**FINMA**), and investors in the [Notes] will not benefit from protection or supervision by such authority.]<sup>4</sup>*

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<sup>1</sup> Other than structured products as such term is understood within the meaning of the Swiss Federal Act on Collective Investment Schemes.

<sup>2</sup> Optional. Only relevant where the debt securities are or will be listed abroad and the offering material is called listing prospectus.

<sup>3</sup> Optional. The addition "*or the Swiss Collective Investment Scheme Act*" should only be added if the debt securities are such that they come close to structured products. It is advisable to seek legal advice in the specific case.

<sup>4</sup> Optional. Only relevant if debt securities are such that they come close to or could potentially constitute structured products. As a different legal regime could apply, e.g., the securities could potentially only be eligible to be offered to "qualified investors" within the meaning of the Swiss Federal Act on Collective Investment Schemes, it is advisable to seek legal advice.