

Swiss Commercial Law Series

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**Swiss Corporate Finance
and Capital Markets –
Legal Aspects**

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by

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Abbreviations

References to Acts and Ordinances are to the original Acts and Ordinances as amended

APA	Federal Act on Administrative Procedures of 20 December 1968
BO	Ordinance on Banks and Savings Institutions of 17 May 1972
CC	Swiss Civil Code of 10 December 1907 (Civil Code)
CHF	Swiss franc
Circular 4	Circular on the Treatment of Bonds and Derivative Financial Instruments for the Purpose of Federal Income Tax, Federal Withholding Tax and Federal Stamp Duties of 12 April 1999
CO	Federal Code of Obligations of 30 March 1911
DEBA	Federal Act on Debt Enforcement and Bankruptcy of 11 April 1889
DPA	Federal Act on Data Protection of 19 June 1992 (Data Protection Act)
DPO	Direct Public Offering
EC	European Community
ESOP	Employee Stock Ownership Plan
EUREX	European Exchange
FBA	Federal Act on Banks and Savings Institutions of 8 November 1934 (Banking Act)
FBC	Federal Banking Commission
FER/ARR	Accounting and Reporting Recommendations (<i>'Fachempfehlungen zur Rechnungslegung'</i>)
GDP	Gross Domestic Product
IAS	International Accounting Standards
IFA	Federal Act on Investment Funds of 18 March 1994
IFO	Ordinance on Investment Funds of 19 October 1994
IFO-FBC	Ordinance of the Federal Banking Commission on Investment Funds of 24 January 2001
IPO	Initial Public Offering
ISDA	International Swaps and Derivatives Association

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MLA	Federal Act concerning the Combat of Money Laundering in the Financial Sector of 17 June 1996 (Money Laundering Act)
MTN	Medium Term Notes
Nasdaq	National Association of Securities Dealers Automated Quotations (US)
NYSE	New York Stock Exchange
OTC	Over The Counter
PILA	Federal Act of Private International Law of 18 December 1987
SEC	U.S. Securities and Exchange Commission
SESTA	Federal Act on Stock Exchanges and Securities Trading of 24 March 1995 (Stock Exchange Act)
SESTO	Ordinance on Stock Exchanges and Securities Trading of 2 December 1996
SESTO-FBC	Ordinance of the Federal Banking Commission on Stock Exchanges and Securities Trading of 25 June 1997
SPC	Swiss Penal Code of 21 December 1937
TO	Ordinance of the Takeover Board on Public Takeover Offers of 21 July 1997
UK	United Kingdom
US	United States of America
USD	US dollar
US GAAP	US Generally Accepted Accounting Principles

I. Introduction

Goethe summed up Switzerland as a combination of ‘the colossal and the well-ordered’. The colossal wealth of the Swiss economy, with a per capita GDP 15 to 20 per cent above that of the big Western European economies, and the well-ordered Swiss banking system have produced one of the largest financial markets in the world. Switzerland manages nearly a third of the total global private assets, and the Swiss National Bank has calculated that Swiss banks hold a total of CHF F3,522 billion in securities, of which CHF 1,880 billion are managed for foreign clients. The Swiss capital markets are instrumental in mobilising these funds. Not surprisingly, the Swiss Exchange is one of the leading stock exchanges in Europe and the ninth-biggest in the world. In terms of capitalisation, it surpassed CHF 1,300 billion in 2000.

Globalisation of the equity markets has become inevitable as financial regulations are harmonised, competitive pressures are growing and the internet is revolutionising the investment world. In particular, as a result of Anglo-American influences, most civil law countries, including Switzerland, nowadays foster the ideal of *investor protection*, thus effectively discarding the ancient rule of *caveat emptor*. America’s innovative economy has become the envy of the world, and so has its regulatory system.

It is a sign of the times that even the traditionally independent-minded Swiss have opened up, legally and politically. *Legally*, Swiss securities regulation has been overhauled by the Federal Stock Exchange Act which came into force in 1997/1998 and aligned Swiss legislation with international standards. As a member of the World Trade Organisation, Switzerland has undertaken liberalisation commitments under the General Agreement on Trade in Services (GATS), which extends to financial services and came into force on 1 September 1996. *Politically*, Switzerland has taken a step towards Europe by adopting seven bilateral agreements with the European Union in a national referendum in May 2000. GATS and the bilateral agreements with Europe will dismantle trade barriers, stimulate growth in the financial markets and present new opportunities for foreign investors.

The aim of this publication is to map the ways to raise finance in this challenging environment.

II. Regulation of Financial Businesses

1. General

In Switzerland, the regulation of such businesses as securities dealing, investment funds, banking and insurance has not yet been brought together under one roof, as has been the case in the Scandinavian countries, Luxembourg, the UK, Canada and Japan. Consequently, standards of supervision and investor protection vary considerably depending on the applicable regulatory framework. On this basis, the following overview serves as an initial guide to the various regulations; a detailed description of each statutory regime would be beyond the scope of this publication.

In late 1998, the head of the Swiss finance department set up a group of financial services experts to conduct a review of the existing body of law and to elaborate a proposal of necessary reforms. In November 2000, the expert group published a final report entitled '*Financial Markets Regulation and Supervision in Switzerland (Banks, Insurance Companies, Financial Conglomerates, and other Financial Services)*' where it stressed the need to regulate all financial service providers, including introducing brokers, foreign exchange dealers and independent asset managers, and to transfer regulatory control over all financial services to *one single regulator*, which in the view of the expert group is to acquire the functions now exercised by the current supervisory authorities, the Federal Banking Commission (FBC), the Federal Office of Private Insurance and the Federal Control Office for the Combatting of Money Laundering. However, the proposed reforms will not be implemented until a new law, still to be drafted, will come into effect.

2. Securities Dealers

2.1. Definition

In 1995 the Federal legislator made sweeping changes to Switzerland's securities regulation by passing the *Federal Act on Stock Exchanges and Securities Trading of 24 March 1995* (SESTA). SESTA sets out the framework of the new regime, which was designed to secure transparency and equal treatment of investors in order to ensure orderly and fair securities markets. Similar in scope and purpose to the US Securities Exchange Act of 1934, SESTA regulates stock exchanges, securities dealers, disclosure of shareholdings and tender offers. The first part of SESTA on stock exchanges and securities dealers entered into effect on 1 February 1997; the second part on disclosure of shareholdings and tender offers came into force on 1 January 1998.

SESTA provides that a Swiss or a foreign securities dealer who intends to carry on business in Switzerland is subject to authorisation by the FBC. SESTA's definition of the term 'securities dealer' is broad and covers

- (a) *dealers* who are engaged in the business of effecting securities transactions in their own name and for their own account for re-sale in the short term, provided they are mainly active in the financial sector and reach a gross turnover of more than CHF 5 billion per year;
- (b) *market makers* who are engaged in the business of trading in securities on a short-term basis for their own account and making markets by providing quotations representing their buy and sell interests to the public (offers are deemed not to be made to the public if they are addressed to banks, securities dealers, enterprises under government supervision, institutional investors with a professional treasury, and certain other persons);
- (c) *security issuing houses* mainly active in the financial sector and engaged in the business of underwriting securities issued by third parties on a firm or commission basis in order to offer these securities to the public on the primary market (offers are deemed not to be made to the public if they are addressed to banks, securities dealers,

enterprises under government supervision, institutional investors with a professional treasury, and certain other persons);

- (d) *derivatives firms* mainly active in the financial sector and engaged in the business of issuing standardised (i.e., uniform) derivatives suitable for mass trading for offer to the public on the primary market, either for their own account or for the account of third parties (offers are deemed not to be made to the public if they are addressed to banks, securities dealers, enterprises under government supervision, institutional investors with a professional treasury, and certain other persons);
- (e) *brokers* who are engaged in the business of buying and selling securities in their own name but for the account of clients if the brokers (i) keep depository accounts to settle the transactions in their own name for their clients or (ii) keep custody of their clients' securities (for the purpose of this definition, the term 'client' does not include banks, securities dealers, enterprises under government supervision, institutional investors with a professional treasury, and certain other persons).

The *Ordinance on Stock Exchanges and Securities Trading of 2 December 1996* (SESTO) furthermore provides that the Swiss National Bank, fund management companies, insurance companies, and pension funds are not deemed to be securities dealers as they are subject to different regulatory regimes.

For the purposes of Swiss law, a *foreign securities dealer* is defined as a company organised according to foreign law which holds a license as a securities dealer abroad, or uses the term 'securities dealer' or a term with a similar meaning in the company name, in the description of its business purpose or in business documents, or conducts securities trading within the meaning of SESTA as set forth above. A foreign securities dealer is subject to Swiss regulation and authorisation if it employs persons in Switzerland who are permanently engaged in the business in or from Switzerland of (a) trading in securities, maintaining client accounts or committing the securities dealer legally (*branch*), or (b) operating in another way, specifically by passing on client orders to the dealer or representing it for advertising or other purposes (*representative office*). In addition, the FBC has clarified that if a foreign

securities dealer employs an *introducing broker* in Switzerland, the foreign securities dealer will be subject to authorisation unless the introducing broker is engaged on a non-exclusive basis and does not use the foreign securities dealer's name. *Cross-border* securities dealer activities, however, are outside the scope of Swiss regulations (see II.6).

2.2. Licence Requirements and Continuing Obligations

A securities dealer must obtain a licence from the FBC before registering in the commercial registry and commencing securities dealing activities. To obtain a licence as a *Swiss securities dealer*, the applicant must show that certain conditions are satisfied in respect of its corporate documentation and organisation of the business, the minimum paid-in capital (CHF 1.5 million), as well as the management and the conduct of business (fit-and-proper test). Furthermore, the securities dealer must provide information on certain qualified shareholders (holding at least 10 per cent of the capital or the voting rights), directors, managers, and other key persons. If qualified shareholders acquire or dispose of shares and, as a result, cross certain thresholds (20, 33 $\frac{1}{3}$ or 50 per cent), the FBC needs to be notified.

An authorised securities dealer may carry on its business subject to various duties arising under SESTA and its implementing ordinances, such as a duty to comply with requirements relating to minimum equity, risk diversification, accounting and auditing, as well as an obligation to comply with rules of conduct, a duty to maintain a journal (showing orders received and carried out) and certain reporting duties. The relevant rules are applied on a consolidated level.

A *foreign securities dealer* setting up a Swiss *subsidiary* is subject to the same authorisation requirements as a Swiss securities dealer. If the formation of a Swiss *branch* is contemplated, not only conditions similar to those applying to Swiss securities dealers must be satisfied, but the foreign securities dealer must also show that he is subject to adequate supervision in his home country, including supervision of the Swiss branch. In addition, the foreign securities dealer's name must be acceptable for registration in the commercial register, and the foreign supervisory authorities may not raise objections against the formation of a branch in Switzerland and commit themselves both to informing the FBC immediately if any circumstances arise which could jeopard-

ise clients' monies deposited with the branch and to providing administrative assistance to the FBC. The establishment of a Swiss *representative office* ('rep office') involves less onerous requirements: authorisation will be granted if the persons in charge of the office are fit and proper, the foreign securities dealer is subject to adequate supervision abroad and the formation of the rep office meets with the approval of the foreign supervisory authorities.

Foreign securities dealers operating a branch or a rep office in Switzerland are generally exempt from minimum equity and risk diversification requirements as well as from the obligation to comply with the pertinent rules on a consolidated basis. In addition, the restrictions laid down in SESTA relating to accounting and auditing do not apply to representative offices of foreign securities dealers.

3. Financial Intermediaries

3.1. Definition

Financial intermediaries are regulated by the *Federal Act concerning the Combat of Money Laundering in the Financial Sector of 17 June 1996* (MLA) and its implementing ordinances. *Financial intermediaries* are widely defined to include banks, fund managers, insurance entities, securities dealers and persons who by profession accept possession or custody of assets of others or help to invest or transfer funds. The definition includes persons who deal in credit transactions, provide payment services, deal for their own or for a third party's account, act as distribution agents of a domestic or foreign investment fund, manage assets, make investments as investment advisors or keep custody of or manage securities. Excluded from the field of application of the MLA are investment advisors who do not manage investments and financial intermediaries who provide services exclusively to banks, fund managers, insurance entities, securities dealers or to foreign financial intermediaries who are subject to supervision in relation to money laundering.

3.2. *Licence Requirements and General Duties*

Financial intermediaries who are not members of a recognised Swiss self-regulatory organisation must obtain a licence for their activities from the Federal Control Office for the Combatting of Money Laundering. A licence will only be granted if the financial intermediary is registered as a commercial entity in the register of commerce, ensures compliance with the duties arising under the MLA by virtue of its internal regulations and the organisation of its business, and enjoys a good reputation, along with the persons responsible for the administration and management.

Financial intermediaries are obligated to identify their contractual partner and the beneficial owner of the assets in relation to which an arrangement is made and to keep records for at least ten years concerning transactions or enquiries which are required by the MLA. Moreover, the MLA makes it mandatory for financial intermediaries to immediately report what is considered to be a suspicious transaction to the Money Laundering Office. Transactions are deemed to be suspicious if there are reasons to assume that the assets involved are either the proceeds of a crime or under the control of a criminal organisation, or if they may be linked to money laundering as defined by Article 305^{bis} of the *Swiss Penal Code of 21 December 1937* (SPC), which prohibits actions aimed at foiling the prosecution of crimes.

Despite the fact that a report on suspicious investments of a client may have detrimental effects on the relationship between the financial intermediary and his client when it results in criminal investigations on suspicions of money laundering, an offence which can result in imprisonment and/or a fine, the FBC has made it clear that it will strictly enforce the obligations arising under the MLA.

4. Investment Funds

4.1. *Definitions and Organisation*

The *Federal Act on Investment Funds of 18 March 1994* (IFA) applies to pools of assets raised as a result of public solicitation on the basis of a collective investment contract. The IFA regulates unincorporated and open-ended *Swiss investment funds*. In the case of *foreign funds*, both

open-ended (such as US mutual funds or UK unit trusts) and closed-ended funds (such as UK investment trusts and US unit investment trusts, as well as US management companies) are covered by the IFA, whether incorporated or not. Exceptionally, the IFA does not apply to foreign closed-ended funds, unless they are named ‘investment fund’ or ‘fund’ or subject to investment fund supervision in their home countries, or unless they redeem units on request of the investors who do not enjoy participation rights in these funds.

Swiss investment funds are managed for the account of the investors by the *fund manager* who legally owns the fund’s assets as a trustee for the benefit of the investors. The fund manager must be incorporated as a company limited by shares with its registered office and administrative headquarters in Switzerland and with the sole object of carrying on the investment fund business. Based on a portfolio/management agreement, the fund manager may delegate certain investment decisions to a third party. Moreover, the fund’s assets must be held by a licensed Swiss bank as a *custodian*.

As a matter of commercial practice, it is worthy to mention that only a small portion of the funds managed by Swiss Banks are *Swiss investment funds*. For nearly two decades foreign subsidiaries of Swiss banks have set up funds abroad, especially in Luxembourg, in order to avoid Swiss issue tax, which was abolished in 1991, and to take advantage of a swift registration process and the right to distribute the funds in the whole European Union without further regulatory restrictions. Until recently, sales and purchases of investment fund units in Switzerland have been subject to turnover stamp duties levied on the transfer of ownership of fund units through or with the assistance of a Swiss fiscal securities dealer, the definition of which included banks, fund managers and custodian banks. Since the recent amendments to the *Federal Act on Stamp Duties of 27 June 1973* (Stamp Duties Act) fund managers fall outside the scope of the definition of a fiscal securities dealer, and transactions involving ‘institutional investors’, including Swiss and foreign investment funds, are no longer subject to turnover stamp duties. The new tax regime is generally expected to boost the Swiss investment fund business.

Depending upon whether the fund concerned is a ‘securities fund’, an ‘other fund’, or a ‘real estate fund’, different *investment regulations* apply, as specified in the IFA, the *Ordinance on Investment Funds of*

19 October 1994 (IFO), and the *Ordinance of the Federal Banking Commission on Investment Funds of 24 January 2001* (IFO-FBC). For instance, *securities funds* are modelled on the EC Directive on UCITS (Undertakings for Collective Investments in Transferable Securities) and may invest in shares, bonds and, to a limited extent, derivative financial instruments quoted on a stock exchange, traded in another regulated market open to the public or over-the-counter. *Real estate funds* are allowed to invest in real estate and mortgage certificates only. By contrast, the regime for *other funds* permits investments in securities, precious metals and derivative financial instruments.

The fund management together with the custodian bank draws up the *fund regulations*, which need to be approved by the FBC. Furthermore, funds are distributed on the basis of a *prospectus* containing information on the fund, the fund management, the custodian bank, the portfolio managers, the fund regulations and other relevant information.

4.2. License Requirements

Prior to commencing business activities the fund management of a *Swiss investment fund* must obtain authorisation from the FBC. The same is true for custodian banks and for sales agents engaged in the business of offering or distributing fund units ('distributors', '*Vertriebsträger*'). No authorisation to offer or distribute units is required for fund managers, Swiss licensed banks and securities dealers as well as for Swiss licensed insurance companies. Moreover, the fund regulations of each particular Swiss investment fund must be submitted to and authorised by the FBC.

Anyone wishing to become engaged in the business of offering or distributing units of *foreign investment funds* in or from Switzerland requires authorisation from the FBC. Technically, authorisation is granted to a Swiss representative ('*Vertreter*') of the foreign fund, not the fund itself. Each foreign fund has only one Swiss representative who in turn may use licensed sales agents for the distribution of the units in question. A licence is granted if the foreign fund is subject to supervision in the country where the fund management is headquartered provided the investment policy of the foreign fund is comparable to IFA requirements in so far as investor protection is concerned.

Only recently, the Investment Fund Ordinance (IFO) has been amended to clarify that *no authorisation* is required to offer or distribute funds in Switzerland where there is *no public solicitation* of investors (*‘öffentliche Werbung’*). However, in the absence of clear guidelines by the FBC as to what ‘public solicitation’ means in this context, the decision not to file an application should not be taken lightly. No authorisation is generally believed to be required if in the absence of any public advertising, marketing or promoting activities an asset manager (bank or independent asset manager)

- (a) is contacted by an investor seeking to purchase fund units on his own initiative;
- (b) offers fund units to clients who have signed a discretionary management agreement or buys fund units for the portfolio of these clients, provided that the portfolio manager has no distribution agreement with the promoter;
- (c) purchases, on the basis of a discretionary management agreement, fund units for which he is the promoter, provided that the certificates are distributed only to his own clients (private label funds);
- (d) offers and distributes fund units to 20 investors at maximum.

5. Other Regulated Businesses

5.1. Banking

5.1.1. General

Banking is regulated by the *Federal Act on Banks and Savings Institutions of 8 November 1934* (FBA), as amended, and its implementing ordinances and directives. *Authorisation* is needed for (a) institutions engaged in the business of accepting or soliciting deposits from the public with a view to financing an undefined number of unrelated persons or enterprises, or (b) institutions refinancing themselves in substantial amounts from a number of banks in order to provide financing for their own account to an undefined number of unrelated persons or entities outside their group. Such authorisation may be given only if certain minimum criteria relating to the corporate documentation, the

administrative organisation, the paid-in capital (at least CHF 10 million), the management and the conduct of business (fit-and-proper test), the qualified stakeholders and the residence of management are satisfied. The FBC must be advised of any stakeholder acquiring or disposing of at least 10 per cent of the capital or votes, and of any increase or decrease in participation with the effect of crossing the thresholds of 20, 33⅓ or 50 per cent. Most Swiss banks are also licensed securities dealers. The license requirements for foreign banks setting up a business in Switzerland bear a strong resemblance to the regulation of securities dealers (as set forth above, under II.2.2). Cross-border banking activities fall outside the scope of the Swiss banking regulation (see II.6).

5.1.2. *Swiss Banking Secrecy*

Swiss banking secrecy implies a *duty of confidentiality* that the banks must observe in respect of client-related data. More specifically, banking secrecy imposes an obligation upon the banks, their executive bodies and their employees to treat any client-related information confidentially so as to avoid any disclosure of information potentially harmful to a client's interest. This obligation on the part of a bank mirrors the client's right to privacy. However, privacy in this context should not be taken to imply that Swiss banks do not need to know their clients' identities. Rather, Swiss banks are obliged to identify each of their contractual partners and the beneficial owners of the assets involved in any given business relationship (see II.3 above). To dispel a common misconception, though there are what is called 'numbered accounts', there are *no anonymous accounts* in Switzerland (as regards the banks' duties see II.3.2 above and, more specifically, the *Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence of 28 January 1998*).

Swiss banking secrecy is based on the bank's general duty of loyalty as an agent vis-à-vis the client as principal (Article 398 CO), the bank's obligation not to contravene the clients' right to privacy as guaranteed by the Civil Code (Article 28 CC) and, most prominently, Article 47 FBA which makes the violation of banking secrecy a criminal offence. This notwithstanding, banking secrecy has never been absolute, and the obligation to secure their clients' privacy does not dispense

the banks from federal and cantonal *disclosure obligations*. For instance, banking secrecy may not be invoked as a valid defence against requests to produce client information in criminal court proceedings, bankruptcy or debt collection procedures, or even civil proceedings in certain cantons. Moreover, in connection with what is called ‘administrative assistance’, the FBC may on certain conditions gather and transmit protected information to foreign banking and financial market supervisory authorities, albeit in case of client-related information the *Federal Act on Administrative Procedures of 20 December 1968* (APA) applies, requiring the FBC to issue an order to the respective client who may appeal against it to the Federal Supreme Court. Further, Switzerland is party to a number of international treaties regarding legal assistance in criminal matters under which exemptions apply to banking secrecy as well.

In particular, in spite of banking secrecy legal assistance is granted in cases of *tax fraud* which implies the use of falsified evidence, forged or incorrect records, such as account books, profit and loss statements, balance sheets, income statements or any other documentary evidence with a view to actively misleading the tax authorities. Tax fraud amounts to a criminal offence which is investigated in criminal proceedings, where the bank must produce information and testify on client matters. However, Switzerland continues not to grant legal assistance in the event of tax evasion.

5.2. Private Insurance

The established system of Swiss insurance regulation is comprehensive. Private insurance companies are subject to a range of statutory obligations of which the most important are contained in the *Federal Act on Supervision of Private Insurance Companies of 23 June 1978* (‘Insurance Supervision Act’), the *Federal Act on Direct Life Insurance of 18 June 1993*, and the *Federal Act on Non-Life Insurance of 20 March 1992*. Subject to international treaties, the application to obtain an *insurance licence* must be filed with the Federal Office of Private Insurance by (a) direct Swiss insurance and reinsurance companies, (b) branches of foreign insurers marketing or selling direct insurance or reinsurance to persons in Switzerland, or to persons outside Switzerland from Switzerland, and (c) foreign direct insurers car-

rying out cross-border activities aimed at persons in Switzerland, whereas cross-border activities in respect of reinsurance is not subject to authorisation. According to a well-established principle of Swiss insurance law, the life and non-life insurance business may not be operated by the same insurance company. Besides, an insurance company may not carry on any business other than the insurance business, and acquisitions of stakes in companies engaged in non-insurance business are subject to authorisation if certain thresholds are exceeded.

Since the mid 1980s *captive insurance companies* have become increasingly popular. A captive insurance company forms part of a group by which it was set up to insure or re-insure risks of the group companies exclusively. Captive insurance is usually a lower cost alternative to third party insurance coverage. In Switzerland, captive insurance companies are treated like normal insurance companies for regulatory purposes, whereas captive re-insurance companies are subject to relaxed standards of supervision, especially regarding minimum capital requirements.

The Insurance Supervision Act is currently being revised. Among other things, it has been proposed to abolish the prohibition for insurance companies to indirectly carry on non-insurance businesses. The financial services expert group (see above II.1) even went so far as to recommend that insurance companies should be free to carry on any other business they choose, provided the relevant authorisation is obtained. Besides, it has been proposed to introduce regulation to cover certain insurance (as opposed to re-insurance) brokerage services.

A major theme of Swiss insurance law is the enforcement of adequate assets and solvency requirements. Assets set aside for security purposes are subject to investment restrictions, as opposed to funds outside the scope of covering expected liabilities. Re-insurance companies are generally subject to less onerous investment restrictions than life or non-life insurers. The use of derivative financial instruments by insurance companies is regulated by the *Federal Ordinance on the Use of Derivative Instruments by Insurance Companies of 19 November 1997*, which provides that derivative transactions may only be entered into to hedge risks and to manage investments efficiently.

ATR (Alternative Risk Transfer) products are the latest star in the insurance firmament. They involve a risk transfer not only within the insurance and re-insurance markets, but also via the financial markets

where the risk is shifted to investors, for example through insurance linked securities (such as CAT bonds) or a whole range of financial derivatives.

5.3. Pension Funds

Under the *Federal Professional Old Age, Survivors and Disability Insurance Act of 25 June 1982* (Pension Plan Act), it is compulsory for employers to provide pension plans for the benefit of their employees. A pension fund must be administered by a separate legal body. Most commonly pension funds are operated by foundations. Employers can either form their own autonomous pension fund or establish a non-autonomous fund which will take out insurance with a collective pension fund set up and managed by a bank, life insurer or a parent company.

Pension funds are subject to investment restrictions imposed by their own rules and regulations, by the Federal Office for Social Security or by the cantonal supervisory authorities. Of particular importance are the investment guidelines contained in the *Federal Ordinance on Occupational Pension Plans of 18 April 1984*, as amended, according to which pension funds may invest in derivatives provided the underlying instrument is a permitted investment, the obligations of the pension funds arising from derivatives transactions are fully covered and no leverage effect is achieved in relation to the aggregated funds. Permitted investments include cash, debt securities, claims, real estate, shares and similar equity securities, including shares in real estate companies, and shares in foreign companies on condition that they are listed abroad or in Switzerland.

5.4. Financial Conglomerates

The recent past has witnessed the emergence of large financial conglomerates seeking to provide a whole range of financial services under one roof, including banking and insurance. However, Swiss law imposes *restrictions* on the possibility of acquiring companies subject to insurance and banking regulation.

More specifically, Swiss insurance law provides that as a general rule *insurance companies* may not operate non-insurance businesses.

Acquisitions of equity stakes in companies conducting non-insurance businesses are subject to authorisation if certain limits in relation to the capital of the companies involved are exceeded. A merger between an insurance company and a non-insurance company is generally prohibited. However, Swiss insurance companies are not restricted in offering services as *intermediaries or brokers* in non-insurance transactions (as to the current revision of Swiss insurance regulation, see above II.5.2).

Banking law is more liberal with regard to activities not falling within its primary scope of regulation. *Banks* are generally permitted to offer financial services other than banking provided the necessary authorisations are obtained. Moreover, as a rule, a bank may acquire shares in companies other than banks within certain limits relating to the bank's own funds, though these limits do not apply to the acquisition of a participation in insurance companies. A bank is therefore free to acquire an insurance group.

5.5. *Non-Regulated Investment Advice*

No regulatory restrictions apply on providing corporate finance or investment advice in Switzerland. This is conceptually different from the UK, where no person may carry on any kind of investment business unless he is either an authorised person or an exempted person (subject to a few exceptions).

5.6. *General Regulatory Restrictions*

5.6.1. *Advertising, Marketing or Promoting in General*

Apart from the general limits set by Swiss law on fair competition and financial markets, there are *no restrictions* on advertising, marketing or promoting activities. Yet, based on recent court decisions excessive advertising, marketing or promoting by a subsidiary in respect of its relationship with the parent may lead to the parent's liability for the subsidiary's debts. The Federal Supreme Court has developed a doctrine according to which the parent becomes jointly liable with a subsidiary if the creditors were made to believe in the given circumstances that the parent would assume responsibility for the subsidiary's obligations should the latter not be able to discharge them. Even though

uncertainty surrounds the scope of this ‘group liability’, there is no risk involved for the parent if the subsidiary’s relationship with the parent is not excessively advertised, promoted or marketed, e.g. if the subsidiary’s letterhead merely refers to the subsidiary’s being part of the parent’s group.

5.6.2. Limitations on Type, Percentage or Size of Investment

There are no regulatory restrictions on the type, percentage or size of investments in Switzerland with the exception of investments in real property and in companies owning real estate not used for business purposes, investments in certain regulated businesses (such as banks), public services (partly) controlled by government, and a few industries, such as mining and petroleum exploration.

The sale of assets and liabilities of an ongoing business that requires a licence or a concession to operate (for example in the transport, health and agricultural sectors) may be subject to approval by the competent authorities, whereas the sale of shares of a corporation which has been issued with a licence will generally not necessitate a renewal of such licence.

5.6.3. Banking or Foreign Exchange Restrictions

Currently, there are no banking or foreign exchange restrictions or controls applying to the funding of investments in Switzerland or the repatriation of earnings and gains to foreign investors. There is, however, a duty to report issues of Swiss franc bonds and Swiss franc medium term notes to the Swiss National Bank and an obligation to appoint a licensed Swiss bank or securities dealer as lead manager for the issuance and distribution of such bonds and notes. Theoretically, the Swiss National Bank could implement a stricter regime in relation to credit and currency policies, though it is unlikely to do so. In certain exceptional circumstances the Swiss government may even prohibit the sale of securities of Swiss companies, as it did in 1978, in order to control the Swiss franc exchange rate.

5.6.4. *Data Protection*

The *Federal Act on Data Protection of 19 June 1992* is concerned with the collection, storage, use, amendment, disclosure and destruction of data in or from Switzerland. Data processing must be fair and lawful as well as proportionate. Personal data may only be processed for the purpose indicated at the time of collection, as evident under the circumstances or as provided for by law. An employer may process data contrary to the aforementioned principles based on certain legal grounds, such as the consent of the employee or an overriding private or public interest. In addition, the export of personal data is prohibited if the privacy of the persons concerned would be seriously endangered, especially in the case of data exports to countries where data protection does not meet Swiss standards. However, cross-border disclosure of personal data is permissible based on the consent of the employee concerned and based on certain other grounds provided the necessary contractual safeguards are put in place. Additional requirements relating to data protection arise in connection with such obligations as professional secrecy, securities dealer secrecy or banking secrecy.

6. Cross-Border Activities

Cross-border *securities dealing* into Switzerland is free from regulatory restrictions, except where foreign stock exchanges seek to provide access to its technical systems to securities dealers in Switzerland or where foreign securities dealers intend to establish a business in Switzerland or seek membership with the Swiss Exchange without a physical Swiss presence. Among legal writers it is still open to doubt whether the Swiss rules of conduct as laid down in Article 11 SESTA (and specified for Swiss securities dealers in guidelines of the Swiss Bankers' Association of 22 January 1997 entitled 'Code of Conduct for Securities Dealers governing Securities Transactions') – comprising the duties of disclosure, due care and loyalty – should generally also apply to foreign security dealers engaged in cross-border business in Switzerland.

Cross-border banking has been liberalised so as to mirror the situation for cross-border securities dealing. For instance, internet banks

may offer banking and securities dealing services to Swiss residents without authorisation, provided no staff is employed in Switzerland and provided the server hosting the respective web site is located outside Switzerland (the latter being a requirement applied by the FBC in practice). Trading in *commodities and foreign currencies* is generally free from any regulations (save for gold trading).

In stark contrast to securities dealing and banking, cross-border activities in connection with *foreign investment funds* require authorisation by the Swiss supervisory authorities which will be granted in certain circumstances. Cross-border activities of *life or non-life insurance* companies are also regulated and are basically impermissible unless the foreign insurers are subject to Swiss supervision, whereas *re-insurers* covering the Swiss market without establishing a local business operation do not have to overcome any regulatory impediments.

III. The SWX Swiss Exchange

1. General

1.1. International Developments

The Swiss Exchange is one of the largest exchanges in Europe and a leading securities trading centre in the world. It is an association with over sixty members of which a quarter are foreign institutions. The Swiss Exchange became the world's first fully integrated electronic trading, clearing and settlement operation in August 1996. The various segments of the Swiss Exchange, EUREX – a joint venture with Deutsche Börse, as well as the Swiss clearing system and performance indexes are considered in more detail below.

On an international level, the Swiss Exchange is currently faced with a situation where competition for cross-border trading facilities gathers pace as investors demand more liquidity and lower costs and the NYSE and Nasdaq – the first and second-largest exchanges in the world by market capitalisation – try to capture business outside the US.

Various groups of global exchanges are currently vying to maintain market share in the increasingly competitive equity world. Among the protagonists are the London Stock Exchange and Deutsche Börse, whose plan to merge to form iX, Europe's largest stock market, which was to include Nasdaq for technology stocks, failed recently. 10 other exchanges, including the stock exchanges of New York, Tokyo, Hong Kong, Europe's Euronext alliance (Amsterdam, Brussels and Paris) and other overseas bourses are in talks to create an alliance, to be known as the Global Equity Market (GEM), whose members will use the same trading technology and contract with a central counterparty. The combined market capitalisation of the 10 exchanges in total is USD 19,000 billion, or 53 per cent of the world's aggregate stock market valuation.

1.2. virt-x

The Swiss Exchange, instead of linking with either GEM or iX, decided to team up with Tradepoint Financial Networks plc ('Tradepoint'). The

Swiss Exchange and Tradepoint have formed a UK based joint venture called *virt-x*, which aims to become the top market for trading in Europe's biggest 600 blue chip equities representing 80 per cent of European market capitalisation by the end of 2001. It is expected to go live in June 2001.

In future, a distinction will have to be drawn between the listing of securities and their admission to trading. The securities in question will continue to be listed by the SWX Swiss Exchange, the UK Listing Authority (UKLA) and other recognised listing authorities based on the respective listing requirements, and, separately, will be admitted on certain conditions (capitalisation, trade volume, etc.) to trading on *virt-x* as a recognised investment exchange supervised by the Financial Services Authority (FSA). As to the Swiss jurisdiction, the procedure for listing and the continuing obligations of listed companies will be as at present. The London Clearing House will act as a central counterparty, and the trades will be settled through SIS SegInterSettle, CrestCo or Euroclear. On- and off-exchange transactions will have to be reported to *virt-x*, which will automatically pass on the information to the Swiss and the UK regulators or their designated reporting offices.

2. Segments of the SWX Swiss Exchange

Issuers can choose between the following different segments of the Swiss Exchange, each governed by special regulations: Main Market, Investment Companies, New Market, Local Caps, International Bonds, Repos and Real Estate Companies.

2.1. Main Market

The conditions to be satisfied in order to be admitted to the Main Market include the following:

2.1.1. Incorporation, Duration of Business, Accounts

In general, the company applying for a listing must have a three-year trading record and must have presented accounts covering three complete financial years. The Admission Board may allow exemptions

from this requirement according to principles laid down in a special directive. Accounting standards must be in compliance with FER/ARR as defined in the Listing Rules and their Annexes. The company's capital must be at least CHF 25 million on a consolidated level.

2.1.2. Capitalisation

If equity securities are listed for the first time, the off-floor capitalisation must have reached at least CHF 25 million. The total nominal amount of debt securities to be listed must not be less than CHF 20 million. With respect to derivatives, the minimum market capitalisation is CHF 6 million or, alternatively, the underlying instruments' capitalisation must amount to, in the case of (a) bonds, at least CHF 100 million, (b) Swiss equity securities listed on the Swiss market index, at least CHF 50 million, (c) Swiss equity securities not listed on the SMI, at least CHF 25 million, (d) Swiss equity securities traded on the SWX New Market, at least CHF 25 million, (e) foreign equity securities, at least CHF 50 million, (f) indices, currencies, precious metals, commodities and investment funds, each a minimum of CHF 50 million, and (g) baskets consisting of the above mentioned underlying instruments, the minimum amount of the respective instrument.

2.1.3. Public Ownership

The Listing Rules require that a sufficient number of shares be distributed to the public by the time of admission of the securities for which listing is sought. In the case of equity securities, a sufficient number of shares is deemed to have been distributed to the public if 25 per cent of the shares in respect of which application for the admission has been made are in the hands of the public. A percentage lower than 25 per cent may also be acceptable if the applicant can show that this is unlikely to affect the proper operation of the market. In case of bonds and derivatives, adequate distribution is considered to have been reached when the applicant submits a declaration from the lead manager to the effect that the distribution of the securities in the hands of the public is such that the market will operate properly.

2.1.4. Application Procedure

The application procedure is simple compared with other jurisdictions. The listing application must be lodged with the Admission Board by the issuer or a recognised representative in writing and must be made not later than one month before the listing date, unless an exception is granted. Together with the listing application the following documents must be filed: copies of the prospectus, the listing notice, the securities certificates or in the event of uncertificated securities an assurance by the issuer that the right holders may at any time obtain proof of their holding, and, as far as equity securities are concerned, an extract from the commercial register or a comparable foreign register from which it can be seen that the equity securities legally exist.

New issuers must file additional documents, such as an extract of the commercial register or a comparable foreign register, articles of incorporation, and copies of the last three business and interim reports as well as notifications about any price sensitive facts which have been published since the last business report.

The Admission Board approves the application if it complies with the Listing Rules. Debt securities and derivatives may also be admitted provisionally. The application for provisional trading must be filed with the Admissions Board not later than three business days before the intended commencement of trading. If subsequently the application for listing is not lodged within two months, admission to provisional trading automatically lapses, and the applicant may be fined.

2.1.5. Foreign Issuers

As a general rule, securities of companies incorporated in countries other than Switzerland and denominated in foreign currencies are admitted to the Main Market of the Swiss Exchange provided certain additional requirements are met. For instance, services pertaining to dividend, interest and capital payments must be provided in Switzerland. If equity securities are not listed in the state where the company is incorporated or where the majority of the shares are held, the issuer must prove that such listing was not avoided due to local investor protection rules. The application and the requisite annexes thereto must be provided in German, French, Italian or English; translations must be

certified and be accompanied by the original texts. Exemptions from listing requirements are available for equity securities of foreign issuers which are already listed on an exchange with listing requirements equivalent to those of the Swiss Exchange.

In November 2000, the Swiss Exchange has published a draft 'Directive for the Listing of Foreign Companies', which is expected to be enacted in early 2001. The new directive draws a distinction between primary listings and secondary listings.

To qualify for a *primary listing* a foreign company must (a) follow the normal listing procedure in accordance with the Listing Rules of the Swiss Exchange and (b) demonstrate that the requirements for listing in the home jurisdiction of the foreign company are satisfied, either by obtaining the foreign listing authority's approval for listing in the home jurisdiction or by providing a legal opinion by an independent law firm confirming that the relevant requirements are met. There will be no need, however, to enter into a separate listing agreement with the Swiss Exchange. All that will be required is an express statement by the applicant in the prospectus where the information to be provided in accordance with the Listing Rules of the Swiss Exchange and the corporate law of the home jurisdiction will be published.

For an foreign applicant seeking a *secondary listing* on the Swiss Exchange, the main requirements are as follows:

- (a) the company's securities must be admitted to the official list of a foreign stock exchange with listing requirements equivalent to those of the Swiss Exchange;
- (b) a short form prospectus (containing information on the securities to be listed) must be produced, unless a dual listing is taking place in which case the Swiss Exchange will accept a prospectus approved by the listing authorities of the primary market (provided a Swiss wrap is included containing purely technical information); moreover, a listing notice must be prepared;
- (c) a simplified listing procedure must be followed;
- (d) for as long as listing is maintained the foreign company must provide the Swiss market with the same information as the primary market and must, in any case, comply with annual and semi-annual

financial reporting duties and *ad hoc publicity* requirements as per Article 72 SESTA.

In addition, the sponsor will have to ensure not only that the foreign applicant will abide by the rules relating to the information of the Swiss Exchange and the Swiss investors but also that information published in the home jurisdiction (e.g. involving a change of name, registered office, or capital as well as dividend payments) will be made available to the Swiss investors.

2.2. *Investment Companies*

Investment companies are corporate bodies whose object it is to generate yields and/or capital gains by making and disposing of investments. Swiss investment companies are closed-ended funds not regulated by the IFA. The Swiss Exchange's new regulatory framework for investment companies, which came into force on 1 March 1998, is meant to ensure an appropriate degree of transparency on the part of such companies, while at the same time relaxing the admission requirements in respect of capitalisation.

Besides the information required to be provided on the main market, investment companies must include the following in the prospectus: the object of the company, a detailed explanation of the guidelines of the investment policy (including a description of the investment objectives and the instruments and investment techniques), information as to who may change the investment policy, the persons or companies managing assets (including their professional qualifications, the material contractual conditions and the remuneration, in particular bonuses, which the company pays for marketing, management and other services), accounting methods in the case of investments which have only limited marketability, details about the possibility of realising investments, the taxation status of investments provided this is relevant for a value assessment, guidelines issued concerning risks, securities custody, disclosure of any potential conflicts of interest and/or links between members of the board of directors, the management and the auditors on the one hand, and the promoters, significant shareholders, administrators and depositary banks of the investment company on the other hand.

As far as the reporting is concerned, the following additional information must be included in the annex to the annual accounts: an inventory of company assets at their current value (intrinsic value, net asset value), the value of a security thus derived on the last day of the accounting year, details about initial and end inventories, as well as deviations from the investment policy during the period covered by the report and certain other items. In addition, investment companies must publish half-yearly interim results including the balance sheet, the profit and loss statement, the net asset value and other information.

2.3. *New Market*

The SWX New Market was created in view of listings of companies with special characteristics (e.g. new sales markets, innovative procedures, development of new products or services) and provides for less stringent admission requirements but increased transparency. The new regulatory framework entered into effect on 1 June 1999.

In order to be listed, the company must have been in business for a period of not less than 12 months, the share capital must be at least CHF 2.5 million, the capitalisation at least CHF 8 million, and 20 per cent of the shares must be in public hands. The minimum number of shares is 100'000. The initial listing needs to comprise a primary offering (i.e. a share capital increase) accounting for 50 per cent or more of the proceeds to be used for financing the company's growth. Existing shareholders owning more than two per cent of the outstanding share capital are subject to a selling restriction for a period of six months following the public offering during which they may not sell their shares. Further, a SWX member bank must have agreed to act as a market maker for the newly listed securities. Transparency is increased by such requirements as the publication of quarterly financial reports, IAS or US GAAP accounting principles, as well as the production of research reports at least biannually during a period of at least two years following listing by the bank sponsoring the issue. Special provisions on risk disclosure have to be included in the prospectus as well.

2.4. Local Caps

The SWX Local Caps segment is a platform provided by the Swiss Exchange serving companies that cannot yet fulfil the conditions for a full listing on the main market. The issuer must have published accounts for at least two fiscal years, its capital must be at least CHF 2.5 million (identical to the SWX New Market), and the total market value of the company's shares may not be less than CHF 10 million. Furthermore, a sufficient number of shares (15 per cent) must already be in the hands of the public. The transparency requirements for companies in the Local Caps segment are identical to those on the Main Market, entailing such duties as the production of a listing prospectus and a listing notice, the application of accounting standards in accordance with FER/ARR, IAS, US-GAAP, semi-annual reporting, and ad hoc publicity.

Companies not qualifying for the SWX Local Caps segment may opt for off-exchange trading, usually with the assistance of Luzerner Regiobank (80 per cent of the market), Zürcher Kantonalbank or CS Group. Alternatively, a quotation on the regional stock exchange in Bern may be envisaged.

2.5. International Bonds

The *Rules for the Admission of International Bonds to Trading on the SWX Swiss Exchange*, which were referred to as Eurobonds rules prior to their latest revision (effective as of 1 May 2001), now define International Bonds as bonds that have been issued by a foreign issuer in a foreign currency and are listed on a recognised foreign stock exchange. International Bonds may include straight bonds, convertible bonds, exchangeable bonds, warrant bonds and floating-rate notes, but not structured derivative products (such as reverse convertible instruments).

International Bonds which have been admitted for trading are not listed securities within the definition of the Listing Rules. Accordingly, there is no need for a bond issuer who seeks admission for trading on the Swiss Exchange to produce a prospectus or provide the exchange with regular or ad hoc information. In certain circumstances, a term sheet together with what is called a 'declaration of interest' must be submitted by an SWX participant.

When deciding whether to select and admit International Bonds for trading on the Swiss Exchange, the Admission Board will apply a test based on criteria such as whether the security is already listed on a stock exchange recognised by the Swiss Exchange, whether the security is denominated and capitalised in a manner to ensure a proper market in the International Bonds segment, and whether settlement of exchange transactions will be possible through a clearing house recognised by the Swiss Exchange.

2.6. Repo

Electronic trading of sale and repurchase agreements, in short 'repos', has been introduced by the Swiss Exchange in June 1999. The SWX Repo platform comprises a Swiss franc and an international segment. International commercial banks continuously quote bid and asking prices for terms ranging from over-night to 12 months in maturity. The Swiss National Bank carries out its open market repo transactions exclusively via SWX Repo.

2.7. Real Estate Companies

The Real Estate Companies segment has been the latest addition to the Swiss Exchange. The additional rules for the listing of real estate companies took effect on 1 May 2001. The main features are a dispensation from the three-year trading requirement, an obligation to disclose the investment policy and a number of specific requirements aimed at enhancing transparency so as to simplify the assessment and comparability of real estate companies. The additional requirements involve specific information to be disclosed in the annual financial statements, the provision of interim financial reporting and the notification of amendments to the investment policy.

A company is deemed to be a real estate company for the purposes of the Listing Rules if at least two thirds of its income are derived from real estate activities (rental, lease, real estate services) and at least two thirds of the gross assets are real estate investments.

3. EUREX

EUREX – the EUROpean EXchange – was set up as a joint venture between SWX Swiss Exchange and Deutsche Börse AG through the merger of DTB Deutsche Terminbörse and SOFFEX (Swiss Options and Financial Futures Exchange) to create the first transnational derivatives market. EUREX is the leading derivatives exchange in the world.

4. Clearing System

The Swiss Exchange has been the world's first securities exchange with a fully integrated electronic trading and clearing platform. SIS SegInterSettle AG is not only a *national* but also an *international* central securities' depository, providing services for the clearing, settlement and custody of national and international securities transactions. SIS SegInterSettle AG is a subsidiary of the Swiss Financials Services Group AG whose shareholders are the most important Swiss banks. SIS is in the process of setting up links to other central securities' depositories in Europe so that participants in other markets can also benefit from straight through processing. Currently, there are links to Deutsche Börse Clearing AG (only for EUREX and OTC transactions), Cedel and Euroclear (only for Eurobond trades), Crest (only for Swiss securities) and Monte Titoli. Further links to other clearing organisations are planned. In addition, SIS has a network of correspondents in all major markets around the globe. The EUREX clearinghouse is Eurex Clearing AG which clears and settles all transactions as the central counterparty.

5. SMI, SPI, SBI, SNMI, STOXX

The *Swiss Market Index* (SMI) is made up of up to 30 of the most important Swiss shares (blue chips) and represents 80 per cent of the total market capitalisation in Switzerland, i.e. in aggregate CHF 870 billion. The *Swiss Performance Index* (SPI) covers all Swiss shares listed on the Swiss Exchange with the exception of investment companies and companies listed on the SWX New Market. The *Swiss Bond*

Index (SBI) measures the performance of Swiss franc bonds with a minimum maturity of one year. The *SWX New Market Index* (SNMI) comprises all securities of the SWX New Market. STOXX Limited – founded by Deutsche Börse AG, Dow Jones and Company, Paris-Bourse SA and the Swiss Exchange – publishes and disseminates the *Dow Jones STOXX* family of European indexes.

6. Consequences of Listing

6.1. Continuing Obligations of Listed Companies under SESTA

6.1.1. General

Companies listed on the Swiss Exchange are subject to rather strict rules. The purpose of the continuing obligations is to ensure a fair market and equal treatment of the shareholders. To this effect, the Swiss Exchange has imposed on each of the quoted companies an obligation (a) to publish business reports, including the auditors' reports, and to file these reports with the Admission Board, (b) to publicly announce certain price-sensitive facts concerning the company to prevent a false market ('ad hoc publicity'), and (c) to make certain notifications of interests in its shares to the Swiss Exchange. Contrary to other exchanges, the Swiss Exchange has not yet requested that a listed company send circulars to its shareholders advising them of impending transactions or make certain arrangements relating to dealings by directors in the securities of the company or the repurchase of shares by the company of its own shares.

6.1.2. Ad Hoc Publicity

Under the principle of ad hoc publicity quoted companies must inform the market of *price sensitive facts* which are not yet public. Facts are deemed to be price sensitive if they are likely to result in substantial price movements in the shares of the company. Ad hoc publicity announcements must be made to the market participants so as to ensure their *equal treatment*. In practice, announcements are made outside trading hours via news agencies, nowadays generally in electronic

form. Furthermore, the Admission Board of the Swiss Exchange must be notified before the beginning of trading.

Events which typically trigger a publication duty are corporate restructurings, changes in the capital, including share repurchase offers, as well as material changes in relation to the earnings situation, the course of business and, if unforeseen, changes in the board of directors, management and the auditors of the company. By way of contrast, events not triggering a duty to disclose information are simple changes in the dividend rate, profit warnings if management did not previously whet the appetite of the investors, the execution and completion of agreements, litigation or anti-trust proceedings, acquisitions of minor importance, extraordinary earnings or expenses provided they do not substantially change the picture of a company's financial situation.

Conceptually different from UK and German disclosure regulations, the Listing Rules of the Swiss Exchange allow *postponement* of the disclosure of a price sensitive fact without the need for a specific dispensation by the Swiss Exchange on condition that (i) they arise in relation to a plan or decision of the company, (ii) their dissemination would prejudice the interests of the company, and (iii) the company ensures that they continue to be treated confidentially.

6.2. Obligations of Shareholders After Listing

6.2.1. Disclosure of Shareholdings

In light of the duty of an investor to make a public offer to the other shareholders if he acquires a certain stake in a listed company (see III.6.2.2), it is important for the company and the shareholders to be aware of the beneficial owners of the company's shares. Consequently, SESTA and SESTO-FBC require a person who has a certain interest in equity securities of a Swiss company listed in whole or in part on a Swiss stock exchange to notify the company and the Swiss stock exchange where the equity securities in question are listed. The obligation to disclose is triggered by a change from below a notifiable percentage to, or above, such percentage, and vice versa. The notifiable percentages are 5, 10, 20, 33⅓, 50 or 66⅔ per cent of the voting rights, irrespective of whether or not such voting rights may be exercised. Persons acting in concert, for example due to shareholders' agreements or

as members of a group or a family, are also subject to the disclosure obligation. Securities dealers are obliged to disclose their holdings if they are trading shares in their own name and for their own account.

A shareholder may passively reach, exceed or fall below one of the above thresholds due to an increase or a reduction of the share capital. If a shareholder does not subscribe new shares in the event of a share capital increase, the effect is the same as if he had sold shares. If a shareholder does not accept a buyback offer by a company in view of a share capital reduction, this achieves the same result as if the shareholder had bought new shares. Contrary to other jurisdictions, where there is a share capital increase in Switzerland, the percentage level of the shareholder's interest before the capital increase is not determined by the share capital after the increase so that if a shareholder takes up his rights in a rights issue, usually no obligation to notify will arise.

The notification to the company and the stock exchange must be made not later than four trading days following the day upon which the obligation to notify arises. The company must then publish the notified share interests within two trading days in the Swiss Commercial Gazette and in an electronic medium publishing stock market information. The Disclosure Office of the Swiss Exchange may grant exemptions from the disclosure duties on important grounds, for instance if transactions are of a short-term nature, subject to conditions or such that the exercise of voting rights is not intended.

There are no provisions under Swiss law requiring directors of a company to disclose their interests in shares of the company or entitling the company to investigate the beneficial ownership of its shares by serving notice on shareholders who in response to such notice must reveal their shareholdings.

6.2.2. *Takeovers and Mandatory Offers*

(a) Takeover Rules

The tender offer rules embodied in SESTA and the *Ordinance of the Takeover Board on Public Takeover Offers of 21 July 1997* (TBO) are concerned with offers for shares of a Swiss company of which at least one class of equity securities is listed on a Swiss stock exchange. Offers for shares of foreign companies listed on the Swiss Exchange and man-

aged in Switzerland are also subject to SESTA and TBO. This is different from the scope of the City Code on Takeovers and Mergers in the UK (on which the Swiss provisions were basically modelled), which operates in certain circumstances where the offeree company is a listed, public or even a private company.

The classical takeover situation involves an offer by a Swiss or a foreign company to acquire the whole or part of the equity capital of a listed Swiss company. The obligations and requirements arising in such a takeover for the offeror, the offeree and their respective boards of directors are numerous. The basic principles can be summarised as follows:

- The bidder must publish a prospectus, which must have been approved by an auditor or a securities dealer.
- The offeror must treat all shareholders of the target company equally.
- Conditions may be attached to the offer. Suspensive conditions are generally permissible, whereas resolutive conditions (i.e. conditions which, if fulfilled, would entail an unwinding of the transaction because the fulfilment or non-fulfilment of the condition can be ascertained only after the end of the offer period) require the approval of the Takeover Board of the Swiss Exchange (e.g. in case of pending anti-trust clearance requirements, etc.).
- The board of directors of the target company must advise its shareholders whether to accept or reject the bid by publishing a special report. Besides, the target's board may not take any frustrating action by employing defensive tactics intended to significantly alter the assets or liabilities of the target company.
- The offeror and any other person holding at least five per cent of the voting rights of the target company must report all purchases and sales of equity securities of the target company to the Takeover Board and the Swiss Exchange during the interval from publication until lapse of the offer.
- The right to squeeze out remaining shareholders arises if the offeror holds more than 98 per cent of the voting rights of the target company and involves civil court proceedings to cancel the remaining shares.

(b) Mandatory Offers

Whilst the general takeover rules relate to voluntary takeover offers, under SESTA a person may be required to make an offer to buy all the equity capital of a company in certain circumstances. No such mandatory offer requirements exist for example under US federal laws. The triggering event for a mandatory offer is an acquisition of equity securities resulting in a shareholding exceeding 33 $\frac{1}{3}$ per cent of the voting rights of a target company, irrespective of whether such voting rights may be exercised or not (e.g. due to voting limitations in the articles of incorporation of the company). The price offered may not be lower than the current market price and 25 per cent below the highest price paid by the offeror in the preceding 12 months for equity securities of the target company.

Mandatory offers are governed by the same rules as other tender offers, but unlike normal bids mandatory offers may not be made subject to conditions unless an exemption is granted by the Takeover Board on important grounds (e.g. in view of necessary antitrust clearances). If a partial offer is made resulting in a shareholding exceeding 33 $\frac{1}{3}$ per cent of the voting rights of the target company, as a general rule the terms applying to mandatory offerings must be fulfilled from the beginning. However, the Takeover Board has relaxed this rule to allow offers which are conditional on acceptances of a percentage above 33 $\frac{1}{3}$ per cent. Unlike the City Code, SESTA allows a Swiss target company to opt out of the mandatory offer rules by adopting an article to this effect in its articles of incorporation. Furthermore, target companies may opt up the threshold triggering a mandatory offer requirement in their articles of incorporation to 49 per cent.

6.3. Criminal Liabilities

6.3.1. Insider Dealing

In comparison with the US and most European jurisdictions, Switzerland's insider dealing legislation has a narrow field of application. Pursuant to Article 161 of the *Swiss Penal Code of 21 December 1937* (SPC) a person who has information as an insider with respect to a listed company is liable to a fine and/or imprisonment if said person (a) abuses a confidential fact (usually by dealing) or makes such confi-

dential fact known to a third party, (b) foresees that the dissemination of such confidential fact will have a significant effect on the price of a listed security, and (c) makes a profit or avoids a loss. Furthermore, a ‘tippee’ who learns a confidential fact from an insider commits an offence if he as tippee abuses the information as set forth above, provided the insider is guilty of insider dealing. Insiders can be directors, managers, auditors, agents, and any of their auxiliaries. A ‘confidential fact’ is deemed to be a fact involving an issuance of securities, a merger or an event of similar significance. Hence, the definition of a ‘confidential fact’ is narrower than that of a ‘price sensitive fact’ which is relevant in the context of ad hoc publicity requirements imposed by the Listing Rules.

Since the introduction of Article 161 SPC in 1988, convictions for insider dealing have been rare. The reasons are twofold. First, as set forth above, the expression ‘confidential fact’ is narrowly defined, effectively excluding much price sensitive information from the Article’s field of application. Secondly, it has proven very difficult for the prosecution to establish that a confidential fact was brought to a tippee’s knowledge by an insider who committed insider dealing as set forth above.

6.3.2. *Price Manipulation*

Under Article 161^{bis} SPC it is an offence for an individual to spread misleading information or effect fictitious sales and purchases, including wash sales and matched orders, with intent to significantly influence the market price of listed securities and to realise a profit for himself or for another person.

Information is misleading only if it involves facts or forward looking statements made by certain qualified persons. Omissions of statements may qualify as price manipulation where there is a failure to comply with disclosure duties, such as the ad hoc publicity rules arising under the Listing Rules of the Swiss Exchange. Besides, it cannot be ruled out that errors in, or omissions from, a listing or takeover prospectus may give rise to criminal penalties under this provision. Transactions aimed at stabilising or maintaining the market price in connection with an offering of securities, as they are commonly effected on capital markets, do not fall within the scope of Article 161^{bis} SPC.

6.4. Corporate Law Consequences

While listed companies are subject to a complex web of rules imposed by SESTA, Swiss corporate law applies to listed and unlisted corporations alike. The most notable exceptions include the following:

- (a) a listed corporation must include in the notes to the balance sheet a list of shareholders holding at least five percent of the voting rights to the extent they are known or should be known to the company;
- (b) a listed corporation must prepare consolidated financial statements and publish the annual financial statements in the Swiss Commercial Gazette or on request send a copy to the respective shareholder,
- (c) auditors of listed corporations must meet certain requirements as to their professional qualifications;
- (d) the transferability of listed registered shares may be restricted to a lesser degree than the transferability of shares in an unlisted corporation given that the only valid reason for restricting the transferability of listed shares is a percentage limit up to which an acquirer must be recognised as shareholder with voting rights; and
- (e) in the case of listed shares with restricted transferability, the acquirer is not restricted in the exercise of rights other than voting rights even in the absence of an approval of the transfer by the corporation provided the purchaser applies for registration in the share register; in practice, however, dividends are paid via the banking system even to holders of shares for which no such application has been made (commonly referred to as ‘dispo-shares’).

IV. Raising Capital in Switzerland

1. General

Most large businesses seeking access to the Swiss financial market are run by *companies limited by shares/corporations* ('*Aktiengesellschaften*', 'AG', 'SA'). The following chapters provide an overview of the corporate legal framework within which such companies operate and set out how they can finance their activities by raising equity or debt capital, or equity and debt capital in combined form through hybrid products.

2. Swiss Corporations

2.1. Sources of Corporate Law

The main source of Swiss corporate law is the *Federal Code of Obligations of 30 March 1911* (CO). Furthermore, listed companies are subject to SESTA and its implementing ordinances. A bill in relation to a *Federal Act on Mergers, Spin-offs, Transformations and Business Transfers* ('Merger Act') is currently under consideration in parliament. The proposed law will replace the provisions on mergers and transformations contained in the CO and will close certain regulatory gaps. Its main purpose is to increase the flexibility of businesses changing their legal form or transferring their assets and liabilities to different legal entities. In addition, partial revisions of various tax laws will ensure that re-organisations of Swiss companies are not hindered by negative tax implications. The new Merger Act will probably enter into effect in 2002.

Information about a particular corporation can be obtained from the commercial register. Annual returns and accounts of past business years are, however, not available at the commercial registry. A company search is usually carried out by applying for an excerpt of the commercial register which sums up all relevant information on the company. Furthermore, certain corporate documents (to the exclusion

of commercial contracts) are also on public display at the commercial registry.

2.2. Formation and Incorporation

Under Swiss law, if a business wants to carry out its activities in the form of a body corporate, the method is either to acquire a corporation already engaged in business operations or to actually form a new company. The acquisition of a shelf corporation is not an alternative for various reasons.

The mechanics of creating a Swiss corporation involve two basic steps:

- (a) The company is formed on the occasion of a special meeting held in the presence of the founders and a notary public. The founders declare that the share capital is fully subscribed and that the respective payments have been made. Contributions may be made in cash or in kind. Contributions in kind entail the disclosure of the assets in question, the value of these assets and the names of the persons contributing them. A similar rule applies in the event assets are planned to be purchased shortly after the creation of new share capital, in which case the assets, the person from which they are acquired as well as the purchase price have to be disclosed. Furthermore, the founders adopt the articles of incorporation and appoint the various bodies of the corporation (such as the board of directors and the auditors). The articles of incorporation contain the charter of the company as well as certain rules relating to its internal affairs, in other words, no distinction is made between memorandums of association and articles of association.
- (b) The company is registered with the commercial register and then published in the Swiss Commercial Gazette (*'Schweizerisches Handelsamtsblatt'*). It is at this point in time that the company becomes a body corporate, a legal person with rights and obligations distinct from those of its members.

2.3. *Limited Liability of Shareholders*

The key feature of a Swiss corporation is the limited liability of its shareholders whose only obligation is to pay in the capital they have subscribed. Consequently, shareholders in a Swiss corporation are not liable for the debts of an investee company. The corporate veil of a Swiss corporation may be pierced and (foreign) shareholders may be held liable for the corporation's debts only if the corporation has failed to comply with its basic corporate duties, such as convening shareholders' and board meetings, etc.

2.4. *Shares and Certification*

Swiss corporations have a stated capital of at least CHF 100,000, which is divided into shares with a nominal value of at least CHF 0.01 each. Swiss corporate law provides for two types of shares, namely *bearer shares* and *registered shares*. The main difference is that only the latter may be restricted in their transferability and entered into a share register, in consequence of which the company knows (most of) its shareholders. The disadvantage of registered shares is the higher costs related to the administrative work to keep a share register. Nevertheless, an increasing number of Swiss corporations with a single share structure are using registered shares. Furthermore, it is permissible to create *preferred voting shares* and *preference shares* conveying other preferential rights, for instance relating to dividends, liquidation proceeds, or pre-emptive rights. A corporation may also issue non-voting shares ('participation certificates') provided that the participation capital does not exceed twice the amount of the (voting) share capital.

Traditionally, shares have been represented by individual or global *certificates* kept by the shareholders either at home or in a bank deposit. Yet, in recent years the trend has been towards shares held in *book-entry form* only. Several large listed companies even went so far as to exclude the (theoretical) right of each shareholder to request printing of his shares, thus creating permanent uncertificated *rights in personam*. Most legal scholars agree that such permanently uncertificated shares ('dematerialised shares') are in compliance with Swiss corporate and securities laws on condition that they were already provided for in the original articles of incorporation or introduced at a later stage with the unanimous approval of the shareholders.

Listed companies must also comply with the requirements of the *Swiss Exchange* in relation to the certification of securities. In particular, *bearer shares* may take the form of dematerialised rights or permanent global certificates in order to qualify for listing on the Swiss Exchange. *Registered shares*, however, will only be listed if they are either dematerialised or printing has been deferred and if they are traded through SIS SegInterSettle AG. Shares already printed will be booked into the SIS system only after de-certification. The implication of this is that shareholders must have a deposit account with a bank in order to be able to trade shares on the exchange. In contrast with dematerialised shares, shares with deferred printing may be printed on request of a shareholder. The majority of the Swiss corporations have opted for registered shares with deferred printing albeit dematerialised shares have become increasingly popular in the recent past.

2.5. Shareholders' Rights

As regards *voting rights*, the shareholders' entitlement is derived in proportion to the total par value of their shares. Yet, corporations may limit the transferability of registered shares in their articles of incorporation. Many listed corporations have introduced such limitations and refuse registration of voting rights for shareholdings in excess of two to five per cent (shares in excess of such percentages being registered as shares without voting rights). In addition, the articles of incorporation may limit the maximum voting power each holder of either registered or bearer shares may have in person or by proxy in a shareholders' meeting.

The shareholders' meeting has the non-transferable power to vote on any amendments to the articles of incorporation, to elect the directors, the statutory auditors and the group auditors, to approve the annual report and the consolidated financial statements, to set the annual dividend, to grant the directors and management discharge from liability for matters disclosed to the shareholders' meeting, and to order an independent investigation into specific matters proposed to the shareholders' meeting ('*Sonderprüfung*').

The shareholders' meeting passes resolutions and makes elections, if not otherwise required by law or by the articles of incorporation, with a simple majority of the votes represented, meaning that abstentions

have the effect of votes against the proposal. Under Swiss law a resolution passed at a shareholders' meeting with a supermajority of 66 $\frac{2}{3}$ per cent of the votes represented and the absolute majority of the nominal value of the shares represented (the latter test is only relevant if the company has preferred voting shares outstanding) is required for (a) amendments to the business purpose, (b) the creation of shares with privileged voting rights, (c) restrictions on the transferability of registered shares, (d) an authorised or conditional increase of the share capital, (e) an increase of the share capital by way of capitalisation of reserves ('*Kapitalerhöhung aus Eigenkapital*'), against contributions in kind ('*Sacheinlage*') or for the purpose of the acquisition of certain assets ('*Sachübernahme*'), or the granting of special privileges, (f) the restriction or withdrawal of pre-emptive rights of shareholders, (g) a relocation of domicile, or (h) the dissolution other than by liquidation (for example by way of a merger). In addition, any provision in the articles of incorporation providing for a voting requirement stricter than that prescribed by law or the articles of incorporation must be adopted in accordance with such stricter voting requirement.

At meetings, shareholders may only be represented by a legal representative, another person entitled to vote based on a written proxy, the appointed representative of the corporation, the independent proxy or an assignee of proxy votes for deposited shares.

2.6. Directors and their Duties

The members of the board of directors are elected by the shareholders' meeting. The term of office is three years unless the articles of incorporation provide otherwise, and directors may be re-elected. The members of the executive management are appointed by the board.

The directors and the senior management of a Swiss corporation are under an obligation of due care and loyalty vis-à-vis the corporation and are required to treat shareholders equally in like circumstances. The directors as well as other persons authorised to act on behalf of the corporation may engage the company in any transaction within the scope of the business purpose. The courts have ruled that the directors may take any action which the business object does not exclude. If directors and officers enter into a transaction on behalf of the corporation in violation of their statutory duties with *bona fide* third parties, the

transaction is nevertheless valid as long as it is not beyond the corporation's business object.

Directors and managers contravening their statutory duties – whether dealing with *bona fide* third parties or performing any other acts on behalf of the corporation – may become liable for damages to the corporation, its shareholders and, in the event of bankruptcy, to the company's creditors. The liability is joint and several, though limited to the extent that no individual director will have to pay more than the damages attributable to his own wrongdoing. If the board of directors lawfully delegates the power to carry out the day-to-day management to an executive board, the directors can be held liable only for not having exercised due care in selecting, instructing or supervising the executive board members.

2.7. Corporate Governance

The current global debate about corporate governance is concerned with the proper running of a company by its directors, including the organisation of the board and the allocation of responsibilities, and their accountability to the company's stakeholders. On an international level, various reports and acts have been produced of which the most recent are the *Turnbull Report* and the *Hampel Report*, both published in the UK in 1998 (following the Cadbury Report and the Greenbury Report), the French *Rapport Viénot* of 1998, the German Act on *Kontrolle und Transparenz im Unternehmensbereich*, the US *Blue Ribbon Report* of February 1999, and, last but not least, the OECD *Principles of Corporate Governance* published in April 1998. These reports are legally significant in so far as their recommendations are adopted by a legislator, stock exchange (such as in the so-called *Combined Code* of the London Stock Exchange), or a supervisory authority (such as the SEC in case of the Blue Ribbon Report).

Swiss corporate law allows the integration of corporate governance rules as they are currently debated into the existing legal framework. Although Swiss companies are not obliged by virtue of the Listing Rules or directives of Swiss supervisory authorities to directly implement the recommendations proposed by the above reports, Swiss companies cannot ignore what is considered to be best practice of corporate governance for this is a primary concern of international investors.

Consequently, most Swiss companies have introduced audit and remuneration committees and have balanced the number of executive and non-executive directors (besides, some institutions, such as banks, are obliged by law to separate supervisory functions from management).

3. Primary Securities Market Regulation

On the *primary market* new issues of securities are initially distributed, whereas on the *secondary market* securities already issued are traded after completion of the primary offering. Although Swiss securities regulation has recently been overhauled, the reforms concerned the secondary market only. In the absence of a coherent and comprehensive legislative framework in relation to the primary market (comparable for example to the US Securities Act of 1933), Swiss law in this area continues to be fragmentary.

A foreign issuer offering securities in Switzerland must have regard to Swiss legal requirements governing the primary market by virtue of Article 156 of the *Federal Act of Private International Law of 18 December 1987* (PILA) providing that claims arising from public issues of equity or debt instruments by means of a prospectus, circular or similar publications are governed by the law applicable to the issuer or that of the state where the offering is made. If a prospectus contains a statement regarding the governing law of the issue which contravenes Article 156 PILA, the respective clause is invalid. The state where the offering occurs is the state or market place targeted by the issuer. For instance, in the event of internet offerings selling restrictions should be put in place so as to clarify to whom, in which jurisdictions, an offering is not intended to be made. To achieve this, it should suffice to introduce Q&As in dialogue boxes to ensure that only persons fitting a defined investor's profile access the relevant web page.

There are three core provisions governing the Swiss primary securities market: Articles 652a, 752 and 1156 CO. These provisions impose a *prospectus duty* for public offerings of *shares* and *bonds* (see IV.7.1) and define *prospectus liabilities* (see IV.8). Convention XIX of the Swiss Bankers' Association regulates public and private offerings of *notes* denominated in Swiss francs (see IV.5.1). Furthermore, Article 50 IFA requires the preparation and publication of a prospectus dis-

closing information pertaining to the offering of *investment fund units* (see II.4.1). In addition, quoted companies, when issuing and listing new securities, have to comply with the conditions for listing, including the obligation to prepare a listing prospectus, as set forth in the Listing Rules issued by the Swiss Exchange pursuant to the power given to it by SESTA (see IV.7.3).

The statutory regime is fragmentary in that the law explicitly deals with public offerings of *shares of Swiss corporations* only and remains silent on offerings of equity securities by companies other than Swiss corporations. Whilst this has led the traditional Swiss doctrine to assume that the prospectus requirements laid down in Article 652a CO do not apply to foreign issuers and Swiss companies other than corporations, legal commentators have recently taken the position that in light of a functional interpretation of the law the prospectus requirements as per Article 652a CO should apply *mutatis mutandis* to any public offering of equity securities by a Swiss or foreign company in Switzerland. In practice, however, this functional interpretation will have no serious consequences for issuers seeking access to the Swiss financial markets due to the fact that the disclosure requirements as per Article 652a CO are minimal (see IV.7.3) compared with those of other jurisdictions.

Generally speaking, *no registration requirements* exist in relation to a new offering of securities in Switzerland. Still, in respect of bond and note issues linked to the Swiss franc, the Swiss National Bank has imposed a *reporting duty* and an obligation for these issues to be lead-managed by a licensed Swiss bank, including licensed branch offices of foreign banks, or a securities dealer according to SESTA (principle of entrenchment).

4. Raising Equity Capital

4.1. Issuing Share Capital

4.1.1. Amendment of the Articles of Incorporation

Since the articles of a Swiss corporation state the amount of the share capital, the nominal value and the type of shares, a change of the capital entails an amendment to the articles of incorporation and requires a shareholders' resolution to be confirmed by a public deed.

4.1.2. *Categories of Share Capital Increases*

There are three different ways to issue share capital under Swiss law:

In the event of an *ordinary share capital* increase, the shareholders resolve to increase the share capital by simple majority of the votes represented at the shareholders' meeting (unless provided otherwise in the articles of incorporation) and instruct the board of directors to execute it. Upon subscription of the new capital and payment of the contributions, the board of directors confirms in a formal resolution that the increase has been carried out and procures the registration of the new capital in the commercial register. The registration must occur not later than three months after the shareholders' meeting has taken place.

The shareholders may furthermore resolve to create or increase what is called *authorised share capital*. To this effect, the shareholders' resolution requires a majority of two thirds of the votes represented at the meeting and the majority of the nominal value of the shares represented (unless provided otherwise in the articles of incorporation). By creating authorised share capital, the shareholders authorise the board of directors to issue capital up to a pre-determined amount within a period of two years. The authorised share capital may not exceed 50 per cent of the current ordinary capital.

The third option involves the creation of *conditional share capital*, which requires a shareholders' resolution of a majority of two thirds of the votes represented and the majority of the nominal value of the shares represented (unless provided otherwise in the articles of incorporation). Conditional share capital is used in connection with the issue of convertible bonds or options, for example for employee option plans. Its main feature is that the holders of conversion or option rights automatically trigger the increase by exercising their rights. On the basis of an auditors' report the board amends the respective clause in the articles of incorporation after each financial year and files the amendment with the commercial register within three months. Conditional share capital may not amount to more than 50 per cent of the ordinary capital.

4.1.3. *Determination of Nominal Value*

The nominal value of each share must be at least CHF 0.01. The articles of incorporation may provide, within certain limits, for shares with different nominal values and for the principle that each share shall carry one vote, irrespective of its nominal value. The shares which have a lower nominal value are referred to as 'preferred voting shares'. They must be issued as registered shares and have to be fully paid in.

4.1.4. *Pre-emption Rights*

As a general rule, if a Swiss corporation issues shares, the new shares must first be offered to the existing shareholders in proportion to their holdings. Contrary to UK law, this right of pre-emption applies in any case, even if the shares are issued for a non-cash consideration.

However, the right of pre-emption may be varied or removed by a resolution of a shareholders' meeting on 'valid grounds'. The resolution must be taken by a majority of two thirds of the votes represented at the meeting and the majority of the nominal value of the shares represented (unless provided otherwise in the articles of incorporation). Valid grounds are, for instance, the acquisition of all or part of the assets and liabilities or the acquisition of the shares of another company as well as the creation of employee participation plans. The shareholders may not be treated unequally in connection with any dis-appliance of pre-emption rights. Moreover, it must be in the interest of the company to remove such pre-emption rights in any given case. In the event of a conditional or authorised share capital increase, the shareholders' meeting may delegate the decision as to whether pre-emption rights should be dis-applied to the board of directors provided the fundamental principles upon which the decision has to be made are determined by the shareholders' meeting.

Pre-emption rights of existing shareholders are necessarily excluded if a Swiss corporation issues convertible bonds or options where those having exercised rights will automatically receive shares of said corporation. Instead, the existing shareholders are entitled to a *priority subscription right* for the newly issued bonds or options. This priority subscription right may only be dis-applied on valid grounds.

4.1.5. *Going Public*

If a closely held corporation is seeking new shareholders and offers its shares to the public, the corporation is said 'to go public'. For this purpose, either a primary offering or a secondary offering can be envisaged. Primary offerings involve the creation and the distribution of new shares, whereas secondary offerings involve the sale of existing shares. Unless the shares are privately placed, a prospectus must be made available to the investors in either event (for more details on prospectus duties in connection with public offerings, see IV.7.1 and IV.7.3.1). Often, a corporation seeking to go public will create new shares and sell them together with existing shares. If shares are listed, additional information must be provided in the listing prospectus as per the Listing Rules.

4.2. *General Terms*

Where there is a share capital increase by way of a public offering, various terms need to be stipulated, such as the subscription period, the payment date, the issue price, the pre-emption ratio, and the date from which the new shares are entitled to dividends.

The most important point to address is the issue price. If the issue price is set above the nominal value of a share, a premium ('*Agio*', paid-in surplus) is created, which must be allocated to the general reserves (after deduction of the issue costs). Swiss legal writers disagree as to whether a share premium may be re-distributed to the shareholders. The prevailing view is that a share premium may be paid as a dividend based on a newly audited balance sheet as part of the freely disposable general reserves (if any). In the event of a rights offering, the issue price is usually set at a substantial discount from market value. Still, issuers may fix the issue price close to the market price where they do not want to create an incentive for existing shareholders to take up their rights.

Another point to be resolved involves the ratio based on which an existing shareholder may receive new shares in view of his pre-emption rights. Finally, it has to be decided at what point in time the new shareholders will be entitled to receive dividends. If the new shareholders of a quoted company receive dividends only in the coming financial year,

the new shares will be traded on a separate line until the dividend for the current business year has been paid.

4.3. Share Repurchases

Share repurchases are generally permissible irrespective of the class of shares. However, in order to safeguard the interests of the shareholders and the creditors, certain conditions must be satisfied. A Swiss corporation may only buy back shares if it has sufficient freely disposable reserves to pay the purchase price and if the aggregate nominal value of such shares does not exceed 10 per cent of the nominal value of the share capital. Shares repurchased by a Swiss corporation do not carry any rights to vote at shareholders' meetings. In addition, when a company buys back own shares, a transfer of distributable profits or freely disposable assets must be made to an undistributable capital redemption reserve in the amount of the purchase price of the acquired shares on its balance sheet.

The conditions mentioned above do not apply if a shareholders' meeting resolves that a company shall buy back shares in order to cancel them so as to reduce the share capital. Moreover, there are no special restrictions under Swiss law in relation to *financial assistance* by a corporation to persons intending to purchase shares of that corporation. Rather, the board of directors has to ensure that such transactions are in compliance with general principles of corporate law and certain tax directives.

Listed companies intending to implement a share buyback programme must comply with additional requirements imposed by SESTA and the Takeover Board. All public offers by a listed company on its own shares are deemed to be tender offers, albeit after review of the offer the Swiss Takeover Board may exempt the company from the obligation to comply with the takeover rules provided:

- an application is made not less than 10 trading days before publication of the offer;
- the liquidity of the market in the shares is not substantially reduced;
- the structure of share ownership and the position of the major shareholders is not substantially changed;

- the buyback offer involves a maximum of 10 per cent of the votes and the share capital;
- the company confirms not to possess any relevant non-public information;
- the company discloses how the shares are to be used (ESOP, capital reduction, treasury shares);
- the offer is published not less than 10 trading days before the expiry of the offer period; if the price remains undetermined, the company must disclose the offer price through the electronic media not less than three trading days before expiry of the offer and the offer may be accepted only after such disclosure.

Exemptions are available if equal treatment of the shareholders, transparency, fairness and good faith are guaranteed.

For tax purposes, share buybacks with a subsequent capital reduction are partial liquidations of the company, resulting in income and withholding tax duties for private sellers on the difference between the redemption price and the nominal value of the shares. In other words, private sellers will not realise a tax free capital gain. Therefore, share repurchase programmes with a subsequent capital reduction are attractive only for Swiss holding companies and tax exempt entities, such as pension funds. In order to avoid negative tax consequences for the sellers, schemes have been devised involving the distribution of put options on the shares and the tax-free sale of the shares and the attached put options by the shareholders to a tax-exempt pension fund, which in turn can exercise the put options vis-à-vis the company without incurring any tax liabilities.

Share repurchases with a subsequent capital reduction are not considered as a partial liquidation of the company if the corporate law requirements are satisfied and the redeemed shares are not held for a period of more than six years (in case of options/convertibles the period starts to run when the respective obligations expire).

4.4. Retaining Profits

Under Swiss corporate law, a dividend may be declared if the corporation has sufficient distributable profits or if there are freely disposable

reserves. In either event, dividends may not be paid prior to approval by the shareholders' meeting. In practice, the shareholders' meeting usually approves the dividend proposal of the board of directors. Dividends will normally be due and payable immediately after the shareholders' resolution has been passed. The statute of limitation in respect of dividend payments is five years.

As regards the legal reserves, Swiss law provides that five per cent of the annual profit must be allocated to the general reserve until it has reached 20 per cent of the paid-in share capital. After having reached the 20 per cent limit, the following must be paid into the general reserve:

- (a) any surplus over the nominal value upon the issue of new shares after deduction of the issue cost, to the extent such surplus is not used for depreciation or welfare purposes;
- (b) the excess of the amount which was paid in on cancelled shares over any reduction on the issue price of replacement shares; and
- (c) 10 per cent of the amounts which are distributed as a share of profits after payment of a dividend of five per cent.

To the extent it does not exceed half of the share capital, the general reserve may only be used to cover losses, to support the company in times of financial distress and to counteract or alleviate the consequences of unemployment.

However, holding companies are exempt from the obligation to build up reserves as referred to in (c) above once they have reached the 20 per cent threshold and are free as to the use of the general reserve irrespective of the circumstances.

Any remaining net profits are at the disposal of the shareholders' meeting.

4.5. Taxation

4.5.1. Withholding Tax on Dividends and Similar Distributions

Dividends and other similar cash or in kind distributions made by a Swiss company to a holder of its shares (including dividends on liquidation proceeds and stock dividends) are subject to a federal withhold-

ing tax at a rate of 35 percent. The withholding tax will be withheld by the company on the gross distributions and will be paid to the Swiss Federal Tax Administration. A *Swiss resident beneficiary* is generally entitled to a full refund or tax credit for the withholding tax if he is the beneficial owner of such distributions at the time they are due and if he reports the receipt thereof in the income tax return. A non-resident beneficiary may be entitled to a (partial) refund of the withholding tax if the country in which such beneficiary resides for tax purposes has entered into a bilateral treaty for the avoidance of double taxation with Switzerland and the conditions of such treaty are met. The procedures for claiming treaty benefits (and the time limits applying for obtaining a refund) may differ from country to country.

4.5.2. Income and Profit Tax on Dividends and Similar Distributions

Swiss resident individuals are subject to income tax on income earned worldwide, including dividends and similar distributions, except for income derived from enterprises or permanent establishments outside Switzerland. Non-Swiss residents are subject to Swiss income taxation of Swiss source income, including dividends and similar distributions received on the shares in a Swiss company, if they hold these shares as part of a Swiss business operation or a Swiss permanent establishment. Swiss resident companies or non-Swiss resident companies holding shares as part of a Swiss permanent establishment are required to include dividends and similar distributions of a Swiss company in their Swiss taxable income. However, a Swiss or a non-Swiss corporation holding shares as part of a Swiss permanent establishment may, under certain circumstances, benefit from relief from taxation with respect to dividends (*Beteiligungszug*).

4.5.3. Tax Treatment of Capital Gains

Swiss resident *individuals* who hold securities as a private capital asset are generally exempt from Swiss federal, cantonal and communal taxes on capital gains realised upon the sale or other disposal of securities. In certain circumstances, however, an individual is deemed to be a taxable person for capital gains tax purposes, for instance if he qualifies as a professional securities trader. Also, gains realised upon a sale of shares

to a Swiss company may be re-characterised as a taxable distribution if such company does not dispose of the repurchased shares within six years after the repurchase in view of a capital reduction. If the company does not sell the shares within this interval, the difference between the repurchase price and the nominal value of the shares will be a taxable capital gain of the original individual seller.

An individual who is a Swiss resident for tax purposes and who holds shares as business assets or who is a non-Swiss resident who holds shares as part of a Swiss business operation or a Swiss permanent establishment is subject to Swiss income tax in relation to the capital gains realised upon the disposal of the shares. Likewise, capital gains realised upon the disposal of the shares in a Swiss company are taxable income of a Swiss resident legal entity or a non-Swiss resident legal entity holding shares as part of a Swiss permanent establishment.

4.5.4. *Stamp Duties*

Stamp duties are levied on issues of shares at a rate of one per cent on the fair market value of the capital contribution. Contributions up to the first CHF 250'000 of a company's share capital and share issues in connection with certain reorganisations are generally exempt.

Subject to certain exemptions, Swiss turnover stamp duties are payable on the sale of Swiss or foreign shares if the sale occurs through or with the assistance of a Swiss fiscal securities dealer as defined in the Stamp Duties Act. The rate is 0.15 per cent of the consideration in relation to Swiss shares and 0.3 per cent of the consideration in relation to foreign shares. Only very recently, the Stamp Duties Act has been amended to exempt transactions involving certain institutional investors as well as Swiss banks trading Swiss securities on foreign exchanges (such as *virt-x*) from security turnover taxes.

In addition to stamp duties, the sale of the shares of a Swiss company by or through a member of the Swiss Exchange may be subject to a stock exchange levy of up to 0.02 percent of the sales proceeds (including the FBC surcharge).

5. Raising Debt Capital

5.1. Issuing Bonds and Notes

5.1.1. Offering of Bonds and Notes

(a) Bonds

Bonds are rights issued under the same terms according to which an issuer contracts, amongst other things, to repay the bondholder a borrowed principal amount on a stated future date (more than one year after the issue of the bond) and, usually, to make a series of interest payments during the bond's life. In contrast with other markets, no distinction is made in Switzerland between the terms 'bond' and 'debenture' depending upon whether the issue is secured or not.

Investors based in Switzerland are among the largest buyers of *Eurobonds*. The Eurobond market is a market for bonds issued outside the country where the issuer is domiciled (as well as outside the United States) and exempt from withholding tax. The majority of Eurobonds are issued by highly rated borrowers, such as governments and large corporations and are offered by an international syndicate of banks in the capital markets of several countries at the same time. Bonds are normally issued in the form of bearer certificates or depositary receipts and are settled via the Central de Livraison de Valeurs Mobilières and Euroclear.

Public offerings of bonds require the publication of a prospectus in accordance with Article 1156 CO in connection with Article 652a CO (see IV.7.1 and IV.7.3.1). If bonds are listed, additional information must be provided in the listing prospectus as per the Listing Rules. In respect of Swiss franc bond and note issues linked to the Swiss franc, the Swiss National Bank has imposed a duty to report such issues to the Swiss National Bank and an obligation for such issues to be lead-managed by a licensed Swiss bank, including licensed branch offices of foreign banks, or a securities dealer according to SESTA ('principle of entrenchment').

As a general rule, neither Swiss law nor the articles of incorporation of a Swiss company restrict a company's power to borrow. The decision to raise debt finance and issue debt securities is usually passed by or under the direction of the board of directors. A shareholders' resolution is not required.

(b) Notes

Notes are usually, but not necessarily, medium term papers (with a maturity of five to seven years) that are privately placed, generally with clients of (syndicate) banks. *Medium Term Notes* (MTN) are used in the Euromarkets where maturities are normally up to five years. Securities are issued in tranches, with each tranche possessing a unique maturity and coupon rate.

Convention XIX of the Swiss Bankers' Association defines notes as debt instruments with denominations of at least CHF 10'000, consisting of an unconditional promise to pay a sum of money at a specified future date. Issues of debt instruments with denominations of less than CHF 10'000 are treated as bonds. According to *Convention XIX* foreign issuers of Swiss franc notes seeking to distribute Swiss franc notes in Switzerland must prepare a prospectus, the content of which is defined in *Convention XIX*, and must comply with certain other obligations, irrespective of whether the notes are privately placed or offered to the public.

Swiss franc MTN tranches distributed in Switzerland must be reported to the Swiss National Bank. In addition, the dealer who is responsible for the Swiss franc tranche must be a licensed Swiss bank or securities dealer.

5.1.2. *General Terms*

The key features of the general terms of bonds include:

- (a) *Form, Denomination, Printing, Reopening*: The bonds are either in bearer or registered form. The issue is usually represented by a permanent global certificate and is divided into co-ownership quotas (bonds) of a certain nominal value and entitlements to payment of interest (coupons). The right to demand printing of the bonds and coupons is generally excluded. Normally, the issuer will reserve the right to reopen and increase the principal amount of the issue at any time and without prior consultation or permission of the bondholders through the issuance of additional bonds which are fungible with the existing bonds, that is to say identical in relation to terms, security number, final maturity and interest rate.

- (b) *Interest*: Interest is computed on the basis of twelve 30-day months of a 360-day year.
- (c) *Redemption*: The issuer undertakes to repay all outstanding bonds without further notice on a certain date. Furthermore, the terms ordinarily provide that the issuer may redeem the bonds at his option at any time upon written notice to the lead bank if certain events occur (usually related to taxation of the issuer) and may purchase the bonds for redemption at any time.
- (d) *Transfer of Funds by the Issuer*: The issuer will have to agree to make the amounts required for the servicing of the bonds and/or coupons available to the lead bank or the paying agent on behalf of the security holders. It is standard Swiss practice to provide that the receipt by the banks of these funds releases the issuer of its payment obligations vis-à-vis the bondholders and/or the couponholders.
- (e) *Taxation*: Interest payments will be subject to Swiss withholding tax, which is deducted from the interest payment by the issuer (see IV.5.4).
- (f) *Status and Negative Pledge*: It is common to define the status of the bonds for instance by stating that they are direct, unsecured and unsubordinated and rank pari passu with all other direct, unsecured and unsubordinated debt of the issuer. Furthermore, the issuer will normally undertake, subject to certain exceptions, not to create any encumbrance of or upon any of its assets or revenues to secure any indebtedness with a maturity over one year without at the same time according to the bonds in question the same security.
- (g) *Repayment in Events of Default*: The lead bank will insist on the right to declare the principal of the bonds and interest accrued to be due and payable immediately if certain events of default occur, such as failure on the part of the issuer to pay any amounts due under the bond or to perform any of the terms, covenants or undertakings contained in the bonds for a defined period, or such as the instigation of bankruptcy or court composition proceedings against the issuer or the liquidation of the issuer (for reasons other than merger, consolidation or combination).

- (h) *Consolidation, Merger or Sale of Assets*: Generally, consolidations, mergers or sales of assets will still be permissible, provided that the successor assumes the obligations arising under the bonds.
- (i) *Replacement of Debtor*: The parties normally agree that the issuer may ask the lead bank for approval to be replaced as debtor of the bonds by another party, for example a subsidiary or affiliate of the issuer, without the consent of the bondholders. The bank may refuse such approval only if the bondholders are not satisfactorily protected.
- (j) *Prescription*: It is usual to provide that claims for payment of principal and interest cease to be enforceable by legal action in accordance with the applicable statute of limitations (5 years for interest payments and 10 years for principal payments, as from the due date).
- (k) *Listing*: If a listing is planned, the issuer will undertake to use its best endeavours to have the bonds listed and to maintain such listing during the lifetime of the bonds.
- (l) *Sales Restrictions*: In case of an international offering, sales restrictions, if any, are set forth in the terms of the bonds.

5.1.3. *Swiss Exchange Issues*

According to a directive of the Swiss Exchange, debt securities and derivatives must be governed by Swiss law in order to qualify for listing on the Swiss Exchange. Furthermore, investors must be able to enforce their rights under the debt securities or derivatives in Switzerland. However, there are exemptions to this rule regarding (a) debt securities forming part of an international issue program, (b) debt securities issued by an issuer of the public sector if local law requires that the securities be issued under local law and local jurisdiction be available, and (c) asset-backed transactions conceptually based on a foreign legal system.

5.2. *Loan Facilities*

Traditionally, the most common method for raising private capital in Switzerland has been to borrow it from commercial banks. Debt financing is used by Swiss companies not only for the short term, for example to finance smaller purchases or to provide working capital, but also to support long term goals such as major expansions. In case of large commitments to single borrowers, the required monies are usually provided by a syndicate of banks. Recently, the Swiss syndicated loan market has gained ground due to the increased level of mergers and acquisitions, where loans are the adequate means to quickly and discreetly provide finance to clinch a deal and bond markets can offer re-financing opportunities. If a conventional loan is considered too high a risk, the banks may still be willing to enter into a mezzanine financing agreement, the characteristic features of which are the subordination of the loan, fixed interest rates and an equity kicker, usually in the form of warrants conveying the banks a right to purchase equity in the debtor.

Banks are by far the most important lenders, with well established networks, procedures and standardised documentation. Borrowing is therefore a simple and cheap process to arrange in Switzerland, not least because Swiss interest rates are still the lowest in the Western hemisphere. For the time being, the Swiss loan market is a private market with a low level of transparency. However, as acquisition finance has proved to be an attractive business for banks, and as international regulators try to make loan transactions more transparent, the trend will be towards the features of the more mature US market, where loans are not only more commoditised and rated by credit agencies but also traded more actively in the secondary market.

Swiss law does not distinguish between ‘loan facilities’ and ‘loan agreements’ to highlight the difference between a mere right to draw down (facility) or an obligation to do so (loan). Since the CO provides for a framework of provisions governing loans to the extent that the parties have not agreed on different terms, Swiss statutory law allows tailor-made solutions in any given situation, and all types of loan facilities commonly agreed under US and UK law can easily be fitted into a Swiss style agreement, including bank lines, revolving credits, fixed term loans, mortgage loans, and subordinated debt.

5.3. *Securitisation*

Despite recent growth, securitisation remains at a relatively early stage of development and is still evolving as a mainstream financing mechanism in Switzerland. In general, assets are transferred from an originating entity to a special purpose vehicle. The special purpose vehicle finances the purchase of the assets by a public issue or private placement of securities or by syndicated loan arrangements and provides a security interest in the purchased assets for the benefit of the investors. Assets often used for securitisation purposes are mortgage loans.

Since 12 October 1997 asset-backed securities may be listed on the Swiss Exchange in accordance with special guidelines. Issuers of asset-backed securities need not have existed for three years and do not have to comply with the listing requirements as far as capital resources are concerned. Furthermore, asset-backed securities do not have to be governed by Swiss law, and there is no need for a place of jurisdiction in Switzerland provided the conditions contained in the Directive on Listing of Debt Securities Subject to Foreign Law are satisfied. Certain legal opinions must be procured by the lead manager, and a recognised rating agency must rate the securities. Finally, a transaction summary together with a transaction overview needs to be included in the prospectus.

5.4. *Taxation*

Withholding taxes are levied at a rate of 35 per cent on interest paid on deposits with Swiss banks and on bonds and similar negotiable debt instruments issued by Swiss resident borrowers. Furthermore, issuers of normal bonds and notes are liable to *issue stamp duties* of 0.12 per cent, while the rate for the issue of cash bonds is 0.06 per cent, of the nominal value for each full or broken year of the maximum term.

The Federal Tax Administration has published guidelines in a *Circular on the Treatment of Bonds and Derivative Financial Instruments for the Purpose of Federal Income Tax, Federal Withholding Tax and Federal Stamp Duties of 12 April 1999* (commonly referred to as 'Circular 4') which differentiates between normal bonds, cash bonds and individual loan obligations. According to these guidelines, a Swiss debtor is deemed to issue a bond if

- (a) written debt instruments are issued,
- (b) funds are borrowed from more than 10 creditors in case of a normal bond (based on a single credit transaction) and 20 creditors in case of a cash bond (issued on an ongoing basis and under variable conditions), in both cases Swiss and foreign banks not being counted, and
- (c) the funds borrowed amount to at least CHF 500'000.

Single loans are not considered to be bonds. Still, refinancing of a single loan by way of assignments of partial claims to more than 10 assignees may constitute a taxable bond. A private placement of debt securities may be considered to be a taxable bond if it involves the issuance of more than 10 written debt instruments by the main lender.

Bonds issued by foreign affiliates of Swiss parent companies are deemed to be issued by the Swiss parent if the bond is guaranteed by the parent and the proceeds of the bonds directly or indirectly flow back to the Swiss parent. Certain tax exemptions apply to bonds issued with an original issue discount, whereas bonds with a so-called 'predominant single interest payment' are taxable upon the alienation or repayment of the instrument.

6. Other Forms to Raise Capital

6.1. Convertibles and Exchangeables

Convertible bonds may be converted by its holders into securities of the issuer on certain conditions. Where the bonds can be exchanged for equity securities of a company other than the issuer, the instrument is commonly referred to as an 'exchangeable'. Swiss companies have used exchangeables recently, inter alia, to divest unwanted holdings.

The general terms of convertible and exchangeable bonds usually include the clauses set out below, besides the terms applying to straight bonds. For ease of reference, the following text refers to convertibles only; however, the following statements apply to exchangeables alike, unless stated otherwise:

- *Conversion Period*: The period during which bonds can be converted in equity securities of the issuer (or a third party in the case of an exchangeable bond) will usually extend to the maturity of the bond but may start only after a waiting period.
- *Conversion/Conversion Price*: The conversion ratio defines how many shares will be delivered at what price upon exercise of the conversion right attaching to the bond. The terms normally provide that each bondholder has the right to convert each bond of a given nominal amount into a certain number of shares at a conversion price of a certain amount for each share (usually, the conversion price is higher than the current closing price of the shares), subject to adjustments. Any difference between the conversion price to be paid for the appropriate number of shares and the aggregate par value of such bond(s) will be paid to the respective bondholder (cash payment amount). Sometimes the terms provide that the issuer has the right to elect, instead of delivering shares, to pay to the relevant bondholder an amount (cash settlement amount) equal to the product of the number of shares to which the bondholder would be entitled and the cash value (defined as arithmetic average of the closing prices of the shares on the SWX during a certain period preceding the exercise date).
- *Procedure*: To exercise the conversion rights, the bonds will have to be surrendered together with all un-matured coupons at a Swiss business office of any of the banks involved. Upon exercise of the conversion rights the bondholder will be entitled to receive dividends pertaining to the shares either from the date of conversion so that the bondholder may receive profits of the last business year if he exercises prior to the ordinary shareholders' meeting, or for the current business year (distributed next year) so that, in case of listed shares, a second line will have to be opened on the SWX for the shares that are traded ex dividend until the date of the ordinary shareholders' meeting.
- *Adjustments*: If during the conversion period the issuer issues new equity securities, bonds with conversion or warrant exercise rights or warrants by granting subscription rights to the existing shareholders, it is common for the bondholders to be entitled to exercise

their conversion rights in order to receive such shares prior to new issues or prior to the date when the official trading in subscription rights begins. The exchange price for bonds that are not exchanged will be reduced by the average closing price of the subscription rights or by the average intrinsic value of the warrants.

- *Procurement of Shares*: The equity shares to be delivered upon the exercise of the conversion rights may be procured by conditional share capital or in the form of treasury shares (convertibles) or by (re-)purchases of shares in the market (convertibles and exchangeables).

In the past, Swiss parent companies have used newly formed off-shore subsidiaries to issue convertible or exchangeable bonds and to list these bonds on the Swiss Exchange in order to avoid Swiss issue and withholding taxes. In such instances, the Swiss Exchange may waive the listing requirement in relation to the three-year trading period if the parent provides a guarantee or a keep-well commitment securing the obligations under the bonds, including all payment obligations. Subject to certain exemptions, such guarantee commitments have to be governed by Swiss law and must provide for a place of jurisdiction in Switzerland.

6.2. Derivatives

The classical types of derivatives comprise forwards (contracted off-exchange), futures (traded on the exchange), swaps and options. Derivative instruments are traded either on EUREX if they are standardised, on the main segment of the Swiss Exchange in the case of warrants or in the over-the-counter (OTC) market if they are customised.

Derivatives may be listed on the *Swiss Exchange* provided the issuer is a Swiss licensed bank (subject to the FBA) or a licensed Swiss securities dealer (subject to SESTA) or subject to a comparable foreign supervision. Exemptions apply if the derivatives entitle to purchase securities issued by the issuer of the derivatives or an affiliated group company and such securities are held in reserve or created by authorised or conditional capital. Furthermore, the Swiss Exchange's Directive on Debt Securities Subject to Foreign Law is applied to derivatives issues *mutatis mutandis*.

With regard to *EUREX*-traded instruments, the credit risk of every market participant is on the exchange. The clearing house acts as contractual partner of the buyer and the seller who are both clearing members, or rather exchange members authorised under the rules of the exchange to settle transactions. The individual investor does not enter into a contractual relationship with the exchange but with the exchange member. Since the credit risk of trading is thus centred on the clearing house, the exchange applies high standards to its clearing members and requires standardised products to facilitate documentation and trading.

Even though *OTC derivatives* may vary from product to product as to their contents and documentation, there has been a general drift in Switzerland towards the use of international market standards. In particular, the *ISDA Master Agreements*, developed by the International Swaps and Derivatives Association, and the *Swiss Master Agreement*, together with the pertinent Schedules, are increasingly popular. The main purpose of these agreements is to reduce capital adequacy requirements for banks on the one hand and counterparty risks on the other hand by providing for far-reaching *netting* clauses. Article 12 f BO states that these netting agreements are recognised for purposes of calculating capital adequacy requirements. As regards the enforceability of such clauses in the event of a bankruptcy, Article 211 para. 2bis of the *Federal Act on Debt Enforcement and Bankruptcy of 11 April 1889* (DEBA) provides for automatic termination of all transactions involving financial futures, swaps and options, which can be valued based on market or stock exchange prices, as at the time of the opening of the bankruptcy, thus disallowing any cherry-picking by the bankruptcy administration in enforcing individual rights of the bankrupt debtor. Members of the Swiss Bankers' Association are subject to the Association's *Risk Management Guidelines for Trading and for the Use of Derivatives of 31 January 1996*.

Enforcement of any foreign court judgement under Swiss debt collection and bankruptcy proceedings may only be made in *Swiss francs* and any amount adjudicated in any other currency must accordingly be reconverted into Swiss francs at the rate prevailing on the date of instigation of the enforcement proceedings. Though *ISDA Master Agreements* are normally subject to New York or English law, the question as to whether a party has the *capacity and authority* to enter into a Master Agreement and the underlying derivatives transactions is gov-

erned by the law of the state according to which the party is organised. In Switzerland, a company's capacity to enter into derivatives transactions can be established based on an excerpt of the commercial register, the articles of incorporation and investment restrictions applying by virtue of mandatory law to certain regulated businesses (such as pension funds, insurance companies, and investment funds). Sometimes, Master Agreements contain *cross-affiliate set-off clauses* which are usually ineffective under Swiss law, unless the affiliates concerned have also signed the Master Agreement or have agreed to the netting clauses in particular. In practice, *securing* derivatives transactions in an international setting may sometimes be more problematic than the parties realise due to uncertainties regarding enforcement of collateral rights, cumbersome perfection techniques (for instance if assets are pledged), or because of unresolved conflict of law issues.

6.3. Taxation of Derivatives and Hybrids

Derivatives (including futures, options and warrants) do not generally give rise to issue or transfer stamp duties or, as far as profits realised by private individuals are concerned, to income or withholding taxes. However, the situation has been less clear in relation to hybrid products, such as convertible and exchangeable bonds, as well as reverse convertibles. To clarify the situation, on 12 April 1999 the Federal Tax Administration has issued Circular 4 setting forth detailed rules for various products.

7. Offering Techniques

7.1. Private Placements and Public Offerings

7.1.1. Private Placements

Private placements of securities in Switzerland do not require the preparation and publication of a prospectus or any other document for public inspection. A placement is deemed to be private if it is addressed to a limited circle of persons. Although the scope of the phrase 'limited circle of persons' is unclear, as a rule of thumb and in the absence of a body of precedents it is widely believed in practice that if not more than

20 persons are contacted (irrespective of how knowledgeable they are), the offering qualifies as a private placement. If more than 20 persons are approached by any means of communication, whether by telephone, letter, through the internet, or in the context of marketing, promotional, or any other activities, the offering is likely to be deemed public.

Exceptionally, private placements of Swiss franc notes, as defined by Convention XIX of the Swiss Bankers' Association, require the publication of a special prospectus containing the information set out in Convention XIX. However, these rules are binding only for members of the Swiss Bankers' Association.

7.1.2. *Public Offerings*

The distribution of equity securities and bonds in Switzerland does not require any governmental authorisation, filing or registration. Based on a functional interpretation of Article 652a CO a *prospectus* must be made available to the investors for each public offering of securities by the time such offering is made (see IV.3).

7.1.3. *Online Offerings*

Over the past few years, Switzerland has seen a surge of online banking and brokerage services. In addition, most listed Swiss companies have set up their own web sites to furnish company information and to communicate with shareholders and other target groups. Since the internet allows cost-effective and rapid dissemination of information to a whole range of investors, it is in many ways an ideal means to make securities offerings (see IV.7.2.3).

So far the FBC has not prescribed any specific procedures that must be followed if offerings involve the use of the internet. By the same token, no regulatory accommodations have been made to facilitate online placements. Because of the requirement that private placements of securities not involve a general solicitation, online placements are deemed to be public based on the current regulatory system if an issuer's or a broker's web site is unrestricted and thus publicly available. Theoretically, a private placement can be conducted online if it is posted in a password-restricted web page permitting access only to a

limited circle of pre-selected investors. As technology evolves, new issues will continue to arise, such as how internet discussions of new offerings (including bulletin boards, discussion forums and chat rooms) – possibly hosted by brokers - should be treated, whether an issuer may condition participation in a new offering upon consent of electronic delivery of required information only, and whether the issuer should be responsible for third party information to which he has established a hyperlink on his web site. Questions such as these may warrant regulatory action in the future.

7.2. Firm Commitment Underwriting, Commission Based Distributions and DPOs

7.2.1. Firm Commitment Underwriting

The most prevalent distribution technique in Switzerland involves investment banks underwriting securities on a ‘firm-commitment’ basis, thus effectively assuming (at least part of) the risk of distribution. In the case of equity securities, the banks subscribe all newly created shares (primary offering) or buy all existing shares to be offered (secondary offering) prior to selling them to the public. The traditional English way of strict underwriting, where institutions subscribe or buy for their own account only those shares which are not taken up by the public, is not common in Switzerland, except in the form of standby underwriting in connection with certain rights offerings. Even though the securities are in a first step subscribed or purchased by one or several banks rather than a group of investors, legal commentators agree that underwritten distributions made with a view to publicly distribute the underwritten securities are public in nature, and, therefore, have to meet the corporate law requirements applying to public offerings.

7.2.2. Commission Based Distributions

If the issuer or a group of selling shareholders seek the assistance of banks to benefit from the banks’ distribution channels without expecting them to firmly underwrite securities, the banks will normally be engaged as agents offering the securities in the name and for the account of the issuer or the group of selling shareholders in what is

called a 'commission-based placing'. The banks are compensated for their services by a commission, usually defined as a function of the market volume of the placed shares or of the nominal value of the securities placed through them. In the event of commission-based placings, the issuer and/or selling shareholder retains the risk of not being able to sell the shares.

7.2.3. DPOs

An issuer or a group of selling shareholders may offer securities to the general public without the assistance of investment banks, albeit such *direct public offerings* ('DPOs') have been rare as of yet in Switzerland. Nevertheless, the internet will have profound effects on how the finance business will be conducted in a few years time, and it is safe to predict that DPOs will become increasingly popular.

An internet DPO can offer several advantages over a traditional IPO. Prospectuses can be distributed online and printed out through a web browser. This, together with savings in commissions for underwriters, can reduce offering costs dramatically. Properly implemented, the potential subscriber can review an electronic prospectus and then complete an on-line subscription form with real-time credit card processing. The disadvantage of DPOs so far has been the lack of a liquid secondary market although certain regional banks provide a market making function in such unlisted companies. Currently, no significant exchange or market place exists where shares can be readily traded. The reason is that typically DPOs are too small to be considered for trading on a stock exchange or even an OTC market. While on-line brokers are trying to fill this gap by offering order-matching services, the goal is to create the necessary platforms to enable investors to trade shares on the internet without brokers as intermediaries based on fully integrated trading, clearing and settlement facilities.

7.3. Documentation

7.3.1. Prospectus

(a) Issue Prospectus

The most important document to be prepared in connection with a public offering of securities in Switzerland is the prospectus. The information required to be included in a prospectus varies depending on whether the securities are to be listed. If no listing is planned, Article 652a CO requires the publication of a prospectus containing the following information in relation to *shares*:

- the content of the current entry in the commercial register except for information relating to the persons authorised to represent the company;
- the current amount and composition of the share capital, including the number, nominal value and type of shares as well as preferential rights of individual classes of shares and provisions in the articles of incorporation concerning an authorised or conditional increase of share capital;
- the number of profit sharing certificates and the rights connected therewith;
- the latest annual statutory financial statements and the consolidated statements with the auditors' reports, and, if the closing of the balance sheet dates back more than nine months, interim financial statements (which do not need to be audited);
- dividends paid during the last five years or since the date of incorporation;
- the resolution on the issue of new shares.

With respect to public offerings of *bonds*, in addition to the information required to be published in relation to equity securities, according to Article 1156 CO the prospectus must contain information on the terms of the bonds, in particular regarding interest and repayment, collateral provided as security and representation of the creditors.

As far as public offerings of *derivatives* are concerned, Swiss corporate law is silent on the need to produce a prospectus and its required

contents. However, in the light of how legal writers have recently interpreted the law, it is advisable to prepare a prospectus complying with Articles 652a and 1156 CO *mutatis mutandis* (see IV.3).

(b) Listing Prospectus

If shares, bonds or derivatives are to be listed, the Swiss Exchange requires the production and publication of a prospectus as a condition for admission. In contrast with UK law, the Listing Rules do not distinguish between a prospectus and listing particulars, the former to be produced in the event that an issuer applies for a listing of securities to be offered to the public for the first time and the latter to be prepared where the securities have been publicly offered before. Rather, Annex I of the Listing Rules comprises a catalogue of information to be included in the listing prospectus of which certain items may be omitted if securities are already listed. Annex I is divided into three sections.

The first section sets out the information required about the *issuer* and covers the following topics:

- general information, including name, registered office, incorporation, purpose, etc.;
- information on group companies;
- capital and voting rights;
- business activities;
- investment policy (which is a peculiarity to the Swiss Exchange);
- assets and liabilities, financial position and profits and losses;
- corporate information, including staff composition, activities other than with the issuer, auditors, holdings, interests and loans.

The second section contains information requirements regarding the *securities* to be listed, such as

- legal basis for the new issue of securities;
- nature of issue, nominal value and number of units;
- conditions attached to the securities (bonds, options, equity securities);

- paying agents and/or places of exercise;
- information on securities underlying derivatives;
- information on taxation;
- presentation;
- publication of listing notices;
- price movements of equity securities;
- negotiability;
- further information.

The third section relates to information to be provided on persons bearing responsibility for the prospectus.

7.3.2. Listing application

In order to be able to offer securities on the Swiss Exchange, the issuer must obtain a listing. To this effect, the applicant must satisfy certain basic conditions and follow an application procedure (see III.2.1.4).

7.3.3. Letter of Intent/Engagement Letter

Once the issuer/selling shareholder has appointed an investment bank, the bank often will not immediately enter into a fully-fledged agreement. Instead, in the early stages of the offering process, the underwriters will sign a letter of intent (or an engagement letter) which is for the most part a non-binding agreement. The banks will give the issuer/selling shareholder assurances so as to eliminate as much ground for misunderstanding as possible by setting forth the structure of the contemplated offering, the number of shares, sometimes a first price range, timing, underwriters' commissions, and further terms and conditions. The binding part of the letter includes the responsibility of the issuer/selling shareholder for the payment of certain costs and expenses incurred by the banks in preparation of the offering, irrespective of whether it will be carried out eventually. Recently, parties have started to sometimes annex a standard underwriting agreement to the engagement letter consenting that the final agreement will be in line with the annex.

7.3.4. *Underwriting of Equity Securities*

International offerings involve syndicates of banks acting as underwriters. So-called global co-ordinators lead the offering process by acting as book-runners and assume the largest percentage of the underwriting commitment. The global co-ordinators are assisted by lead managers, co-lead managers, and co-managers, each underwriting a lower percentage of the transaction and performing more limited roles in the offering process. If the offering comprises a global tranche, which by definition covers all potential investors, typically global managers are appointed who are allowed to cross-sell shares in all regions, sometimes with the exception of Switzerland.

The *Underwriting Agreement* defines the rights and obligations of the parties in respect of the distribution of the shares. If new shares are created, the parties normally enter into a *Nominal Amount Deposit and Subscription Agreement* (see below) prior to signing the Underwriting Agreement. The main point to be agreed in the Underwriting Agreement is the offering price, which will not be determined until just before the offering takes place for it must be responsive to current market conditions. Hence, the Underwriting Agreement is normally finalised and signed on the day before the effective date of the offering. Until this point in time, there is no strict legal obligation on the part of the issuer or the underwriting banks to proceed with the offering and both parties could theoretically back out of the deal at the eleventh hour.

Even though Underwriting Agreements vary on each occasion, they commonly follow a pattern containing clauses as shown below:

- (a) *Parties*: The issuer and the group of selling shareholders on the one side and the global co-ordinators (often acting on behalf of all the managers) on the other side will execute the Underwriting Agreement.
- (b) *Issue, Purchase, Underwriting and Listing*: The issuer will confirm that a certain number of shares has been newly issued to the global co-ordinator, and the selling shareholders, if any, will agree to sell a specified number of shares to the several underwriters (including shares to cover an over-allotment option of the banks to satisfy demand in the event of over-subscription or to allow the banks to sta-

bilise the market during the first days of trading). The price normally corresponds to the price at which the shares will be offered to the public. The global co-ordinator and the rest of the underwriters will agree to purchase, severally and not jointly, the secondary shares from the selling shareholders. If a primary offering is made and the new shares have been subscribed by the global co-ordinator prior to execution of the Underwriting Agreement, as is usually the case, the managers will agree to purchase their portion of new shares from the global co-ordinator at a certain price in order to make the offering.

- (c) *Representations and Warranties*: The Underwriting Agreement normally provides for a comprehensive list of representations and warranties by the issuer and the selling shareholders.
- (d) *Payment and Delivery*: The offer price for the shares (net of the nominal amount of the newly created shares, fees and commission) will have to be paid by the global co-ordinator and the underwriters against delivery of the shares through the facilities of SIS Seg-aInterSettle AG on the closing date.
- (e) *Fees and Expenses*: The gross fee level for a listing on the Swiss Exchange is usually between 2.5 per cent and 6.5 per cent of the total offering size. The gross fees are often split on a 20:20:60 basis between underwriting, management and selling fees. Furthermore, the agreement will set forth the costs and expenses which have to be paid by the issuer and the selling shareholders. Generally, in the event of any failure on the part of the issuer or the selling shareholders to fulfil a condition precedent, the parties agree that the underwrites shall be reimbursed for their out-of-pocket expenses, including reasonable fees and expenses of their counsel.
- (f) *Covenants*: The issuer will have to covenant to prepare a prospectus in a form approved by the global co-ordinator, to provide the underwriters with information concerning the business and the financial condition of the issuer and to refrain from issuing new shares during a certain interval after listing.
- (g) *Conditions and Termination*: It is usual to provide that the obligations of the underwriters to purchase and pay for the shares will be

subject to the satisfaction of certain conditions precedent, including the correctness of the representations and warranties of the issuer and selling shareholders, approval of listing, the absence of any material adverse change likely to affect the issuer's business, the receipt by the global co-ordinator of certain documents (legal opinions, auditors' comfort letters, officers' certificates, etc.) and certain force majeure events (a declaration of war, natural catastrophes, a banking moratorium, general economic, political or financial problems). Sometimes, these force majeure events are a justification for the underwriters to terminate the agreement rather than a condition precedent.

- (h) *Indemnity*: The underwriters will seek indemnities from the issuer and the group of selling shareholders against any losses arising from untrue statements or omissions in the prospectus, except if such untrue statements or omissions were based on information provided by the underwriters. Likewise, the underwriters will agree to indemnify the issuer and the selling shareholders against any losses arising from untrue statements or omissions due to information provided by the underwriters.

Where there is a primary offering of Swiss shares it has become customary for the issuer, the majority shareholders and the underwriters represented by the global co-ordinator to enter into what is called a *Nominal Amount Deposit and Subscription Agreement*. The agreement ensures that the new shares are duly issued under Swiss law. It covers the following topics:

- (a) *Share Capital Increase*: It is common for the issuer and the majority shareholders to confirm that the shareholders' meeting has resolved or will resolve to increase the share capital by issuing a certain number of shares and that the statutory pre-emption rights have been or will be disapplied. In turn, the global co-ordinators will agree to subscribe the new shares and to deposit an amount equivalent to the nominal value of the shares in a blocked bank account. Further, the company will commit to taking all necessary steps to procure the registration of the capital increase with the commercial register and to deliver the newly created shares to the underwriters on the closing date.

- (b) *Use of Shares and Nominal Amount*: The global co-ordinators will agree to sell the newly created shares in a public offering subject to the conditions of an Underwriting Agreement. In turn, the company will agree to transfer the deposited nominal amount to a non-interest bearing account with the global co-ordinator and to abstain from withdrawing such amount before the closing date or certain other events.
- (c) *Undertakings*: The banks will insist on an exit clause in case the Underwriting Agreement is not signed or terminated prior to the closing date. Technically, one or several shareholders of the issuer will have to undertake to purchase the shares from the banks at nominal value if a defined exit occurs. Due to mandatory statutory Swiss law the issuer may not pay back contributions received from the shareholders on the occasion of new share issues, unless the issuer re-purchases the shares for cancellation, which necessitates the approval of a shareholders' meeting.
- (d) *Termination*: The agreement ordinarily provides for a right of each party to terminate the agreement prior to registration of the capital increase if events occur which would be likely to materially prejudice the success of the offering.

7.3.5. *Agreement Among Underwriters*

The *Agreement Among Underwriters* legally creates the syndicate of banks in view of a firm commitment underwriting. Typically, it contains the following clauses:

- (a) *Commitment*: Each of the underwriters will undertake (usually severally but not jointly) to purchase a certain number of shares and to offer these shares to the investors.
- (b) *Allotment*: The global co-ordinator will be authorised to allot shares to the underwriters up to the number of shares each underwriter is committed to buying.
- (c) *Authorisation*: The global co-ordinator will be granted broad authority over the offering process in its capacity as agent of the underwriters.

- (d) *Stabilisation*: It is usual to provide that the global co-ordinator shall be authorised to enter into transactions on behalf and for the account of the underwriters for the purpose of stabilising the market price of the shares after listing.
- (e) *Undertakings*: Each of the underwriters will have to agree to comply with selling or marketing restrictions in certain jurisdictions and, in relation to the given syndicate and tranche structure, to offer and sell shares to investors in a certain area or in all regions.
- (f) *Liabilities/Indemnification*: It is common for the underwriters to agree to indemnify each other in proportion to their commitments for certain liabilities, losses, and damages incurred in connection with the offering, including prospectus liabilities.

7.3.6. *Underwriting of Debt Securities*

A Bond Purchase and Paying Agency Agreement generally covers the following areas:

- (a) *Parties*: The issuer and the members of the banking syndicate are parties to the Underwriting Agreement, as opposed to the investor whose rights are laid down in the general terms of the bonds.
- (b) *Issue, Sale, Placement, Listing*: The company will agree to issue and sell to the members of the syndicate bonds in a certain principal amount, and the members of the syndicate will agree, according to a separate agreement among the underwriters, to underwrite the issue, each for its part, to offer it for public subscription and to apply for and maintain listing of the bonds on the Swiss Exchange.
- (c) *Use of Proceeds*: The agreement usually specifies that the net proceeds will be applied by the issuer for certain purposes, e.g. general corporate purposes, including the funding of acquisitions.
- (d) *Security*: If the bonds are secured (by a guarantee or suretyship), the agreement will refer to the respective agreement.
- (e) *Terms of the Bonds*: The terms of the bonds, which set forth the rights and obligations of the issuer and the investors, form an integral part of the Underwriting Agreement, to which they are usually attached.

- (f) *Commission, Fees and Expenses*: The issuer will normally have to pay an underwriting commission calculated as a percentage on the aggregate principal amount of the bonds that are firmly underwritten by the banks, paying agency fees, and out-of-pocket expenses. The commission fees and expenses are usually deducted from the proceeds of the issue to determine the net proceeds which have to be paid by the banks to the issuer on the payment date.
- (g) *Representations and Warranties*: It is common for an Underwriting Agreement to contain a comprehensive list of representations and warranties of the issuer, including statements in relation to corporate status, authorisations and consents, binding nature of obligations, prospectus, financial statements, no material adverse change, litigation, and no breach or default.
- (h) *Covenants and Undertakings*: The issuer will have to covenant to provide the lead bank with financial and other information. In case of Swiss franc bonds, the lead bank will have to undertake to make the necessary notifications to the Swiss National Bank.
- (i) *Paying Agency*: The issuer generally appoints the members of the syndicate as paying agents who are responsible for the payment of interest and principal and for the cancellation of redeemed bonds and coupons. The funds required for the payment of principal or interest will be transferred to the banks by the issuer for value on the respective due date.
- (j) *Closing Documentation*: In international issues, the agreement normally lists the documents to be delivered to the lead bank by the issuer prior to the payment date, such as copies of the excerpt of the commercial register of the issuer, the permanent global certificate, copies of the prospectus, statements of the auditors, a certificate of no material change, and other relevant documents.
- (k) *Right of Termination*: The syndicate banks will seek to reserve the right to withdraw from the agreement prior to the payment date under certain circumstances, such as if the reps and warranties are untrue, the closing documents are not provided, or a force majeure event occurs.

7.4. Overview of an IPO Process

7.4.1. Tentative Timetable

The following timetable provides a tentative framework of an international equity offering involving a Swiss company. Some key features of the process are discussed in more detail below. Numbers refer to business days.

Preliminary	Appoint professional advisors, sign letters of intent
L - 50	Management presentation/company visits, begin legal and financial due diligence
L - 50	Start drafting prospectus
L - 40	Contact Swiss Exchange re project and exemptions
L - 30	Submit preliminary prospectus and listing application to Swiss Exchange
L - 25	Start of roadshows, bookbuilding
L - 5	End of bookbuilding
L - 5	Sign nominal amount deposit and subscription agreement
L - 5	Shareholders' meeting relating to share capital increase
L - 5	Signing of subscription forms by banks and payment of nominal amount
L - 4	Board meeting re share capital increase
L - 3	Registration of share capital increase with commercial register
L - 3	Entry of company shares in SIS system
L - 2	Signing of underwriting agreement, agreement among underwriters, and other documents (share lending agreement, comfort letters)
L	Final prospectus available for distribution
L	Listing of the shares

L + 3	Closing (payment of issue price minus nominal value of shares minus commission by banks against delivery of shares, legal opinions, etc.)
L + 3	Settlement of first trades
L + 30	Exercise of green shoe option, return of borrowed shares

7.4.2. *Due Diligence*

Every party who is subject to potential prospectus liability will want to ensure that the information provided in the prospectus is correct and not misleading. As a result, legal and financial due diligence procedures are carried out. While the burden of the *legal due diligence*, often combined with a corporate cleanup, falls on both the issuer's and the underwriters' lawyers, the *financial due diligence* typically results in *comfort letters* supplied by the issuer's auditors to the underwriters and to the issuer by which the auditors provide assurances that specific accounting procedures have been complied with, especially in respect of unaudited financial data contained in the prospectus and that all historical financial information in the documents is in line with the audited accounts. A first comfort letter is issued in relation to the preliminary prospectus and followed up by an updated version in relation to the final prospectus and at closing (so-called 'bring down' letter). The due diligence procedure usually only ends at closing, when a final due diligence conference is held and the issuer confirms to the underwriters (ordinarily by providing so-called 'officers' certificates') that the reps and warranties contained in the Underwriting Agreement are still correct and that no material adverse change has occurred.

7.4.3. *Pre-Marketing, Preliminary Prospectus, Bookbuilding, and Research Blackout Period*

Before the bookbuilding period commences, in a phase called 'pre-marketing period', the syndicate's research analysts visit potential institutional investors to discuss their views on the issuer and the specific market. Based on the feedback of the investors, an appropriate price range can be established.

The most important and time-consuming task facing the IPO team is the drafting of the prospectus. A *preliminary prospectus* (nicknamed ‘red herring’ in the US due to portions printed in red ink to indicate that the prospectus is subject to change) needs to be available at the start of the bookbuilding period. It should comply with the minimum requirements in relation to an issue prospectus. During *bookbuilding*, the issue is marketed to institutional and retail investors by the management of the company and syndicate members for two to three weeks, including road shows and one-on-ones. The shares are offered based on an indicative price range. The investors’ interests are recorded by the syndicate in order to build a book of orders and to evaluate market demand. How a company's management team performs on the road show is perhaps the most crucial factor determining the success of the IPO.

During the *research blackout period*, which starts prior to the beginning of the pre-marketing period and ends after the stabilisation period, the syndicate members may not publish research on the issuer. The aim of the research blackout period is to protect investors by preventing syndicate members from unduly conditioning the market.

7.4.4. Pricing, Finalisation of Prospectus, Listing Notice, Tombstone

Once the road show has ended, company management meets with their investment bank to determine the final offering size and price. *Pricing* is different from valuation in so far as pricing relates to the determination of the offer price, whereas valuation relates to the expected capitalisation of the company. Underwriters often recommend to price a new share issue below what they consider true market value to produce an active aftermarket in the shares. Based on the decisions of the pricing meeting, the prospectus can be finalised, printed and distributed to investors on request. The open-price book-building method has become the prevalent pricing method for IPOs in Switzerland. Following the bookbuilding period and the determination of the issue price, the shares are allocated by the syndicate to the institutional and retail investors in accordance with allocation criteria agreed between the issuer and the syndicate.

The Listing Rules require that a *listing notice* be issued for each new issue of securities, which contains the most relevant information and indicates where a prospectus can be obtained. Tombstone ads, by

which the particulars of a new issue are announced, may also be placed in financial papers in Switzerland provided they make reference to a prospectus and where it can be obtained.

7.4.5. Stabilisation and Green Shoe

In the period following the commencement of trading, commonly referred to as ‘aftermarket’, imbalances in supply and demand can occur. In order to smooth the process, various techniques have been developed of which the most common involves the use of an over-allotment option, often referred to as ‘Green Shoe’, in reference to the US company which first made use of this instrument (the Green Shoe Manufacturing Company).

In this process the syndicate banks sell more shares than initially exist. To cover their short position, the banks borrow shares from the issuer or selling shareholders by way of a securities lending agreement. The Green Shoe represents a right, but not an obligation, for the syndicate banks to purchase additional shares from the issuer or selling shareholders, at the issue price, within a certain period (often 30 days) of the allocation date. The banks exercise the option if the shares increase in price, indicating less sellers than buyers. Alternatively, if the share price falls, the syndicate repurchases shares in the market, thus stabilising the price. These shares are then taken to repay the share loan.

8. Liability for Offering Documents

Claims arising from the public offering of equity and debt instruments by means of a prospectus or a similar document are governed by Swiss law if the company involved was a Swiss company or if the issue took place in Switzerland. By virtue of Swiss mandatory law, Swiss courts have jurisdiction at the place where the issue took place.

Article 752 CO applies if the securities involved are issued by or related to a corporation. Article 752 CO provides that anyone who participated intentionally or negligently in the preparation or dissemination of a prospectus or a similar instrument containing statements which are untrue, misleading or not in compliance with statutory requirements (e.g. due to omissions) is liable to compensate any person

who acquires the securities concerned, whether they are shares, bonds or derivatives, and suffers damage as a result thereof. If several persons have been involved in the preparation or dissemination of the prospectus, each person is jointly and severally liable to the extent the damage is attributable to him based on his own fault and the circumstances.

A claim may be brought not only by the original investors but also by the subsequent buyers. According to most legal commentators the investors must not have relied on the misstatement or omission when they decided to invest nor must they have read the prospectus, whereas they may not have been aware of the misstatement or omission. Conversely, it is generally believed that a person may be exculpated from any prospectus liability due to his reliance on portions of the prospectus in which a party recognised as an expert has rendered an opinion, such as a lawyer or an accountant. However, this excuse is not generally available to issuing houses or sponsors for they are under an obligation to make independent enquires irrespective of expert opinions. With respect to claims under Article 752 CO, the statute of limitations is five years after the day when the damage and the liable person became known to the plaintiff and, in any case, ten years after the day when the damage was caused.

In the absence of a body of precedents it remains to be seen whether liability under Article 752 CO can also arise as a result of the omission of information required by, or the breach of obligations laid down in, the Listing Rules and their implementing directives and circulars. For the time being such liability cannot be excluded, either on the grounds of Article 752 CO or in consequence of a tort committed by contravening the Listing Rules.

9. Secured Transactions

9.1. *Common Forms of Security*

Under Swiss law, the most common forms of security arrangements creating rights *in rem*, i.e. rights over assets, involve (a) a transfer of title and/or an assignment of claims incident to an obligation of the transferee/assignee to return identical or equivalent assets once the debtor's obligations are discharged and a right to sell the collateral on

default or (b) the creation of a pledge over movable property (including claims) or a mortgage over immovable property. Under Swiss law any type of collateral can be provided as security.

Guarantees ('*Garantieversprechen*') and suretyships ('*Bürgschaften*') are the most common quasi-security arrangements, where rights *in personam* impose personal liabilities on the security provider.

9.2. Transfer of Title

The main advantage of transferring title rather than creating a pledge or a mortgage is that a private sale of collateral is still possible when bankruptcy proceedings have already been instigated.

9.2.1. Transfer of Title in Tangible Goods

Where a security interest is provided by transfer of title in tangible goods, it is perfected by the execution of a security agreement and by the actual or constructive transfer of possession of the collateral. Traditionally, Swiss law does not distinguish between legal and beneficial ownership. In other words, legal ownership can be transferred irrespective of whether beneficial title is transferred too, and a beneficial owner who is not at the same time the legal owner of a tangible good does not enjoy any statutory rights or claims *in rem*.

Possession of tangible goods can be transferred by (a) physical delivery of the tangible goods to the security holder, (b) notice to the custodian of the tangible goods in question that title has been transferred and that the custodian is to hold the goods for the security holder, or (c) where the security holder already has possession of the goods in question, no further notice will be required. If the goods, title of which is to be transferred to the security holder, are to remain in possession of the security provider based upon a special agreement (such as a deposit or a lease agreement), such transfer of title will not be recognised vis-à-vis third parties (Article 717 para. 1 CC). Where the tangible in question has been acquired from a transferee to whom the goods were entrusted without the authority to transfer such goods, the *bona fide* acquirer will nevertheless be protected if he has acquired title or a security interest in such goods from that person (Article 933 CC).

9.2.2. *Transfer of Title to Uncertificated Rights*

Title to an uncertificated right is transferred by way of an assignment in writing. Whether an assignment requires a valid underlying agreement in order to transfer title or whether the assignment itself is a valid ground for such transfer (so-called ‘abstract nature’ of assignment) is controversial under Swiss law.

In any case, assignments are effective to transfer individually identifiable claims only, whereas the transfer of entire contracts requires an agreement among all the parties involved. If the parties to an agreement wish to transfer individual contractual rights and obligations to a third party, the rights must be assigned to and the obligations must be assumed by the new party. Contrary to UK law, an assumption of obligations does not involve a novation of claims.

Where there is an assignment of individually identifiable claims, the debtor may discharge his obligations by payment to the former creditor until he is advised of the assignment. After the adjudication of bankruptcy over the debtor, the debtor may still be notified of the assignment with the effect that the respective claims do not fall into the bankruptcy estate. However, if assigned future claims come into existence only after the adjudication of bankruptcy, such claims fall into the bankruptcy estate. Furthermore, the assignment does not deprive the debtor from his right to set off its obligations against those of the assignor and from raising all objections against such obligations already existing at the time of notification of the debtor of the assignment, provided that certain conditions are met.

Under Swiss law, a *bona fide* acquirer of claims is not protected against a third party claiming that identical claims were assigned to it first. If claims are assigned on more than one occasion by the same assignor, only the first assignment transfers title to the assignee.

9.2.3. *Transfer of Title to Certificated Rights*

Under Swiss law, certificated rights fall into one of the following categories: bearer instruments, instruments payable to the order (e.g. registered shares of Swiss companies) or registered instruments (*‘Namenpapiere’*). In general, a right holder’s ability to protect himself against third party claims is enhanced if the right is evidenced by a certificate.

For instance, in case of a bearer instrument, title of the *bona fide* transferee is protected if the instrument has been stolen or misappropriated prior to the transfer (Article 935 CC), in case of an order paper the purchaser is protected if the signatures appearing on the chain of endorsements were forged provided the transferee was not grossly negligent and the transferor formally appeared as legitimate holder of the instrument. For the sake of simplicity, only shares and the procedures required to effect their transfer are considered in more detail hereinafter.

The transfer of *bearer shares* requires the physical transfer of the share certificates to the purchaser or to a custodian acting on his behalf or, in the absence of certificates, a written assignment by the transferor to the secured party.

The transfer of *registered shares* necessitates the transfer of possession of the duly endorsed share certificates to the security holder. As long as the shares are held in book-entry form only, the transfer is effected by means of an assignment in writing by the transferring shareholder and notification of such assignment to the company by the bank or the depository institution. Instead of an endorsement, assignment in writing and possession of the instrument generally suffices to effect the transfer of registered shares. However, in the event of an assignment, the *bona fide* transferee is not protected against third party claims. The transfer of registered shares further requires that the purchaser files a share registration form in order to be registered in the share register (*'Aktienbuch'*) of the company as a shareholder with voting rights. The board of directors commonly specifies the details of registration (including the treatment of nominees) in separate rules. Further restrictions apply to the transfer of registered shares if the articles of incorporation provide that the shares may only be transferred with the consent of the company. A company may refuse its consent on certain grounds, which differ depending on whether the company in question is listed or not.

9.3. Creation of a Pledge and a Mortgage

9.3.1. Pledge

The most common type of security interest over chattel, (un-)certificated rights or intangibles in Switzerland is what is termed a 'pledge'. The providing of a valid security interest in tangible goods requires not

only a security agreement but also a transfer of possession (or constructive possession) of the collateral to the secured party or its agent. Where a security interest is to be created in uncertificated rights, such as claims, uncertificated securities, or registered shares subject to deferred printing (as most registered shares listed on the Swiss Exchange), an agreement in writing between the secured party and the party providing the security interest suffices (Article 900 CC). Where an acknowledgement of debt exists, such acknowledgement of debt will also have to be transferred to the secured party. If a security interest is to be created in certificated rights, possession (or constructive possession) of such certificates must be transferred to the secured party or its agent. Moreover, where the certificate in question is not a bearer instrument, additional requirements may apply to its transfer (assignment in writing or endorsement or notification of issuer).

9.3.2. Mortgage

Whereas under UK and US law the term ‘mortgage’ is sometimes used to mean any charge or lien on any property, a ‘mortgage’ governed by Swiss law is a specific form of *security interest over real estate* together with its buildings and fixtures (such as permanently fixed machinery). The creation of a mortgage under Swiss law requires a public deed to be signed in front of a notary public and a registration of the mortgage in the land register. Furthermore, it should be noted that the concept of *chattel mortgages* is unknown to Swiss law, with the exception of security interests in aeroplanes, ships and cattle. Consequently, unlike other jurisdictions, Switzerland does not maintain a register for the filing of security interests.

9.4. Non-Consensual Security Arrangements

9.4.1. Statutory Lien

If a creditor is in possession of movables and securities with the consent of the debtor, such creditor may retain possession of the collateral until the creditor’s claims against the debtor are fully satisfied provided (a) the claims are due, (b) there is a nexus between the goods retained and the claims and (c) the creditor has not waived the right of retention

or the debtor has explicitly instructed the creditor prior to the transfer of the goods or securities that there shall be no right of retention in respect of such goods or securities.

9.4.2. *Statutory Right of Set-off*

According to Article 120 CO claims may be set-off against each other where such claims are for the same kind of performance, relate to the same currency or entail delivery of the same type and kind of securities.

9.4.3. *Statutory Right of Segregation/Statutory Assignment of Claims*

Pursuant to Article 401 CO, a principal may, in case of bankruptcy of the agent, request segregation of all moveable property acquired by the agent in his own name and for the account of the principal. In the case of bankruptcy of a bank, the right to segregation also extends to property which the principal has transferred to the agent as fiduciary. If the agent has acquired claims in his own name but for the account of the principal, such claims vest in the principal upon the principal having fulfilled his obligations vis-à-vis the agent.

9.5. *No Fixed or Floating Charges under Swiss Law*

Under US and UK law, ‘fixed’ and ‘floating’ *charges* allow the borrower to use charged assets until a specified event occurs and do not require immediate transfer of ownership or possession of the charged assets to the security holder. In contrast, as mentioned above, Swiss law does not allow non-possessory forms of security interests. Consequently, the most common route to provide security over assets under UK or US law, the creation of fixed or floating charges, cannot be taken under Swiss law.

9.6. *Quasi-Securities*

The most common types of quasi-security, where rights *in personam* are created (as opposed to rights *in rem*), are *guarantees*, sometimes also referred to as indemnities (as per Article 111 CO), and *suretyships* (Article 492 CO). Even though these terms are identical to those used in other European jurisdictions, the legal implications of a guarantee

and a suretyship governed by Swiss law may differ from those arising under foreign law. In the US, where banks are prohibited from issuing guarantees to secure obligations of their clients vis-à-vis third parties, stand-by letters of credit are used in lieu of guarantees.

A guarantor and a surety both undertake to answer for another party's liabilities. Therefore, it is sometimes difficult in practice to distinguish between the two. However, it is important to clearly define the type of quasi-security for in order to be valid a suretyship requires an instrument in writing, including the maximum amount of liability, whereas a guarantee does not entail a special form. A contract is legally classified as a guarantee if the parties intended to create a separate and independent undertaking. The surety, however, joins in the same promise as the principal and is entirely dependent on its existence. For instance, if the main obligation is extinguished due to novation, the suretyship automatically ceases to exist as well. Since Swiss corporate law treats intra-group agreements like third party transactions, unqualified upstream guarantees and suretyships are impermissible under Swiss law.

9.7. Conflict of Law Issues

The *Federal Act of Private International Law of 18 December 1987* (PILA) draws a distinction between 'contractual matters' and 'property matters'. As a rule, *contractual matters* are governed by the law of the jurisdiction which has the closest connection to a contract unless the parties have agreed on a different choice of law. A security interest in *real estate* is governed by the law of the *lex situs*. The acquisition and divestment of *movable property* is subject to the law of the country in which the property was located (*lex situs*) when such transfer occurred. Special rules apply to goods in transit. The parties are free to stipulate that the acquisition and divestment of property rights in movables shall be subject to the law of the place of dispatch or destination or to the law applicable to the underlying contract. However, such choice of law may not be applied against third parties. The same principle applies to the creation of a security interest in movables. The pledge of claims and securities is governed by the law of the state of habitual residence of the secured creditor in the absence of a choice of law, which may in any case not be applied against third parties.

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