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Inaugural Issuance of TLAC-Eligible Senior Unsecured Notes by Swiss Bank

Reference: CapLaw-2015-15

On 26 March 2015, Credit Suisse issued USD 4 billion senior unsecured debt that intends to be eligible to meet the Financial Stability Board's proposal and envisaged future Swiss standards for instruments counting towards a total loss absorbency capacity (TLAC) requirement.

By René Bösch/Benjamin Leisinger

1) Background and Developments

a) The Idea

In January 2010, in a guest article in The Economist, Paul Calello, the late head of Credit Suisse AG's investment bank division, and Wilson Ervin, Credit Suisse AG's former chief risk officer, proposed a new process for resolving failing banks. Their article entitled *From bail-out to bail-in* presented the idea to ***give authorities the power to order a reduction in creditors' claims*** (*haircut*) ***or a conversion of such claims into equity of the insolvent debtor*** (*debt/equity-swap*, together with a haircut referred to herein as "bail-in") before public money (taxpayers' money) must be used to protect the systemically relevant functions, or operating liabilities generally, of a bank.

b) The Financial Stability Board's Recommendations for G-SIFIs

On 20 October 2010, the Financial Stability Board (FSB) recommended that financial institutions that are clearly systemic in a global context (so-called G-SIFIs) should have ***loss absorption capacity*** beyond the minimum agreed Basel III standards. In particular, the FSB recommended that G-SIFIs should have a higher share of their balance sheets funded by capital and/or by other instruments which increase the resilience of the institution as a going concern. Amongst others, the FSB mentioned a ***quantitative requirement for debt instruments or other liabilities represented by "bail-inable" claims***, which are capable of bearing loss within resolution, thus enabling creditor recapitalization and recovery while maintaining vital business functions. At the Seoul Summit in 2010, the G20 leaders endorsed these recommendations.

In October 2011, the FSB published its *Key Attributes of Effective Resolution Regimes for Financial Institutions* (the Key Attributes) and proposed that resolution authorities should have a broad range of resolution powers available, including the possibility to carry out ***bail-in within resolution as a means to achieve or help achieve continuity of essential functions*** either (i) by recapitalizing the entity hitherto providing these functions that is no longer viable, or, alternatively, (ii) by capitalizing a newly established entity or bridge institution to which these functions have been transferred following closure of the non-viable firm (the residual business of which would then be wound up and the firm liquidated).

c) Switzerland's Bail-in Regime

On 1 September 2011, Switzerland enacted a revised bank resolution regime in the Banking Act, that explicitly provided for the ***possibility of the Swiss Financial Market Supervisory Authority FINMA (FINMA) to order a bail-in***. On 1 November 2012, Switzerland's Ordinance of the FINMA on the Insolvency of Banks and Securities Dealers (BIO-FINMA) entered into effect. In Section 3 on "Corporate Actions", articles 47 to 50 BIO-FINMA contain more detailed rules on how FINMA can order a bail-in. By virtue of the amendments of the Banking Act and the enactment of the BIO-FINMA, Switzerland was among the first movers to meet the requirements recommended for financial institutions by the FSB in the Key Attributes.

Once the new amendment to the Banking Act enters into effect (envisaged for late in 2015 or early in 2016), FINMA's resolution and bail-in authority also applies to ***bank holding companies of a financial group that are domiciled in Switzerland*** (see CapLaw-2014-23 for more information).

d) The Financial Stability Board's Status Report and TLAC Proposal

On 2 September 2013, the FSB reported to the G20 on the status of the progress to end the too-big-to-fail (TBTF) conundrum. While showing some progress, the FSB also stated that many FSB jurisdictions need to take further legislative steps to implement the Key Attributes fully, in substance and scope. The FSB highlighted that important areas where jurisdictions need to act relate to the vesting of resolution authorities with bail-in powers and other resolution tools, powers for cross-border cooperation and the recognition of foreign resolution actions. Additionally, the FSB mentioned that ***a systemically important financial institution (SIFI) needs to have sufficient resources to absorb losses in resolution*** – a feature it referred then to as "gone concern loss absorbing capacity" (GLAC). The FSB committed to prepare proposals for consideration by end-2014 on the nature, amount, location within the group structure, and possible disclosure of such GLAC.

On 10 November 2014, the FSB published its proposal for a common international standard on now so-called ***"total loss absorbency capacity" (TLAC)*** for G-SIFIs (the Proposal) and asked the industry for consultation and comments until the consultation period ended on 2 February 2015. The Proposal specifically featured a draft term sheet (the Term Sheet) with the proposed features of TLAC instruments. According to the Term Sheet, the objective of the proposed minimum TLAC requirement is to ensure that G-SIFIs have the loss absorbing and recapitalization capacity necessary to help ensure that, in and immediately following a resolution, critical functions can be continued without taxpayers' funds (public funds) or financial stability being put at risk. In order for debt instruments not qualifying as regulatory capital of the G-SIFIs to be eligible to count towards the TLAC requirement, the Term Sheet states that certain elements must be met.

The ***core features for such external TLAC*** set forth in Sections 8 through 17 of the Term Sheet are as follows: (1) issued and maintained by resolution entities, (2) being unsecured, (3) having a minimum remaining maturity of at least one year, (4) not qualifying as an "excluded liability" (*i.e.*, not be an insured deposit, not be callable on demand without supervisory approval, generally not be funded directly by the issuer or a related party of the issuer, not qualify as a derivative or have derivative-linked features, not arise otherwise than trough a contract, not be senior to normal unsecured creditors under the relevant insolvency law, not be excluded from bail-in), (5) being able to absorb losses prior to excluded liabilities (to be read as "prior to creditors of operating liabilities of the bank", in the authors' understanding based on the stated objective of TLAC and the comments to the FSB Proposal in the consultation) in insolvency or in resolution by way of either contractual, statutory or structural subordination without giving rise to material risk of successful legal challenge or compensation claims, (6) not be subject to set off or netting rights that would undermine their loss-absorbing capacity in resolution, (7) not be redeemable without supervisory approval, except when replacing eligible TLAC with liabilities of the same or better quality and the replacement of liabilities is done at conditions which are sustainable for the income capacity of the bank, (8) either be governed by law of the jurisdiction in which the relevant resolution entity is incorporated, or if subject to the law of another jurisdiction, include legally enforceable contractual provisions recognizing the application of resolution tools by the relevant resolution authority if the resolution entity enters resolution, unless there is equivalent binding statutory provision for cross-border recognition of resolution actions, and (9) contain a contractual trigger or be subject to a statutory mechanism which permits the relevant resolution authority to expose TLAC to loss or convert to equity in resolution.

e) Switzerland Endorsing the Idea of TLAC

In light of the FSB Proposal, the *Final Report of the Group of Experts on the Further Development of the Financial Market Strategy* dated 1 December 2014 (called after the chairman of that Group of Experts, Professor Aymo Brunetti, the "Brunetti Report") also recommended to supplement the Swiss TBTF regime with binding TLAC requirements so that sufficient liabilities are available to make recovery or orderly resolution possible. On 18 February 2015, the Swiss Federal Council in its evaluation report on Switzerland's TBTF provisions endorsed this recommendation and stated that Switzerland intends to change its laws to introduce a TLAC requirement even if the Brisbane Summit of the G20 does not result in an internationally agreed standard for TLAC.

2) Credit Suisse's Inaugural Issuance

On 23 March 2015, Credit Suisse launched its inaugural issuance of newly designed senior debt instruments that are designed to meet the requirements proposed by the FSB's Term Sheet. The USD 1.5 billion 2.750% Senior Notes due 2020 and USD 2.5 billion 3.750% Senior Notes due 2025 (together, the Notes) have been issued by Credit Suisse Group Funding (Guernsey) Limited, a special purpose vehicle to implement the new funding strategy, on 26 March 2015 on a Rule 144A/RegS basis and are guaranteed by Credit Suisse Group AG (CSG). The Notes will be listed on the SIX Swiss Exchange Ltd.

For Swiss withholding tax reasons, the Notes are issued by a special purpose vehicle. However, the Notes are guaranteed by CSG, the relevant Swiss resolution entity in FINMA's preferred single-point-of-entry resolution strategy. Because of this, the Notes are indirectly (and economically) issued by CSG. It is also worth noting in this context that in the Swiss bail-regime, a guarantee does not present a security that would limit the availability of the respective liability for bail-in under the BIO-FINMA. Notwithstanding this, upon the opening of restructuring proceedings with respect to Credit Suisse AG and/or CSG, a ***prepackaged automatic issuer substitution*** results in CSG becoming the principal debtor under the Notes and the guarantee falling away as a result of this. By means of these contractual features, the Notes would be debt of the resolution entity and completely unsecured during restructuring proceedings with respect to CSG and, hence, subject to a statutory bail-in by FINMA, once CSG is subject to the bail-in regime.

Because the Notes will be the debt of the holding company CSG at the relevant time, the Notes would absorb losses through a statutory full or partial conversion and/or write-down ordered by FINMA in the course of restructuring proceedings with respect to CSG. As senior unsecured instruments, the Notes could only be fully or partially converted into equity of CSG or written-down under Swiss law after shareholders of CSG and holders of subordinated debt of CSG. However, the structure and mechanics of the Notes, through structural subordination, permit that the ***instruments be fully or partially converted or written-down by FINMA prior to creditors of operating liabilities of the bank Credit Suisse AG***. Moreover, as the Notes are governed by New York law, recognition of the exercise of such a resolution power by FINMA in the competent New York courts is safeguard by appropriate contractual clauses (***recognition and acknowledgement clause***). The Notes also contain a set-off prohibition and require approval by FINMA prior to redemption, to the extent required at the time. In order to deal with the issue of Swiss withholding tax application after an automatic issuer substitution, the Notes provide for the ***exchange of the Notes for newly issued notes*** if, after the completion of the Swiss restructuring proceedings with respect to CSG, the Notes have not been fully written-down and/or converted into equity of CSG and CSG is or would be required to deduct Swiss withholding tax from interest payments on the Notes under Swiss laws in effect at such time.

An internal down-streaming instrument issued by a non-Swiss branch of Credit Suisse AG to Credit Suisse Group Funding (Guernsey) Limited and its features provide for the basis of a ***recapitalization by FINMA of the bank Credit Suisse AG*** or other Credit Suisse group companies in the course of restructuring proceedings with respect to CSG without opening restructuring proceedings with respect to Credit Suisse AG or such other group company (single point of entry, top-down) and for the down-streaming instrument absorbing losses prior to any operating liabilities of Credit Suisse AG.

3) Outlook

It remains to be seen what the final proposal and requirements published by the FSB for TLAC-eligible instruments will be. The final FSB TLAC requirements are expected by the end of 2015 and, according to the existing FSB Proposal, are intended to apply by 1 January 2019.

However, in light of the Swiss Federal Council's clear commitment to implement a TLAC requirement, the obvious need to further address the TBTF conundrum, and Switzerland's past history as a fast mover in this area, Swiss systemically relevant financial institutions have already shifted their focus on developing instruments that serve the purpose of protecting operating liabilities, and the systemically relevant functions in particular, in a gone concern and to allow a recapitalization of the bank (or banks) of the financial group in line with FINMA's single-point-of-entry resolution strategy, *i.e.*, without opening restructuring proceedings with respect to the bank itself.

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Is a Regulation of Proxy Advisers needed in Switzerland?

Reference: CapLaw-2015-16

Proxy adviser have now come to play an important role for listed companies in Switzerland with a significant free float. The breadth of the phenomenon is relatively recent and coincided with the enactment and entry into force of the Ordinance against Excessive Compensation for listed companies (OaEC; *Verordnung gegen übermässige Vergütungen in börsenkotierten Unternehmen (VegüV)*), which mandates, *inter alia*, a binding shareholder resolution on say on pay. The increased power of proxy advisers also gives rise to some concerns and to the question of how to address them.

By Thomas U. Reutter

1) Proxy Advisers and their Increased Power

Until recently, ISS used to be primarily associated with a company providing facility services in corporate Switzerland. Not anymore. Institutional Shareholder Services, Inc., best known under its acronym ISS, is well known and sometimes feared among boards and executive management of Swiss listed companies. Although ISS appears to be the most visible international proxy adviser in Switzerland, peers like U.S. based Glass Lewis & Co. LLC, PIRC (Pension & Investment Research Consultants Ltd) and Manifest based in the U.K., IVOX from Germany and Proxinvest from France have been active in respect of Swiss listed companies as well. While some of these firms are pure proxy advisers, most of them offer other services including corporate governance advisory, class action claims management, management of disclosure of major shareholdings and similar services to institutional investors or listed companies.

Of course, Switzerland boasts its own proxy advisers: Z-rating (formerly part of Z-Capital, an investment management firm), Ethos (a foundation for ethical investments) and SWIPRA (Swiss Proxy Adviser; a foundation sponsored by Swiss investment funds). All of them focus their activities and voting recommendations on Swiss listed companies.

Undoubtedly, proxy advisers deserve great praise in fostering good corporate governance, enhanced transparency of listed companies and bolstering shareholder rights. However, a few doubts are lingering. These doubts relate to conflicts of interests, a lack of transparency of reasons behind a voting recommendation and a lack of understanding of the specific issuer or context.

2) Merits and Areas of Concern

It would clearly be best practice for proxy advisers to establish and publish general voting guidelines, which set out in a general manner how proxy advisers will recommend to vote under a given set of facts. However, not all of the proxy advisers establish such guidelines in a level of detail allowing a reader to draw conclusions as to the likely voting recommendation in a given set of facts. Neither are they required to do so by law. Listed companies are therefore at times left in the dark as to the reasons of a "no" recommendation for a proxy adviser. For example, a proxy adviser may issue a "no" recommendation in respect of a binding shareholder vote on board compensation without publishing the reasons leading to a "no" recommendation. In the specific case, the proxy adviser had composed a group of peer companies and calculated a median of compensation per board member. The peer group was not disclosed publicly and was disclosed to the issuer only after repeated requests to do so. The listed company had no opportunity to challenge the peer group (*e.g.* on the basis that such peer group should only have included companies without a controlling shareholder whose representatives are often compensated by such shareholder). Neither did the public or shareholders generally have the opportunity to assess whether the specific recommendation was warranted or not.

This lack of transparency is often combined with a lack of communication with the issuer. Even when the proxy adviser had previously issued a general guideline on voting, the outcome of a specific voting recommendation is often not a case of black or white. This is because the guidelines must, by necessity, be principle based and warrant interpretation and adaptation in specific cases. Often, however, proxy advisers lack the time or the resources to understand a specific issuer and its circumstances and use their respective criteria rather schematically. For example, in the recent adaption of the articles of incorporation to the OaEC, most of the proxy advisers recommended a "no" vote whenever they saw the word "option" as a (potential) part of the executive compensation in one of the clauses of the articles. However, they did not have an issue with "share purchase entitlement awards" (*anwartschaftliche Bezugsrechte auf Aktien*). Would not an option to receive shares also constitute a share purchase entitlement award?

It appears that proxy advisers often base their recommendations on "tick the box" analysis rather than a research of the specific issuer or its country of incorporation. For example, whenever issuers exceed certain thresholds in a motion to shareholders to approve a general authorized capital – usually 20% of the existing capital –, the recommendation will most likely be "no", irrespective of the issuer or the circumstances. By the same token, whenever a board member whose term of office exceeds 12 years will seek re-election, the recommendation will most likely be "no", irrespective of the circumstances (for example, the executive management being in a transition phase).

The problem, it seems, is only to a limited extent rooted in the general voting guidelines. These guidelines, if any, often allow for exceptions in specific cases. However, the (most often junior) researchers of the proxy advisers generally lack the time or the energy to research the specific case or to talk to the issuer ahead of their recommendation. The result is a rather schematic recommendation, which may at times just be unhelpful, but at times also harmful to the listed company concerned.

A further area of concern revolves around conflicts of interest. Proxy advisers may be engaged in consultancy businesses to companies that are also included in their proxy recommendations. Some proxy advisers offer corporate governance advice to listed companies. Of course, a proxy adviser who has advised a listed company will be inclined to apply its discretion in favor of such listed company when issuing a voting recommendation.

Finally, there is hardly any liability for the acts of proxy advisers if they only issue recommendations. No matter how ill-founded a recommendation may be, if merely recommendations are issued by a proxy adviser, a company will find it difficult to successfully invoke any injunctive relief or claim for damages. Hence, private legal remedies tend not to be a deterrent for proxy advisers.

3) Regulation Globally – Regulation in Switzerland

These areas of concern would appear to call for some regulation. However, little has been done in this respect. In the EU, the European Securities and Market Authority (ESMA) has undertaken an extensive analysis of the proxy adviser industry and has found no evidence of market failure requiring regulatory intervention. However, ESMA also noted that there were "a number of concerns regarding conflicts of interest management and the transparency of analysis and advice" and hence recommended the establishment of an EU Code of Conduct for proxy advisers (see www.esma.europa.eu; press release dated 19 February 2013 "ESMA recommends EU Code of Conduct for proxy adviser industry").

In ESMA's view, a Code of Conduct for proxy advisers should focus on the following principles:

- ***Identifying, disclosing and managing conflicts of interest***: Proxy adviser should avoid conflicts of interest or at least disclose them and adopt measures of mitigation.

- ***Fostering transparency to ensure the accuracy and reliability of the advice***: Proxy advisers should issue and disclose publicly their general voting policies and methodologies and the sources used in making specific recommendations. Proxy advisers should also take into account local market, legal and regulatory conditions and disclose whether and, if applicable, how they have been taken into account. Finally, proxy advisers should inform investors about their dialogue with the issuers as well as of the nature of such dialogue.

Although the above principles clearly address most of the areas of concern previously described, it seems that not much progress has been made in finalizing the proposed Code of Conduct.

The situation is slightly different in the United States. While neither the U.S. have a specific proxy adviser regulation, proxy advisers are regulated under the federal securities laws if they seek the power to act as proxy for their clients (constituting a "solicitation" under the federal proxy rules). However, if proxy advisory firms limit their activities to issuing reports with recommendations, they will not be under direct supervision by the SEC (see www.sec.gov/interps/legal/cfslb20.htm; SEC Staff Legal Bulletin N. 20 (IM/CF): Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms). However, there is some indirect regulation through the regulation of investment advisers. The SEC has issued guidance to investment advisers as to their responsibilities in selecting and supervising proxy advisers. For example, investment advisers should consider consistency and quality of proxy recommendations as well as the manner in which conflicts of interest are dealt with by the proxy advisers in the initial selection and periodic review of proxy advisers. However, the SEC did not issue any specific substantive rules, which would require proxy advisers directly, or indirectly through the regulation of investment advisers, to make specific disclosures or to interact with issuers in a required manner.

Proxy advisers are not regulated in Switzerland either. However, a group of associations and foundations including, *inter alios*, the Swiss Pension Association representing institutional investors, the major associations of corporate Switzerland (economiesuisse, SwissHoldings, Swiss Banker's Association) and Ethos, a proxy adviser, have issued "Guidelines for institutional investors governing the exercising of participation rights in public limited companies" (see www.swissinvestorscode.ch). In Principle 3, the Guidelines state that institutional investors must select proxy advisers carefully and must supervise them. Also, institutional investors should not blindly follow recommendations by proxy advisers, but critically examine recommendations and try to identify conflicts of interest. Interestingly, the Guidelines also proclaim a right of the listed company to be heard ahead of recommendations on controversial issues. However, the Guidelines in general and the right to be heard in particular appear to have little relevance in practice. There may be several reasons for that. The Guidelines are addressed to institutional investors (as opposed to proxy advisers), involve only a limited number of relevant players and are essentially non-binding (based on a "comply or explain" regime).

4) What would be the Substance of a Proxy Adviser Regulation?

In an ideal world, proxy advisers would adhere to a procedure that is perceived fair, transparent and conflict free by all players involved. This should also be the goal of any potential proxy adviser regulation. ESMA's suggested Code of Conduct clearly goes into the right direction with its focus on avoiding and disclosing conflicts of interest and increasing transparency. However, the proposed rules seem to only cover a bare minimum. Further granularity would have to added; not in the sense of detailed regulatory regime, but in the sense of a comprehensive but still principle based framework.

An additional element worth considering is the right of the listed company to be heard ahead of a recommendation. This right could be combined with the requirement on proxy advisers to submit investors not only their own analysis and recommendation, but also the statement, if any, by the issuer concerned setting out its own position. This right to be heard would avoid potentially flawed assessments by the proxy adviser due to a lack of understanding of local markets or legal regimes. It would also unveil any "tick the box" approach by proxy advisers and therefore increase their scrutiny and diligence of analysis. Investors would benefit because they receive the analysis and arguments from both, the proxy advisers and the listed company and can therefore make a better informed voting decision.

5) Should Switzerland take Action?

Regulating proxy advisers does not seem to be on top of the political agenda in Europe and the U.S. It would be difficult for a small country like Switzerland to be a first mover in regulation of proxy advisers. In order to be effective, the regulation would have to address proxy advisers based abroad, *e.g.* ISS or Glass Lewis based in the U.S. providing advice to Swiss but also non-Swiss shareholders. The only link to Switzerland would be the headquarters of the listed company whose shares confer the voting rights for which recommendations will be issued. However, the proxy adviser issuing the advice and the institutional investor retaining such advice are likely to be based outside of Switzerland and may even be based in the same third country. Hence, the relationship between the proxy adviser and the institutional investor receiving the advice may be entirely governed by a foreign jurisdiction. The only reason for Switzerland to legislate would be that the effect of such relationship could occur in Switzerland, similar to the "effects doctrine" in competition law. However, legislation based on this principle will likely face resistance internationally unless there is consensus among the relevant countries that the "effects doctrine" is the proper way to address regulation of proxy advisers internationally.

Proxy adviser regulation may have its benefits if undertaken on a broad international scale. However, Switzerland on its own is unlikely to be able to effectively address the areas of concern in proxy adviser activity by regulatory action.

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Revised Cross-Border Marketing Regime for non-Swiss Funds to Qualified Investors in Switzerland applies as from 1 March 2015

Reference: CapLaw-2015-17

The two year transitional period applicable to the rules for the marketing of non-Swiss funds to unregulated qualified investors in Switzerland under the amended Collective Investment Schemes Act (CISA) ended on 28 February 2015. As from 1 March 2015, a Swiss representative and a Swiss paying agent must be appointed and Swiss law governed distribution agreements between the Swiss representative and the entities distributing the relevant non-Swiss fund in Switzerland must be in place, prior to marketing such funds to unregulated qualified investors in Switzerland.

By Patrick Schleiffer/Michael Kremer

1) Introduction

In parallel with the AIFMD coming into force, Switzerland amended its fund marketing regime which entered into force on 1 March 2013. The implementation of the amended requirements for non-Swiss funds to be distributed to qualified investors in Switzerland was subject to a two year transitional period which ended on 28 February 2015. As from 1 March 2015, the distribution of non-Swiss funds to so-called unregulated qualified investors requires the appointment of a Swiss representative and a Swiss paying agent. In addition, distributors have to enter into Swiss law governed distribution agreements with the Swiss representative of the respective non-Swiss fund before marketing the fund in Switzerland.

2) Fund Marketing Regime for Qualified Investors

The revised Swiss fund marketing regime applicable to non-Swiss funds not approved by the Swiss Financial Market Supervisory Authority (FINMA) depends on the type of qualified investors that are being targeted in Switzerland. There are two different regimes which apply to the marketing of funds to qualified investors in Switzerland: the fund marketing regime applicable to the distribution of non-Swiss funds to regulated qualified investors on the one hand and the fund marketing regime applicable to the distribution of non-Swiss funds to unregulated qualified investors on the other hand. Under either regime, no approval, registration or notification in Switzerland is required under the CISA. Absent any prior approval by FINMA or exemption available under the CISA, a non-Swiss fund may not be marketed to investors other than qualified investors within the meaning of the CISA. If the non-Swiss fund is structured as a company, the Swiss civil law prospectus rules may also apply if the distribution of the non-Swiss fund in Switzerland qualifies as a public offering for purposes of such prospectus rules. See CapLaw-2010-42 and CapLaw-2011-22.

a) Fund Marketing Regime for Regulated Qualified Investors

There are no restrictions on the cross-border marketing of a non-Swiss fund to so-called regulated qualified investors which are entities that are prudentially supervised financial intermediaries (such as banks, securities dealers, fund management companies, asset managers of collective investment schemes and central banks) and regulated insurance companies (Regulated Qualified Investors). The marketing of a non-Swiss fund exclusively to Regulated Qualified Investors falls outside the scope of the CISA and is, as such, not subject to specific marketing restrictions and requirements under the CISA. Thus, there is no requirement for a non-Swiss fund to appoint a Swiss representative and a Swiss paying agent, and no distribution agreements have to be entered into between the relevant Swiss representative and the distributors marketing the non-Swiss fund to Regulated Qualified Investors in Switzerland.

b) Fund Marketing Regime for Unregulated Qualified Investors

Where a non-Swiss fund is marketed (also) to so-called unregulated qualified investors in Switzerland which include (i) public entities and pension funds with professional treasury management (professional treasury management requires that the relevant entity has entrusted at least one qualified professional with the management of its asset on a permanent basis), (ii) enterprises with professional treasury management, (iii) high net worth individuals who have declared in writing that they wish to be deemed qualified investors and who fulfill certain conditions such as minimum financial assets and technical competences (HNWIs), and (iv) investors who have entered into a discretionary asset management agreement with a regulated financial intermediary or an unregulated independent asset/portfolio manager meeting the relevant requirements under the CISA, its implementing ordinance and guidelines (Independent Asset Manager), provided that they have not opted out in writing (Unregulated Qualified Investors), a Swiss representative and a Swiss paying agent must be appointed, prior to any marketing activities in Switzerland, and distribution agreements have to be entered into between the relevant Swiss representative and each distributor marketing the non-Swiss fund in Switzerland.

i. Appointment of Swiss Representative and Swiss Paying Agent

For each non-Swiss fund which is marketed (also) to Unregulated Qualified Investors in Switzerland, a Swiss representative and a Swiss paying agent must be appointed. Swiss banks may act both as representative agent (subject to proper licensing) and paying agent.

The duties of the Swiss representative include representing the non-Swiss fund vis-à-vis Swiss-based investors and FINMA. Thus, the Swiss representative is responsible for answering any potential queries or claims raised by FINMA or investors in relation to the distribution of the non-Swiss funds in Switzerland. Also, the Swiss representative has to monitor the distribution activities of the appointed distributor(s) for Switzerland. The Swiss representative has to enter into a Swiss law governed distribution agreement with each distributor appointed to market the non-Swiss fund to Unregulated Qualified Investors in Switzerland.

From a legal perspective, the purpose of appointing a Swiss bank as Swiss paying agent is to enable Swiss investors to receive and make payments in relation to the units of the non-Swiss fund through a Swiss-based bank. However, in practice, payments are typically directly made with or received from the non-Swiss fund's custodian or transfer agent, and, accordingly, the Swiss paying agent does typically not play an active role when non-Swiss funds are marketed to Unregulated Qualified Investors.

The Swiss Funds & Asset Management Association (SFAMA) has published a model representation agreement serving as a template for representation agreements.

ii. Requirements applicable to non-Swiss based Distributors

A distributor based outside of Switzerland may not market non-Swiss funds to Unregulated Qualified Investors, unless it is subject to appropriate supervision in its home jurisdiction. There is currently no further guidance on the interpretation of the Swiss concept of "appropriate supervision". In our view, also a SEC registered investment manager or a MiFID licensed investment firm should, as a rule, be considered to be a non-Swiss distributor subject to an appropriate foreign supervision and should therefore be permitted to distribute, on a pure cross-border basis, non-Swiss funds to Unregulated Qualified Investors in Switzerland.

Distributors (including non-Swiss based distributors) have to enter into a written Swiss law governed distribution agreement with the relevant Swiss representative of the non-Swiss fund, prior to any marketing activities in Switzerland. This obligation also applies to any sponsor, fund manager or asset/investment manager of the non-Swiss fund or to the fund itself, provided they are also engaged in marketing the fund in Switzerland. Such agreements are typically based on the model distribution agreement issued by SFAMA. Distributors (including non-Swiss based distributors) must agree to exclusively use marketing documentation mentioning the Swiss representative, the Swiss paying agent as well as the place of jurisdiction and to comply with the SFAMA guidelines on the distribution of collective investment schemes (Distribution Guidelines) and the SFAMA guidelines on duties regarding the charging and use of fees and costs (Transparency Guidelines). Both the Distribution Guidelines and the Transparency Guidelines have been declared by FINMA as minimum standards to be complied with when marketing funds in Switzerland.

iii. Documents to be used when marketing non-Swiss Funds in Switzerland

Non-Swiss funds to be distributed to Unregulated Qualified Investors must use in Switzerland fund documentation mentioning the Swiss representative, the Swiss paying agent, the place of jurisdiction and the place where the relevant fund documents are available free of charge.

In accordance with the Distribution Guidelines and the Transparency Guidelines, certain information on fees and costs as well as on retrocessions and rebates must be disclosed in the relevant fund documentation. Retrocessions refer to any commissions, kickbacks, trailer or finder's fees that are paid by the fund to distributors. Rebates are payments by funds or their agent directly to investors resulting in a reduction of the fee or cost attributable to the fund. Rebates are permitted, provided that they are granted on the basis of objective criteria. The fund documents must also contain a statement if no retrocessions or rebates will be paid.

In order to comply with the Transparency Guidelines and the regulatory information requirements, SFAMA recently prepared a model annex (Information for investors in Switzerland) serving as a template and covering the required information to be inserted into the fund documentation regarding the Swiss representative and Swiss paying agent, the place of performance and jurisdiction and payments of retrocessions and rebates.

It is untested whether the place of jurisdiction has to be located (as a matter of mandatory Swiss law) at the registered office of the Swiss representative or another venue in Switzerland or whether it can be provided for to be elsewhere (e.g., at the place of the registered office of the fund). In our view, there is no sufficient legal basis for a mandatory submission of the fund to the courts at the registered office of the Swiss representative or another venue in Switzerland. Thus, it should be permissible under the CISA to provide for a place of jurisdiction at the registered office of the fund, subject to mandatory Swiss conflict of law provisions.

iv. Marketing Activities

Under the CISA, any form of marketing activities, whether in writing or orally, occurring on a pure cross-border basis or by representatives of the sponsor, fund manager and any other persons involved in the marketing of the fund physically present in Switzerland (e.g., road shows, investor presentations, term sheets, private placement memorandums, granting access to a virtual dataroom, draft subscription agreement), which is aimed at marketing a specific fund to Unregulated Qualified Investors constitutes distribution under the CISA and thus triggers the obligation to appoint a Swiss representative and a Swiss paying agent and to enter into distribution agreements prior to marketing activities being conducted in Switzerland.

Conversely, presentations that solely describe the sponsor or the fund or asset/investment manager's business, services, experience and investment strategy in general and which do not reference a specific fund to be marketed should in our view not be considered to constitute a distribution within the meaning of the CISA. Further, the testing of the market for a contemplated future fund should in our view not constitute distribution unless the principle terms are already specified so that the fund can be regarded as ready to be marketed in Switzerland. Also references to existing funds which are, at such time, no longer open/distributed to investors in Switzerland should not be regarded as distribution under the CISA.

v. Exemptions

There are three main exemptions from the revised fund marketing regime that non-Swiss funds and non-Swiss based distributors may rely on when distributing a fund in Switzerland:

- *Unsolicited request/reverse solicitation exemption*: The provision of information and marketing material and the marketing of a non-Swiss fund occurring at the instigation/own initiative of the investor in Switzerland do not constitute distribution of such fund to Unregulated Qualified Investors in Switzerland. However, such reverse solicitation is limited to situations where an investor requires information on or acquires units of a specific fund without preliminary intervention or contact from the sponsor, fund, fund manager, distributor(s) or the Swiss representative. Unlike in other jurisdictions, the reverse solicitation/unsolicited request exemption under the CISA is construed rather tightly and in our view cannot serve as a meaningful business model for targeting investors in Switzerland without restrictions under the CISA.

- *Discretionary asset management agreement exemption*: The provision of information and marketing material and the marketing of a non-Swiss fund occurring in the context of a written discretionary asset management agreement entered into by the investor with a regulated financial intermediary (such as a bank or an asset manager of collective investment schemes) do not constitute distribution under the CISA.

- *Advisory agreement exemption*: The provision of information and marketing material and the marketing of a non-Swiss fund occurring in the context of a written advisory agreement which complies with the requirements of the CISA, its implementing ordinance and guidelines, entered into by the investor with a regulated financial intermediary are not regarded as distribution under the CISA.

While the discretionary asset management agreement exemption and the advisory agreement exemption is also applicable in the context of a written discretionary asset management agreement or a written advisory agreement entered into between an (unregulated) Independent Asset Manager and its clients, FINMA currently only considers the provision of information and the marketing of a non-Swiss fund by the (unregulated) Independent Asset Manager to its clients (but not any preceding or concurrent marketing activities of the distributors towards the (unregulated) Independent Asset Manager) as exempt from the fund marketing regime for Unregulated Qualified Investors. Thus, in the context of the discretionary asset management agreement exemption and the advisory agreement exemption and in order to completely stay outside the scope of the revised fund marketing regime, non-Swiss funds may only be marketed to regulated financial intermediaries (such as a bank or an asset manager of collective investment schemes) and by them to their clients (which do not have to be Regulated Qualified Investors) with whom the relevant regulated financial intermediary maintains a discretionary asset management agreement or an advisory agreement meeting the requirements of the CISA, provided that the marketing of the fund to such clients is made through the relevant regulated financial intermediary itself (and not by the distributors of the fund directly).

vi. Transitional Period

The two year transitional period applicable to the amended rules for the marketing of non-Swiss funds to Unregulated Qualified Investors in Switzerland under the CISA ended on 28 February 2015. As from 1 March 2015, a Swiss representative and a Swiss paying agent must be appointed, and Swiss law governed distribution agreements between the Swiss representative and the entities distributing the relevant non-Swiss fund in Switzerland must be entered into, prior to marketing such fund to Unregulated Qualified Investors in Switzerland.

It is untested whether a fund has to appoint a Swiss representative and a Swiss paying agent also in case that the fund was marketed to Unregulated Qualified Investors in Switzerland during the transitional period but not after 28 February 2015. In our view, in such a situation, no Swiss representative and no Swiss paying agent has to be appointed retrospectively, as there was no distribution (triggering the obligation to appoint a Swiss representative and Swiss paying agent and to enter into distribution agreements) after 28 February 2015.

vii. Termination of the Agreements of the Swiss representative, Swiss Paying Agent and Distributor following Distribution?

The revised marketing rules are silent as to whether the agreements with the Swiss representative, the Swiss paying agent and the distributors must also be maintained, if, e.g., a closed-end fund is marketed only one time in Switzerland. In our view, it should in such situation be permissible to terminate the distribution agreement(s) after completion of the distribution, and to terminate the agreement with the Swiss representative at least partially, as there are no longer distribution activities to be monitored by the Swiss representative following completion of the distribution.

Further, it should be acceptable under the CISA to terminate the agreements with the Swiss representative, the Swiss paying agent and the distributors, completely, if following the marketing activities of the distributor(s) no Unregulated Qualified Investors in Switzerland have subscribed for the fund and no marketing is continued in Switzerland, as in such scenario there is no task left for the Swiss representative, the Swiss paying agent and the distributors to do, and no Unregulated Qualified Investors in Switzerland to be protected under the CISA.

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Partial Revision of the Swiss Insurance Supervision Ordinance

Reference: CapLaw-2015-18

The partial revision of the Swiss Insurance Supervision Ordinance (ISO) initiated by the Federal Finance Department (FFD) in 2014 will enter into force on 1 July 2015. The revision focuses primarily on the themes of solvency, qualitative risk management and disclosure. This article shall give an overview on the various amendments, and in particular on the revised provisions on the eligibility of hybrid instruments as regulatory capital.

By Petra Ginter

1) Introduction

The necessity to revise the insurance supervision law became evident in the financial crisis. Furthermore, the introduction of the risk-based Swiss Solvency Test (SST), the equivalence assessment by the European Insurance and Occupational Pensions Authority (EIOPA) in autumn 2011, the Financial Sector Assessment Program (FSAP) of 2013, as well as other international developments, led to the conclusion that a revision of the ISO would be inevitable.

As mentioned, the primary focus of the amendments to the ISO lies on solvency, qualitative risk management and disclosure. At the same time, adjustments will be made to insurance technical reserves, tied assets, intermediary supervision and certain sector-specific provisions.

2) Solvency

a) Discontinuation of Solvency I

The current ISO requires (re)insurance companies to apply two equivalent solvency methods: Solvency I as well as SST. The latter has been applied to Swiss domiciled (re) insurance companies and groups since 2011 by operation of law.

To apply two solvency methods in parallel is, however, no longer considered adequate and also not in line with international standards. Already the message of the Swiss Federal Council (*Botschaft*) on the Insurance Supervision Act (ISA) of 2003 stated that the solvency margins calculated under Solvency I would not provide the necessary protection because Solvency I would not take into account the individual risk profile of the (re)insurance company. Under Solvency I, the required capital is determined based on the volume of the business by applying volume related, formalistic standard calculations. The method does not request higher capital requirements for companies with higher risks and does not take into account market and credit risk. Accordingly, the Solvency I method was considered of limited relevance and was said to barely support the main goal of insurance supervision regulation, namely the protection of the insured. Considering these shortfalls of the Solvency I method, it lost its relevance after the SST became mandatory, even more as today's insurance supervision is a risk-based supervision. Finally, on the EU level, the Solvency I method will be replaced as per 2016 by the new solvency regime under the Solvency II Directive 2009/138/EG (Solvency II).

As a consequence, Solvency I will be discontinued under the revised ISO and the SST will be applied as the sole solvency method and as counterpart to the new Solvency II method in the EU. The SST allows – with a few exceptions – a holistic view on the risks of the (re)insurer and the resulting capital requirements, assessed close to market. The relevant market, credit and insurance risks will be quantified by means of a standardised or individual model and the resulting capital requirements (target capital) will be compared to the effectively available capital (risk-bearing capital). The discontinuation of Solvency I will become effective as per the entering into force of the revised ISO, *i.e.* as per 1 July 2015. In essence, no transitional rules will be applied with respect to the application of Solvency I.

Under the revised ISO, Solvency I will only continue to be applied if an international treaty requires such application. The relevance of this exemption is limited to casualty insurers pursuant to the treaty between Switzerland and the European Union on casualty insurance (SR 0.961.1).

b) Preference of SST Standard Models

Today, around half of the (re)insurance companies that are subject to SST requirement have developed their own internal models. The remaining (re)insurance companies assess their regulatory solvency requirements by applying FINMA's standard model.

On the one hand, practice has shown that a sound review of sophisticated internal models requires overly extensive efforts by the regulator. On the other hand, developing and maintaining an internal model also results in substantial efforts and costs for the (re)insurance company in order to comply with the regulatory requirements. Therefore, the practical application of SST will be adjusted in the interest of a commercially reasonable use of resources. This goal will predominantly be achieved by preferring the use of standard models over the individual models. In addition to simplifying the application, the preferred use of standard models will also result in the ability to better compare market participants' solvency positions.

With the revised ISO, the preference of standard models over individual models will be established. It is, however, not the expressed intention of the regulator to thereby apply higher capital requirements in the insurance market. The revised ISO provides for sufficient transitional rules with respect to the application of the respective models.

3) Qualitative Risk Management

Qualitative risk management refers to the non-financial performance, *i.e.* organisation, structure and processes of the (re)insurance company. In particular, the revised ISO sets forth stricter requirements for risk management as well as for corporate governance, including the separation of power between the board of directors and executive management, control functions and compliance. Risk management and compliance functions must be independent and need to be staffed according to size, business and organisational complexity and risks.

The current rules under the ISO are considered to be too generic and limited to a few rules which do not fulfil the international standards of the Insurance Core Principles of the International Association of Insurance Supervisors (IAIS ICPs). This has been identified by the latest FSAP review.

The revised ISO will also introduce specific requirements for an Own Risk and Solvency Assessment (ORSA) which the current ISO lacks completely. ORSA requires at least a yearly forward-looking self-assessment of the risk situation and capital requirements, including reporting requirements to FINMA. The overall risk profile shall thereby reflect all risks the (re)insurance company is and may be exposed to, including all significant risk concentration and group-wide risks.

Finally, the revised ISO will also provide a proper legal basis for applying specific liquidity requirements. The (re)insurance company needs to have sufficient liquidity in order to fulfil the payment obligations at any time, including in stress situations. The liquidity assessment will also include adverse scenarios and respective stress tests as well as an emergency concept, including effective strategies to deal with liquidity constraints. The already existing FINMA Circular 13/5 Liquidity Insurers does, however, only include liquidity reporting duties. Following the implementation of the new ISO liquidity requirements, the FINMA Circular 13/5 Liquidity Insurers will need to be amended accordingly.

4) Disclosure and Reporting

Under the current ISO, FINMA does not publish solvency results of individual (re)insurance companies. The revised ISO contains a disclosure concept which will be equivalent to internationally accepted standards (IAIS ICPs and Solvency II). The new ISO rules will provide an explicit legal basis in order to establish a direct disclosure on the level of the ISO. With a view to avoid competitive disadvantages, the revised ISO disclosure regime will not become effective prior to Solvency II coming into force.

The revised ISO will further include a new article on the requirement to publish an annual report on the financial situation of the (re)insurance company (article 111a ISO). Such report will include quantitative and qualitative information, and in particular, a description of the business activity, company success, risk management and adequacy, risk profile, valuation basis and methods in particular with respect to reserves and solvability.

Finally, the draft ISO will include stricter, *i.e.* earlier, requirements for the disclosure of substantial participations for (re)insurance groups as per the time of a respective intention to create, acquire and sell such substantial participations by one of its group companies (article 192(2) ISO) and the reporting of intragroup transactions to FINMA prior to them becoming legally binding (article 194(2) ISO).

5) New Hybrid Regime

a) Capital Treatment of Hybrid Instruments

A significant benefit for (re)insurance companies which are active in the hybrid market will be the more flexible rules on the treatment of hybrids for regulatory capital purposes.

(Old) article 39 ISO on "hybrid instruments" will be replaced by (new) article 22a ISO on "risk absorbing capital instruments" defining the requirements for debt instruments to be eligible for Solvency I and SST. The broader term "risk absorbing capital instruments" will not only include debt instruments that are paid-in from inception, but also instruments which become statutory equity upon reaching a pre-defined trigger. *E.g.* upon reaching an SST ratio under 100%, such instruments will be written off or converted into common shares, hence becoming statutory equity.

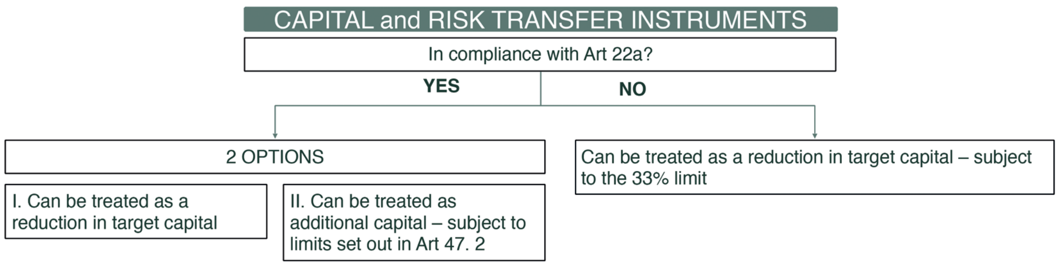
Risk absorbing capital instruments are accountable as statutory capital under Solvency I provided they fulfil all criteria set forth in (new) article 39(1)(a)-(g) ISO. For convertible debt instruments, the conversion from debt to equity only happens upon reaching a certain trigger event. Consequently, such instrument may influence the risk bearing capital in a year and thus should be eligible to be accounted as reduction of the SST target capital. The eligibility requirements are largely unchanged, however, the following three key changes will be introduced:

– debt instruments that qualify under article 22a ISO can either be eligible as available capital under Solvency I and SST, or as a reduction in required capital under SST;

– not only subordinated debt instruments qualify but also debt instruments that convert into statutory equity upon a contractual trigger; and

– FINMA has the authority to define additional requirements for risk absorbing capital instruments to be eligible, such as criteria on the quality of the instruments.

The approval for recognising risk absorbing capital instruments as available capital (Solvency I) will, under the revised rules, also be required for recognition in the risk bearing or the target capital (SST).

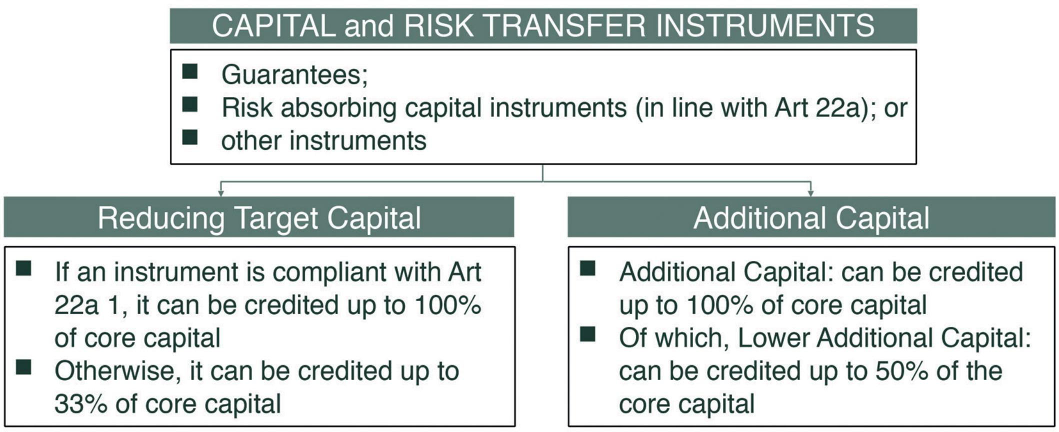


b) Key Changes to Limits

The Solvency I limits remain unchanged. *I.e.,* perpetual risk absorbing instruments can be accounted up to 50% of the lower of the available or required capital. Dated risk absorbing instruments are allowed up to 25% of the lower of the available or required capital.

The SST limitations for upper and lower additional capital instruments also remain unchanged. Additional capital instruments recognised as part of risk bearing capital (available capital) are allowed up to 100% of core capital. Lower additional capital (dated debt instruments) is allowed up to 50% of core capital.

The revised ISO provisions provide, however, for new additional SST hybrid limitations. The overall limit for risk absorbing capital instruments as defined in (new) article 22a ISO is up to 100% of core capital for their consolidated impact on available or required capital. Capital and risk transfer instruments that are not in compliance with (new) article 22a ISO can be accounted as reduction of required capital up to 33% of core capital.



6) Next Steps

In line with the revised ISO, FINMA will continuously develop and communicate its supervisory practice. While a number of FINMA circulars will be adjusted, new circulars will also be drafted until 1 January 2017.

Petra Ginter (Petra_Ginter@swissre.com)

The Rise of Actively Managed Certificates

Reference: CapLaw-2015-19

Actively Managed Certificates (AMCs) have become more and more popular in recent years. Unlike most other structured products, AMCs have special features which enable the active selection and adjustment of the components of their underlying strategy. The fast growth of the AMC market emphasizes the importance of the applicable regulatory and contractual framework. In addition to the general rules that apply to all structured products, AMCs are subject to specific regulatory and contractual requirements. This article provides some insights on these characteristics.

By Luca Bianchi

1) Introduction

Traditionally, structured products were qualified as "passive" financial products. However, there has been a shift to a new breed of "active" product solutions. So-called "Actively Managed Certificates" (AMCs) have grown and continue to grow at an astonishing rate. AMCs are structured products whose underlying strategy, respectively, strategy-components are adjusted over the course of their term at the discretion of a strategy-sponsor. The strategy's performance is tracked by calculating the value of a synthetical strategy-basket (or tailor-made index) that consists of individual notional strategy-components which are actively selected and adjusted in compliance with the parameters of the specific product idea.

This article aims to provide a high level overview on selected features of the regulatory and contractual framework that is applicable to AMCs which are issued or distributed in Switzerland.

2) Regulatory Framework

a) General Rules for Structured Products

AMCs are subject to the general rules for structured products. Structured products may only be distributed to non-qualified investors in or from Switzerland if (i) they are issued, guaranteed or equivalently secured by a Swiss bank, insurance company or securities dealer (or a foreign institute that stands under equivalent prudential supervision) and (ii) a simplified prospectus is published.

The general content requirements of a simplified prospectus for structured products are set out in the Swiss Banking Guidelines on informing investors about structured products of September 2014, p. 1 et seq.

However, the publication of a simplified prospectus is not mandatory if a structured product is listed on a Swiss exchange which ensures the relevant transparency that would otherwise be provided by a simplified prospectus (*i.e.* in the final terms of a product). Further exceptions from the duty to publish a simplified prospectus may apply in the scenario of a distribution which is made *exclusively from* Switzerland (but not *within* Switzerland). Nevertheless, many issuers choose to publish a simplified prospectus on an optional basis for marketing purposes.

Furthermore, the FINMA-FAQ "Structured products" of 10 September 2014 should be taken into consideration. They contain specific guidance on various issues that are related to the offering and distribution of structured products.

It is worth highlighting that foreign issuers of structured products that are not listed in Switzerland are required to have a Swiss branch if distribution to non-qualified investors into, in or from Switzerland is targeted. The term "Swiss branch" comprises a representative office, a branch office, a subsidiary, a sister company or a group company; provided that such "Swiss branch" stands under consolidated supervision at the group level.

The concept of regulated "distribution" applies to any offering or advertising which is not directed exclusively to qualified investors. The scope of this definition is explained in a detailed manner in the FINMA-Circular 2013/9 "Distribution of collective investment schemes" of 1 October 2013 that applies *mutatis mutandis* to structured products (where appropriate).

Generally, the SIX Swiss Exchange (SIX) Listing Rules are also applicable to structured products that will be listed and traded on the SIX Structured Products exchange platform. In particular, the Additional Rules Derivatives (ARD), the Scheme F, the Directive on Procedures for Debt Securities (DPDS), and the Directive on Debt Securities with Specific Structures (DDSS) are applicable.

In addition to this high level overview on the general rules applicable to structured products, the specific requirements that apply for AMCs shall be briefly addressed in the following section.

b) Specific Requirements for AMCs

i. Selected Regulatory Features

The description of AMCs in a simplified prospectus must include information on the basic parameters of the strategy. In particular, the following information should be stated therein: (i) criteria for the selection of strategy-components, (ii) information on the handling of the income of such underlying values, (iii) strategy-guidelines, (iv) the relevant strategy-universe, (v) the strategy-sponsor, (vi) the applicable compensation of the strategy-sponsor, and (vii) notes on where information on the strategy and its current composition are accessible.

Furthermore, AMCs need to be clearly distinguished from collective investment schemes. In practical terms, a general disclaimer must be inserted in a prominent position in the simplified prospectus. This differentiation from collective investment schemes is particularly important because AMCs are, like any other structured products, subject to the issuer risk (whereas this is generally not the case for collective investment schemes). It should be noted that any risk of deception or confusion must strictly be avoided (especially, with respect to the description of the product in the final terms and/or the simplified prospectus).

In addition, AMCs must be marked as dynamic, discretionary managed products in bold letters on the first page of the simplified prospectus. Further regulations may be applicable for specific, innovative AMCs. Potentially applicable restrictions should be evaluated and implemented on a case by case basis; *e.g.* if collective investment schemes shall represent an eligible strategy-component. However, AMCs must not be confused with fund-linked notes (which are subject to special regulatory requirements).

Similar rules apply in case of listed AMCs. For example, SIX can demand that issuers disclose the current composition of the underlying strategy. The SIX may also request the history of the adjustments made to the relevant AMC from the issuer. Moreover, issuers of listed AMCs have to conclude a market making agreement with SIX and are subject to certain reporting requirements (*e.g.* in case of mistrades).

ii. Strategy-Sponsor Agreements and Rule Books

Apart from the general structured products documentation (*i.e.* the base prospectus, the final terms, and distribution agreements) a number of other documents have become market standard for the issuance of AMCs. In particular, issuers conclude so-called "strategy-sponsor agreements" in order to regulate the rights and duties of the strategy-sponsor.

Typically, strategy-sponsor agreements contain sections on (i) the objects of the agreements, (ii) the rights and duties of the parties, (iii) a description of the strategy,

(iv) the administration of the strategy (including guidelines and restrictions for the selection of strategy-components), (v) fees, (vi) liabilities, (vii) term, (viii) sub-delegation, (ix) assignments, (x) notices, and (xi) other standard contract terms.

Potentially, the strategy-sponsor agreements may refer to additional, technical rule books. These documents contain detailed guidelines and restrictions for the selection of and adjustments to the strategy-components. Rule books have become more elaborate in recent practice and continue to become more and more sophisticated. They are recommended in case of complex AMCs.

3) Conclusion and Outlook

Today, AMCs are considered to be a very popular product solution for issuers and for external asset managers. The excellent "time-to-market" of the issuing process as well as the high flexibility in terms of product design seem to be convincing arguments for the selection of these products. It is expected that the trend for more diverse and complex AMCs will continue in the coming years.

Issuers and strategy-sponsors should note that the proposed new rules of the FIDLEG, the FINIG, and the FINFRAG may, presumably, affect production, management, distribution, and trading of AMCs (cp. CapLaw-2014-5 and NKF Banking, Finance & Regulatory Team, Switzerland's New Financial Market Architecture, www.nkf.ch/en/publikationen_suche/fachgebiete.php).

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UBS Group AG Issued Write-Down Notes

Reference: CapLaw-2015-20

On February 19, 2015, UBS Group AG, the new top holding company of UBS group, completed the inaugural issuance of USD 1.25 billion 7.125% Additional Tier 1 write-down notes, USD 1.25 billion 7.00% Additional Tier 1 write-down notes and EUR 1.00 billion 5.75% Additional Tier 1 write-down notes.

Mondelez International, Inc. Announced the Issuance of CHF 675,000,000 FATCA-Compliant Bonds

Reference: CapLaw-2015-21

In March 2015, Mondelez International, Inc. announced the issuance of CHF 675,000,000 FATCA-compliant Bonds. Credit Suisse AG acted as joint-lead manager together with UBS AG. The bonds will be listed on the SIX Swiss Exchange.

Holcim and Lafarge Announce Revised Terms of Combination

Reference: CapLaw-2015-22

On March 20, 2015, Holcim Ltd (SIX: HOLN) and Lafarge SA (Euronext: LG) announced that they had agreed to amend the terms of the merger of equals originally announced in April 2014. The revised terms were approved by both respective Board of Directors and supported by the core shareholders of both companies. The transaction will be consummated by a public exchange offer of Holcim Ltd for all outstanding shares of Lafarge, leading to a top holding company with place of incorporation in Switzerland, following Swiss governance rules, and a balanced allocation of headquarters between Switzerland and France. If closed, the combined company would have a market capitalization of around EUR 41 billion. Closing of the transaction is expected for July 2015, subject to regulatory approvals, Holcim shareholder approval and successful completion of the public exchange offer.

Credit Suisse Issues USD 4 Billion Senior Debt Instruments in Support of its Single-Point-of-Entry Bail-in Strategy

Reference: CapLaw-2015-23

On March 23, 2015, Credit Suisse launched its inaugural issuance of "Bail-inable Bonds", a class of newly designed senior debt instruments. The USD 1.5 billion 2.750% Senior Notes due 2020 and USD 2.5 billion 3.750% Senior Notes due 2025 (together, the "Notes") have been issued by Credit Suisse Group Funding (Guernsey) Limited on March 26, 2015 on a Rule 144A/RegS basis and are guaranteed by Credit Suisse Group AG ("CSG"). The Notes will be listed on the SIX Swiss Exchange Ltd. For further information please see the related article by René Bösch and Benjamin Leisinger in this CapLaw edition.

The Royal Bank of Scotland Announces Sale of its Internationally Managed Private Banking and Wealth Management Business, Branded as Coutts, to Union Bancaire Privée

Reference: CapLaw-2015-24

On March 27, 2015, The Royal Bank of Scotland Group plc (RBS) announced it has reached an agreement to sell its internationally managed Private Banking and Wealth Management business, branded as Coutts, to Union Bancaire Privée UBP SA (UBP).

The sale includes relationships managed from Switzerland, Monaco, UAE, Qatar, Singapore and Hong Kong. As at 31 December 2014 assets under management were approximately CHF 32 billion and total risk weighted assets were CHF 2 billion. The price paid will be determined in part by assets under management on closing. Initial closing of the transaction is envisaged in Q4 2015, when a majority of the business is expected to transfer, with the remainder during the first part of 2016.

Dufry to Acquire World Duty Free

Reference: CapLaw-2015-25

On March 30, 2015, Dufry announced that it has entered into a binding agreement with Edizione S.r.l. to acquire its 50.1% stake in World Duty Free S.p.A ("WDF") for EUR 10.25 per share in cash, valuing the entire fully diluted share capital of WDF at EUR 2.6 billion (CHF 2.7 billion) and implying an enterprise value of EUR 3.6 billion (CHF 3.8 billion). Following completion of Edizione's stake in WDF, Dufry will launch a mandatory tender offer for the remaining 49.9% of WDF's outstanding shares for EUR 10.25 per share in cash.

12th Financial Markets Law Conference (12. Tagung zu Entwicklungen im Finanzmarktrecht)

Tuesday, 12 May 2015, 09.15 h – 16.20 h, Lake Side Casino Zürichhorn, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

Update on Collective Investment Laws II (Aktuelles zum Kollektivanlagenrecht II)

Wednesday, 20 May 2015, 13.30 h – 17.30 h, Kongresshaus, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

Too big to fail – Solution in Sight? (Too big to fail – Lösung in Sicht?)

Friday, 26 June 2015, 12:00 h – 13:45 h, CS Forum St. Peter, St. Peterstrasse 19, 8001 Zurich

http://www.eiz.uzh.ch/weiterbildung/vortragsreihe-am-mittag/

Conference on Financial Market Regulation (Tagung zur Finanzmarktregulierung)

Tuesday, 17 November 2015, Convention Point, Zurich

http://www.lam.unisg.ch/lam-tagungen/finanzmarktregulierung.php