Initial Public Offerings

2020

Fourth Edition

Contributing Editors:
Ilir Mujalovic & Harald Halbhuber

With contributions by:

Global Legal Insights
Initial Public Offerings

2020, Fourth Edition
Contributing Editors: Ilir Mujalovic & Harald Halbhuber
Published by Global Legal Group

GLOBAL LEGAL INSIGHTS – INITIAL PUBLIC OFFERINGS

2020, FOURTH EDITION

Contributing Editors
Ilir Mujalovic & Harald Halbhuber, Shearman & Sterling LLP

Head of Production
Suzie Levy

Senior Editor
Sam Friend

Sub Editor
Megan Hylton

Group Publisher
Rory Smith

Creative Director
Fraser Allan

We are extremely grateful for all contributions to this edition.
Special thanks are reserved for Ilir Mujalovic & Harald Halbhuber of Shearman & Sterling LLP for all of their assistance.

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk

Copyright © 2020
Global Legal Group Ltd. All rights reserved
No photocopying

ISBN 978-1-83918-047-7
ISSN 2399-9594

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations. The information contained herein is accurate as of the date of publication.

CONTENTS

Preface	Ilir Mujalovic & Harald Halbhuber, *Shearman & Sterling LLP*	
Foreword	Aseel M. Rabie, *Securities Industry and Financial Markets Association (SIFMA)*	1
General chapter	*Going public in the USA: An overview of the regulatory framework and capital markets process for IPOs*, Ilir Mujalovic, Harald Halbhuber & Ana Aur, *Shearman & Sterling LLP*	6

Country chapters

Australia	Daniel Scotti & Nicole Sloggett, *MinterEllison*	26
Brazil	Daniela Anversa, *Veirano Advogados*	38
China	Shiwei Zhang, *Zhong Lun Law Firm*	49
Cyprus	Demetris Roti, Yiota Georgiou & Rafaella Michail, *Elias Neocleous & Co LLC*	58
Finland	Maria Lehtimäki, Niko Markkanen & Emilia Saloranta, *Waselius & Wist*	66
France	Hervé Letréguilly & Séverine de La Courtie, *Shearman & Sterling LLP*	75
Germany	Dr. Martin Steinbach & Dr. Mauritz C. Mann, *Ernst & Young*	88
Greece	Nikos E. Pimblis & Nikos O. Xenoyiannis, *Papadimitriou – Pimblis & Partners*	99
Hong Kong	Angel Wong & David Zhang, *ONC Lawyers*	108
Hungary	Márton Kovács, Áron Kanti & Bálint Juhász, *HBK Partners Attorneys at Law*	118
India	Arka Mookerjee & Pracheta Bhattacharya, *J. Sagar Associates*	127
Indonesia	Barli Darsyah, *Indrawan Darsyah Santoso, Attorneys At Law*	139
Italy	Marco Lantelme, *BSVA Studio Legale Associato*	152
Japan	Toshimitsu Nemoto, Suguru Miyata, Kengo Ozaki & Tetsuya Tamura, *Mori Hamada & Matsumoto*	165
Korea	Joo Hyoung Jang, Jisoo Yoo & Ji Hyun Youn, *Barun Law LLC*	178
Morocco	Kamal Habachi & Salima Bakouchi, *Bakouchi & Habachi – HB Law Firm LLP*	189
Portugal	Eduardo Paulino, Margarida Torres Gama & Inês Magalhães Correia, *Morais Leitão, Galvão Teles, Soares da Silva & Associados*	200
Singapore	Wee Woon Hong, *Opal Lawyers LLC*	212
Switzerland	Dr. Alexander von Jeinsen & Annette Weber, *Bär & Karrer Ltd.*	223
United Kingdom	Pawel J. Szaja & Michael Scargill, *Shearman & Sterling (London) LLP*	234

PREFACE

We are pleased to present the fourth edition of *Global Legal Insights – Initial Public Offerings*.

An initial public offering is a key way for companies to raise capital in the global capital markets and list their shares for public trading. Although IPOs are conceptually similar whether made to investors in New York, London or Hong Kong, or in other long-established or newer markets around the world, the regulatory frameworks, market practices, investor communities and subsequent public-company obligations are far from homogenous across jurisdictions.

The *Initial Public Offerings* book provides general counsels, investment bankers, lawyers, business professionals, the investing community and other advisers and interested parties with a detailed overview of the key steps, legal issues and market practices involved in the initial public offering process by examining practices in 21 jurisdictions around the world, with two general chapters focusing on the United States.

Leading practitioners from each jurisdiction provide their expertise and guidance on navigating their local market practices and regulatory framework. Each chapter follows a similar structure: introduction of the IPO market in the relevant jurisdiction; description of the IPO process and key parties; discussion of the relevant regulators and key regulations; public company responsibilities; and potential risks, liabilities and pitfalls.

We hope you find the book will equip you with an understanding of the legal and market fundamentals necessary for a successful IPO.

Ilir Mujalovic & Harald Halbhuber,
Shearman & Sterling LLP

Switzerland

Dr. Alexander von Jeinsen & Annette Weber
Bär & Karrer Ltd.

Introduction

For any company, the decision to go public is a key milestone in its development. By doing so, it enters the public arena and gets access to the capital market and a much broader investor base. However, a public company is subject to public scrutiny, and must also fulfil stricter regulatory requirements than a privately held company. To avoid unexpected difficulties or even failure of the project, an IPO candidate, its shareholders and its executive management should prepare the flotation carefully and familiarise themselves with the regulatory requirements.

One of the first steps during the preparatory phase is the selection of the listing venue, where Switzerland offers very attractive conditions through a combination of its strong financial centre and the stable and issuer-friendly Swiss legal and regulatory regime. This is the case not only for companies which were founded in Switzerland, but also for foreign issuers. In 2018, for instance, the two largest Swiss IPOs (CEVA Logistics AG and SIG Combibloc Group AG) saw the ultimate holding company of the Group migrate to Switzerland solely for the IPO, underlining the attractiveness of the Swiss market.

With a variety of listed companies across all industries, SIX Swiss Exchange is the main and leading stock exchange in Switzerland. It offers a liquid market with state-of-the-art trading conditions. Given its importance, and unless indicated otherwise, references in this contribution to listing requirements and reporting obligations refer to the rules set by SIX Swiss Exchange. The smaller BX Swiss exchange is more focused on Swiss issuers.

Switzerland has seen strong IPO activity over the past two years, with 2018 being the most active year in a decade. In 2018 and 2019, the following companies listed on SIX Swiss Exchange with an initial market capitalisation of more than CHF 1 billion:

- CEVA Logistics AG (CHF 1.4 billion).
- SIG Combibloc Group AG (CHF 3.9 billion).
- Medacta Group SA (CHF 1.9 billion).
- Alcon Inc. (CHF 28.3 billion).
- Stadler Rail AG (CHF 4.3 billion).
- SoftwareONE Holding AG (CHF 2.9 billion).

Until 31 December 2019, the regulatory framework for Swiss IPOs has been primarily determined by the self-regulation of the Swiss stock exchanges with limited statutory provisions regarding the offering of shares to the public. In particular, there was no regulatory authority which reviewed and needed to approve the issue prospectus.

On 1 January 2020, the new Swiss Financial Services Act ("**FinSA**") entered into force, resulting in a fundamental change of the regulatory environment in Switzerland. For the first

© Published and reproduced with kind permission by Global Legal Group Ltd, London

time, the FinSA and the implementing ordinance (the Swiss Financial Services Ordinance ("**FinSO**")) provide for detailed requirements regarding the content of a prospectus and its review by the new Swiss Financial Market Supervisory Authority ("**FINMA**")-licensed review bodies. Although well-known on an international level, the new regime is a novelty in Switzerland where, until now, SIX Exchange Regulation merely checked whether a prospectus formally fulfilled the requirements set by SIX Swiss Exchange. Given, however, that also under the 'old' regime the market practice already adhered to international disclosure standards, it is not expected that this change will fundamentally change the content of Swiss IPO prospectuses or the timeline of the preparation for an IPO. Pursuant to the applicable transitional provisions, the new regulations will only become applicable on 1 October 2020 at the earliest, or six months after the licensing of the first review body. Until the first review body has been licensed by FINMA, all IPOs must be conducted following the 'old' regime.

The IPO process: Steps, timing and parties and market practice

While the IPO process depends significantly on the IPO candidate and the envisaged structure (primary vs. secondary offering and/or a so-called "complex financial history"), the process can broadly be divided into three phases (with a fourth phase following the listing):

- **Phase I**: *Preparation* (approximately four to six months prior to the first day of trading)
  During this phase, the current shareholders and the issuer, together with their advisors, set up the structure, and take and implement the strategic decisions for the IPO-readiness of the company:
  - *Selection of advisors*: In a first step, the issuer chooses its advisers, which include in particular the underwriting banks, the legal advisors to the issuer and to the underwriters, the auditors, and often a pre-IPO advisor. Typically (and, in particular, if the offering is structured as a Rule 144A offering), each issuer and underwriter is advised by two law firms: a Swiss law firm for Swiss law and SIX rules-related matters, and an international counsel, whose task is primarily to ensure compliance with international and U.S. securities laws. Depending on the structure, a selling shareholder might also engage separate counsel. In most cases, the issuer appoints further advisors, such as a specialised PR firm to assist with the marketing.
  - *Structuring*: The underwriting banks advise the issuer and its current shareholders on the structuring of the offering and, in particular, whether the offering should be structured as a primary offering (sale of newly created shares) or secondary offering (sale of existing shares only), or a combination of the two. In case the issuer is not a Swiss company, the structuring includes a decision on whether a foreign entity should list its shares on SIX Swiss Exchange or whether the company should migrate to Switzerland for the IPO. This decision is typically driven by marketing and tax considerations. Structuring may also include the reorganisation of a group of companies, such as the establishment of a new holding company.
  - *Development of equity story*: Together with the issuer, the underwriters develop the equity story to market the shares. A key element of this workstream is meetings between the issuer and potential investors on a confidential basis to test the water (so-called "pilot fishing" and "early-look meetings"). In case the issuer has publicly traded debt outstanding (in particular, high-yield bonds), these meetings must comply with the relevant requirements regarding the disclosure of price-relevant information; in particular, under the European Market Abuse Regulation ("**MAR**"), if the bonds are traded at an EU venue. The development of the equity

© Published and reproduced with kind permission by Global Legal Group Ltd, London

story ultimately leads to the issuer presenting itself to the underwriters' analysts, following which the analysts will prepare and publish research reports for the investors. These reports help to attract the attention of investors for the IPO, and are one of the key elements of the marketing strategy.

- *Corporate governance*: One of the key tasks of the issuer's Swiss legal counsel is advising the issuer regarding the corporate governance set-up. If the issuer has issued several classes of shares, any preferred share classes will typically be converted into common shares prior to listing, as preferred shares are not deemed to be good corporate governance for public companies. Other corporate governance measures include the adoption of the mandatory Swiss 'say on pay' rules (see below) and amending the constitutional documents to ensure compliance with mandatorily applicable Swiss law as well as best practice for public companies. Often, the existing shareholders appoint new members of the board of directors as of the first day of trading. In this context, it is advisable to give due consideration to the most recent guidelines published by the prominent proxy advisors and the Swiss standards for corporate governance; in particular, with regard to the independence of board members. Under certain circumstances, issuers may also consider increasing the threshold for mandatory takeover bids from 33⅓% to up to 49% (opting up), or completely opting out of the mandatory takeover regime; typically, however, neither is well perceived by proxy advisors.
- *Financial statements*: The issuer works closely together with the auditors for the preparation of the financial statements. Generally, a listing at the SIX Swiss Exchange requires a three-year track record evidenced by audited financial statements drawn up in accordance with one of the eligible accounting standards (see below). In certain situations, the preparation of *pro forma* financial statements may also become necessary. If this is the case, the preparation of these financial statements should be initiated as early in the process as possible.
- *Due diligence and prospectus*: The underwriters, the legal advisors and the auditors conduct a detailed due diligence (business, legal and audit respectively) about the issuer. Based on the outcome of the due diligence and the equity story, the issuer's legal counsel drafts the prospectus. Until now, the disclosure requirements were largely part of the self-regulation set by SIX Swiss Exchange. Under the new FinSA regime, the disclosure must comply with the requirements set out in the FinSA and FinSO which are, however, very similar to the SIX Swiss Exchange and also to EU standards. A Swiss prospectus should mainly cover: a summary; risk factors; information on the use of proceeds; information about dividends and dividend policy; information about the issuer (such as members of the board of directors and executive management, issuer's business and share capital as well as its capitalisation and indebtedness) and about the issuer's major shareholders; and information about the offering and the financial statements. Even though neither the SIX Swiss Exchange nor the FinSA/FinSO require an MD&A section, it is market practice to include such a section in an equity prospectus.
- *Underwriting agreement*: The Swiss underwriters' counsel drafts the underwriting agreement. This agreement lays down the main duties and rights of the underwriters and the issuer in connection with the IPO. Currently, it is market practice that the underwriters commit to a 'soft underwriting' so that they only commit to purchasing the shares upon pricing. The Swiss underwriters' counsel also prepares

© Published and reproduced with kind permission by Global Legal Group Ltd, London

ancillary agreements and documents, such as a share lending agreement for the over-allotment option (see below), the agreement among managers, and the various lock-up undertakings. Major shareholders, as well as the directors and managers of the issuer, typically sign lock-up undertakings to not sell their shares in the first months after the IPO.

- *Review of prospectus*: The IPO prospectus must be filed with and reviewed by one of the review bodies for completeness, consistency and comprehensibility. Pursuant to the FinSA, the filing must be made at least 20 calendar days prior to publication. However, the IPO timetable should certainly allow for sufficient time to reflect on comments received from the review body and to refile the prospectus.
- *Listing formalities*: The issuer must appoint a listing agent. While, until now, law firms could act as listing agents, the new listing rules adopted by SIX Swiss Exchange, subject to certain exceptions, require the listing agent to be a bank in the meaning of the Swiss Banking Act, a securities firm in the meaning of the Swiss Financial Institutions Act, or to have a corresponding authorisation in accordance with the law of the jurisdiction of its registered office. The listing agent is responsible for liaising with the SIX Swiss Exchange for submitting the listing application. Under the FinSA framework, the listing application must be filed with the SIX Exchange Regulation 10 trading days prior to the start of the bookbuilding compared to 20 trading days under the current framework.

- **Phase II**: ITF and marketing (approximately four weeks)
  - *Intention to float*: The second phase is initiated by the issuer publishing an intention to float ("**ITF**"). During this phase, the issuer's executive team and the underwriters market the issuer. The ITF does not yet contain detailed information about the IPO, but is meant to draw the attention of the market to, and create momentum for, the upcoming IPO. The research reports prepared by the analysts are distributed shortly after the publication of the ITF.
  - *Roadshow and bookbuilding*: If the IPO gains sufficient momentum, the issuer will ultimately sign the underwriting agreement with the banking syndicate and publish the prospectus. This marks the formal 'launch' of the IPO and is followed by a bookbuilding phase, during which the issuer's executive management markets the company on a roadshow with the support of the underwriters. This shall ultimately lead to investors placing orders for the shares within the price range indicated in the prospectus. At the end of the roadshow, which also marks the end of the bookbuilding period, the underwriters evaluate at what price the shares may be placed with the investors.
- **Phase III**: Execution
  - *Allocation*: At this stage, the heavy lifting has been done. After the roadshow/bookbuilding, the underwriters calculate at what price all offered shares may be sold and, together with the issuer, allocate them to investors in accordance with their bids. The issuer and the underwriters execute a supplement to the underwriting agreement, which sets out the final offer price at which the shares are sold to the investors, and obliges the underwriters to purchase these shares and sell them to the investors. In addition, the issuer publishes a supplement to the prospectus, setting the final price for the offered shares.
  - *Capital increase*: In case of a primary offering, the issuer conducts a capital increase (typically one day prior to the first day of trading).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

  - *First day of trading*: The ringing of a huge cowbell marks the start of the trading and is the highlight of the IPO process in Switzerland. It is, at the same time, the test for the issuer and the underwriters, as they see for the first time how the issuer's shares are traded.
  - *Settlement*: The closing, i.e. the settlement, of the IPO occurs a few trading days after the first day of trading.
- **Phase IV**: Stabilisation (during the first 30 days after the listing)
  After the first day of trading, one of the underwriters acts as the stabilisation agent. When placing the shares in the bookbuilding, the underwriters typically sell more shares to investors than they purchase from the issuer and/or the selling shareholder (typically 15% of the base size) so that these shares can be used to stabilise the market price during the first days of trading. These additional shares are, initially, not purchased from the issuer or a selling shareholder, but are lent by one or more major shareholders under a share lending arrangement.
  Whether or not the over-allotment option (also known as 'greenshoe') is exercised, then depends on the development of the share price (see below for more information on the safe harbour from the prohibition of market manipulation):
  - If the share price is not doing well, the stabilisation agent purchases shares in the market to stabilise the price. These shares are then returned to the lending shareholder(s).
  - If the stock is trading well, the stabilisation agent does not interfere in the market and ultimately either purchases the shares from the lending shareholder(s) or purchases shares from the issuer – which are created in (another) capital increase – and returns these to the respective share lenders.

Regulatory architecture: Overview of the regulators and key regulations

<u>Main regulators</u>

- The *Swiss Financial Market Supervisory Authority* ("**FINMA**"): FINMA is the independent regulatory body in Switzerland in charge of the overall supervision of the securities exchanges and the financial market as a whole.
- *Stock exchanges*: Swiss stock exchanges have the power to adapt their own regulations based on the principle of self-regulation. FINMA supervises the stock exchanges and approves their rules. Within SIX Swiss Exchange, the Regulatory Board is the rule-making body and SIX Exchange Regulation enforces the SIX rules. The SIX Disclosure Office is primarily responsible for the supervision of the disclosure of major shareholdings.
- *Review bodies*: Under the FinSA, one or more so-called "review bodies" have the responsibility to review prospectuses for completeness, consistency and comprehensibility. It is currently expected that both Swiss stock exchanges (i.e. SIX Swiss Exchange and BX Swiss) will seek the licensing of a review body; so far, however, no review body has been licensed.
- The *Swiss Takeover Board* ("**TOB**"): The TOB enacts rules on public takeovers and share buybacks and supervises compliance with those rules.

<u>Key regulations</u>

- Since 1 January 2020, the FinSA and the FinSO are the key regulations for IPOs in Switzerland containing, *inter alia*, rules regarding the requirement to publish a prospectus when securities are offered to the public or shall be admitted to trading at a trading venue (exchange or multilateral trading facility) in Switzerland as well as its

© Published and reproduced with kind permission by Global Legal Group Ltd, London

content and the review. The FinSA further contains rules on prospectus liability (see below) and on the recognition of foreign prospectuses. The FinSA also stipulates a requirement for the publication of a key information document (*Basisinformationsblatt*) in connection with the offering of certain securities to private clients. This is, however, not applicable for the offering of shares, i.e. in an IPO.

- The *Swiss Code of Obligations* ("**CO**") sets out the legal framework for stock corporations (*Aktiengesellschaften*). The CO further includes rules for listed companies with regard to the publication of annual reports.
- The *Ordinance against Excessive Compensation* ("**OaEC**") is an ordinance for Swiss listed companies which was adopted on an interim basis after the vote of the Swiss people on 'say on pay' rules (see below). The final version of the rules will be included in the CO in the future.
- The *Financial Market Infrastructure Act* ("**FMIA**") governs the organisation and conduct of the Swiss financial market. Among other things, it prohibits insider trading and market manipulation and requires shareholders with a shareholding of 3% or more to disclose their shareholding (see below). It also contains the main provisions for public takeovers.
- The *listing rules of SIX Swiss Exchange* (the "**SIX-Listing Rules**") lay down the main requirements for companies to list their shares on the SIX Swiss Exchange and to maintain the listing. The listing procedure for an IPO is governed by the Directive on the Procedures for Equity Securities. As long as the transitional provisions for the FinSA are applicable, different 'Schemes' set out the disclosure requirements for a listing prospectus under the 'old' regime.

Public company responsibilities

Public companies in Switzerland are subject to several obligations which do not apply to private companies. These include, in particular, the Swiss 'say on pay' rules as well as reporting obligations relating to price-relevant information, management transactions and financial statements. In addition, shareholders of a Swiss public company are obliged to report shareholdings of 3% or more to the stock exchange and the issuer, which must subsequently arrange for the publication of such major shareholdings on the stock exchange's website. These disclosures must be made by (and must identify) the beneficial owner of the shares, which is the person controlling the voting rights stemming from a shareholding and bearing the associated economic risk. The identification of the beneficial owner can be particularly complicated in complex private equity structures. In addition, shareholders of a Swiss public company are also obliged to launch a mandatory bid for all shares in case they acquire (alone or acting in concert) more than 33⅓% of the issuer's voting rights – unless the articles of the issuer have increased this threshold (opt-up) or waived this obligation (opt-out).

Say on pay

Following a public vote on a 'say on pay' initiative in 2013, the Swiss Code of Obligations was supplemented by the OaEC, which is applicable to Swiss stock corporations if their shares are listed on a stock exchange in Switzerland or abroad. The OaEC primarily implements rules on the remuneration of directors and executive management, as well as the election of directors and an independent proxy.

The key element of the OaEC is mandatory shareholder approval of the total compensation of both members of the board of directors and the executive management as well as potential members of an advisory board. The general meeting of shareholders must approve the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

total compensation for these corporate bodies by separate vote on an annual basis. Most companies do this vote prospectively, but retrospective approval is also permitted. Pursuant to the OaEC, the main principles for performance-based compensation, as well as for a management participation plan, must be set out in the company's articles of association. Hence, changes to these principles also require shareholder approval.

The OaEC also imposes limitations on severance payments, golden handshakes and payments in connection with M&A transactions. These requirements regarding the remuneration of the main corporate bodies are supplemented by the obligation to publish an annual remuneration report, which is typically part of the annual report.

In addition, the OaEC sets out requirements for the election and maximum term of certain corporate bodies. All board members, the chairman, all members of the mandatory remuneration committee and an independent proxy must be elected by the shareholders on an annual basis. While, under Swiss law, however, the members of the executive management are not elected by the general meeting, but by the board of directors, the OaEC also prohibits notice periods for dismissing a member of the executive management in excess of one year.

Ad hoc publicity

In Switzerland, unlike many other jurisdictions, the rules on *ad hoc* publicity are not statutory obligations, but are set out in the listing rules of the stock exchanges. Nevertheless, these rules are largely comparable to the EU regime set out in the MAR.

The SIX Swiss Exchange requires an issuer to inform the market of any facts which are capable of triggering a significant change in market prices and which have arisen in its sphere of activity. Typical examples include, *inter alia*, financial figures, personnel changes on the board of directors or management, mergers, takeovers, spin-offs, restructuring operations, changes of capital, takeover offers, significant changes in profits, profit collapses, profit warnings and financial restructurings.

In principle, the notification must be made immediately, but the issuer may postpone publication if the price-sensitive fact is based on a plan or if the decision of the issuer and its dissemination could prejudice its legitimate interests. In this case, the issuer must ensure that the fact remains confidential, and must inform the market immediately in case of a leak. If an issuer decides to postpone the publication of a price-relevant fact, it is important to constantly monitor if the prerequisites for the postponement are still met, and to implement a contingency plan in case of a leak.

Disclosure of management transactions

Similar to the obligation for public companies regarding *ad hoc* disclosure, the rules on the disclosure of management transactions (director's dealings) are also set out in the listing rules of the Swiss stock exchanges. The rules are largely similar and require issuers to ensure that both the members of the board of directors and the executive management report to the issuer transactions in the issuer's equity securities, or in related financial instruments, which have a direct or indirect effect on such person's assets. Related financial instruments comprise, in particular, derivatives or rights which provide for or permit the actual delivery of shares or cash settlement (e.g. as subscription rights). The reporting obligation includes transactions carried out by related parties if such transactions are carried out under the significant influence of the director or manager.

The issuer (and not the director or manager) must then report the management transactions to the respective stock exchange, which publishes them on its website on an anonymous basis, i.e. without disclosing the name of the director or manager.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Financial reporting

Both Swiss stock exchanges require issuers to publish and file annual and biannual reports, which must be drawn up in accordance with one of the eligible accounting standards (those currently being IFRS, U.S. GAAP and Swiss GAAP FER). Quarterly reporting is not mandatory, but many public companies voluntarily publish quarterly results or some figures, in line with international standards.

Corporate governance and sustainability reporting

The main corporate governance code in Switzerland is the Swiss Code of Best Practice for Corporate Governance issued by economiesuisse, the largest umbrella organisation representing Swiss businesses. It is non-binding, but provides recommendations for good corporate standards in line with international business practices on a comply-or-explain basis.

SIX-listed companies are also subject to the Directive on Information relating to Corporate Governance requiring disclosure on, e.g. group structure, major shareholders, changes of control, defence measures and compensation, in a separate section of the annual report on a comply-or-explain basis. It also permits issuers to voluntarily inform the SIX that they have prepared a sustainability report in accordance with an internationally recognised standard (opting-in), which then obliges the issuer to publish a sustainability report in accordance with the chosen standard. The BX Swiss has not published specific corporate governance or sustainability reporting requirements.

In recent years, the recommendations of the prominent proxy advisors have also become more and more important for an issuer's corporate governance set-up.

Potential risks, liabilities and pitfalls

Prospectus liability

Article 69 FinSA sets out the Swiss legal framework for prospectus liability. It provides that anyone who – without applying due care – makes statements in a prospectus, key information document or similar instrument which are incorrect, misleading or not compliant with the legal requirements is liable to the acquirers of the securities for any damage caused thereby. Hence, the scope of liable persons under this provision is relatively broad. The prospectus liability regime under the FinSA also introduced certain reliefs for statements made in the summary of the prospectus which shall only result in liability if they are misleading, incorrect or contradictory when read together with other parts of the prospectus. Also, so-called forward-looking statements only lead to liability if they are made against one's better knowledge or without a disclaimer pointing the investor towards the uncertainty of future developments. The FinSA also introduced criminal liability for making false statements or omitting material facts in a prospectus with wilful intent. A claim may be brought not only by the original investors but also by the subsequent buyers in certain circumstances. However, Swiss law does not provide the possibility of a class action.

It is important to note that, unlike in certain other regulatory regimes, prospectus liability under Swiss law applies not only to misstatements in the prospectus, but also to any other communication made in connection with an equity offering. This can include, in particular: mini-prospectuses (e.g. shareholders' information); official notices and marketing presentations such as roadshow, early-look and pilot fishing presentations; invitations to shareholders' meetings; and newspapers and any other media advertisements. In sum, every communication made in connection with or to promote an offering may potentially give rise to prospectus liability and should therefore be subject to a prudent level of scrutiny based on

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the so-called "publicity guidelines". These guidelines are prepared by the lawyers as one of the first documents to ensure that all communications made by the issuer in connection with the IPO comply with applicable laws and to reduce the risk of a prospectus liability claim.

Since Swiss prospectus liability attaches where due care has not been applied, a person potentially subject to a liability claim can avoid liability by proving that it acted diligently when preparing the prospectus or similar communications (due diligence defence). Since there is no official guideline as to the level of diligence, it is advisable to observe recognised market practice to verify the content of the prospectus and to ensure that the prospectus contains all, and does not omit any, material information. In this context, the lead banks typically conduct several due diligence calls with the management of the issuer and request comfort letters from the auditors as well as disclosure opinions from the lawyers. It has become market practice that the legal due diligence is led, and the disclosure opinions issued, by U.S. law firms if the offering comprises a 'Rule 144A' component. In case of a mere 'Regulation S' offering, the disclosure letters would typically be issued by the Swiss law firms, which would then also lead the legal due diligence.

Swiss law does not formally limit or regulate communications or publicity during the IPO process. However, the prospectus liability regime influences the information that IPO candidates share with potential investors and, under Article 68 FinSA, advertisements made in connection with an IPO must be clearly identifiable as advertisements, must include a reference to the prospectus, and must be in line with the prospectus.

Insider trading

The Swiss regulations on the prohibition of insider dealing are set out in the FMIA, which provides for both a criminal insider trading offence and an administrative insider trading offence.

Insider information is defined as confidential information whose disclosure would significantly affect the price of shares traded on an exchange in Switzerland, and both provisions penalise: (i) the misuse of insider information through the purchase or sale of shares or the use of financial instruments derived from such shares; (ii) the communication of insider information; and (iii) the recommendation to purchase or sell such shares or financial instruments derived from such shares based on insider information to another person. The main difference between the criminal and the administrative offence is that the criminal offence requires the realisation of a pecuniary advantage and wilful intent, while the administrative offence merely requires that the offender 'knows' or 'should have known' that the fact is insider information, and does not require that a pecuniary advantage is realised. The criminal provision scales the penalties up to five years' imprisonment or a monetary penalty. The administrative provision provides for a declaratory ruling or the publication of the supervisory ruling. Both provisions also allow the confiscation of a profit.

The Financial Market Infrastructure Ordinance ("**FMIO**") contains important safe harbours from the prohibition to communicate insider information. In particular, it is permissible to communicate insider information to a person if the communication is required with regard to the conclusion of a contract, and if the information holder: (i) makes it clear to the information recipient that the insider information may not be exploited; and (ii) documents the disclosure of the insider information and such clarification.

In light of the prohibition of insider dealing, issuers should generally adopt an insider dealing policy outlining the sanctions resulting from insider dealing, and stipulate instances in which certain individuals are banned from trading in shares of the issuer (so-called

© Published and reproduced with kind permission by Global Legal Group Ltd, London

"blocking periods"), typically in connection with the publication of financial results, as well as in cases of a postponement of an *ad hoc* disclosure.

Market manipulation

Similar to the prohibition of insider dealing, the FMIA distinguishes between a criminal and an administrative market abuse offence. Both provisions aim to penalise the manipulation of the share price, either by: (i) spreading false or misleading information; or (ii) executing fictitious transactions. The main difference between these provisions is that the criminal offence requires wilful behaviour by the offender and the intention of gaining a pecuniary advantage for themselves or for another, while the administrative offence merely requires that the offender 'knows' or 'should have known' that their acts gave false or misleading signals regarding the supply, demand or price of the securities. The criminal provision provides a maximum sentence of five years' imprisonment. The penalties for the administrative offence are, as a general rule, the same as for the insider dealing provisions. Confiscation of a profit is also permitted under both provisions.

The FMIO also contains certain safe harbours from the prohibition of market manipulation, which include a safe harbour for public buyback programs as well as for price stabilisation following a public placement of securities. Under these rules it is permissible, in particular, to use the shares placed as part of an over-allotment option ('greenshoe') to stabilise the price following an IPO if certain prerequisites are met. These include that the price stabilisation must be carried out within 30 days and may not be executed at a price that is higher than the issue price.

Sanctions by the stock exchanges

In addition to the statutory obligations, the Swiss stock exchanges can impose sanctions on issuers in case of violations of their respective obligations under the listing rules (such as violation of the *ad hoc* disclosure obligations or violation of rules regarding the disclosure of management transactions). These can include fines and the suspension of trading as well as, ultimately, a delisting.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Dr. Alexander von Jeinsen
Tel: +41 58 261 54 88 / Email: alexander.vonjeinsen@baerkarrer.ch

Alexander von Jeinsen is a member of the Capital Markets, Financing and M&A practice groups at Bär & Karrer. He graduated from the University of Göttingen in 2009 (*Dipl. Jur.*) and was admitted to the German Bar in 2014. In 2011, he received his Master of Laws (LL.M.) degree from Columbia University and, in 2012, he received his doctoral degree (*Dr. jur.*) from the University of Göttingen. He also earned a Bachelor of Economics from the University of Göttingen in 2010.

Alexander von Jeinsen's practice focuses on a broad range of equity and debt capital markets transactions (in particular, IPOs) representing both underwriters and issuers, financing (in particular, LBO financing) and M&A transactions as well as general corporate law. He also advises clients in the FinTech space, in particular, in topics related to Blockchain/Distributed Ledger Technology, as well as in general corporate law. Alexander von Jeinsen is admitted to the German Bar and also admitted as a German lawyer to the Swiss courts.

Annette Weber
Tel: +41 58 261 52 03 / Email: annette.weber@baerkarrer.ch

Annette Weber is a member of the Capital Markets, M&A and General Corporate & Commercial practice groups at Bär & Karrer. She graduated from the University of Zurich in 2010 (*lic. iur.*) and was admitted to the Bar in 2013. She also received her Master of Laws (LL.M.) degree from Columbia University in 2018.

Annette Weber's practice focuses on capital markets law and M&A transactions as well as general contract, corporate and commercial law. She specialises and is regularly involved in equity capital markets transactions (rights offerings and IPO) as well as in debt capital markets transactions (both convertible bonds and straight bonds).

Bär & Karrer Ltd.

Brandschenkestrasse 90, CH-8002 Zürich, Switzerland
Tel: +41 58 261 50 00 / URL: www.baerkarrer.ch

© Published and reproduced with kind permission by Global Legal Group Ltd, London

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

- **AI, Machine Learning & Big Data**
- **Banking Regulation**
- **Blockchain & Cryptocurrency Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fintech**
- **Fund Finance**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**
- **Pricing & Reimbursement**

Published by: glg global legal group

Strategic Partner: ECLA European Company Lawyers Association