Securities Finance 2021

Contributing editors
Mark Greene, Andrew Pitts and George Stephanakis

LEXOLOGY®
Getting The Deal Through

© Law Business Research 2021

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and March 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2004
Eighteenth edition
ISBN 978-1-83862-715-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Securities Finance
2021

Contributing editors
Mark Greene, Andrew Pitts and George Stephanakis
Cravath, Swaine & Moore LLP

Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Securities Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapter on Switzerland.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mark Greene, Andrew Pitts and George Stephanakis of Cravath, Swaine & Moore LLP, for their continued assistance with this volume.

London
March 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2021
For further information please contact editorial@gettingthedealthrough.com

© Law Business Research 2021

Contents

Global overview 3
Mark Greene, Andrew Pitts and George Stephanakis
Cravath, Swaine & Moore LLP

Germany 6
Andreas Fillmann
Squire Patton Boggs

Japan 15
Motoki Saito
Nagashima Ohno & Tsunematsu

Luxembourg 21
Denis Van den Bulke and Edouard Musch
Vandenbulke

Monaco 31
Olivier Marquet and Anne-Fleur Wagler
CMS Pasquier Ciulla Marquet Pastor Svara & Gazo

Qatar 36
Matthew Heaton and Frank Lucente
Al Tamimi & Company

South Africa 40
David Yuill, Ezra Davids and Ryan Wessels
Bowmans

Switzerland 50
Lukas Roesler, Micha Schilling and Alexander von Jeinsen
Bär & Karrer

United States 57
Mark Greene, Andrew Pitts and George Stephanakis
Cravath, Swaine & Moore LLP

© Law Business Research 2021

Switzerland

Lukas Roesler, Micha Schilling and Alexander von Jeinsen

Bär & Karrer

LEGAL AND REGULATORY FRAMEWORK

Laws and regulations

1 What are the relevant statutes and regulations governing securities offerings?

A variety of statutes, ordinances and regulations are relevant for securities offerings:

- The Federal Act on Financial Services (FinSA), which provides for the rules of public offerings and listing of securities. Together with the Ordinance on Financial Services it details the prospectus requirements including the rules of publication of prospectuses.
- The Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) together with the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIO) govern the organisation and operation of financial market infrastructures, and the conduct of financial market participants in securities and derivatives trading.
- The Federal Act on Financial Market Supervisory Authority provides for rules of supervision by Swiss Financial Market Supervisory Authority (FINMA).
- A set of SIX listing rules and directives that govern the main principles for the listing and maintenance of a listing of securities on the SIX.
- The Swiss Code of Obligations includes rules on the publication of annual reports of listed companies and certain rights of shareholders in connection with primary and secondary offerings.
- The Ordinance against Excessive Compensation, which supplements the Swiss Code of Obligations by 'say on pay' rules applicable to Swiss stock corporations if their shares are listed on the stock exchange in Switzerland or abroad.

Regulator

2 Which regulatory authority is primarily responsible for the administration of those rules?

The main regulatory authorities that are responsible for the administration of the rules under the statutes, ordinances and regulations are the following:

- The Swiss Financial Market Supervisory Authority (FINMA), an independent regulatory body and the main supervisory and regulatory authority in the Swiss financial market. It is in charge of supervising exchanges, banks, securities dealers, insurances and collective investment schemes. It licenses and supervises a reviewing body in charge of reviewing and approving prospectuses (currently SIX Exchange Regulation and BX Swiss, each a review body).
- The SIX Exchange Regulation (Regulatory Body), a legislative body that determines the laws that apply, among others, to issuers and to this end issues rules and regulations under the supervision of FINMA. It is in charge of admitting listings, suspension of trading in and the delisting of securities. It also holds a licence from FINMA as review body for the review and approval of prospectuses.
- Disclosure office of SIX, which primarily supervises compliance with disclosure requirements.

The regional exchange, BX Swiss Ltd (www.bxswiss.com) focuses on Swiss issuers. This article will focus on the requirements of SIX.

PUBLIC OFFERINGS

Mandatory filings

3 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

A public offering of equity or debt securities does not generally trigger an obligation to submit filings with governmental or regulatory authorities (except for the submission of the prospectus with the Review Body). Rather, filings are required for the listing and admission to trading of securities at a Swiss stock exchange (which is a separate process in addition to the submission of the prospectus with the Review Body).

A public offeror of securities must submit a prospectus to the review of, and approval by, the Review Body unless an exemption from the duty to publish a prospectus applies. The Review Body reviews completeness, coherence and comprehensibility of the prospectus prior to publication or admission to trading. The review of an offering prospectus by the Review Body may occur after publication of the prospectus in the case of an offering of certain types of bonds and structured products if a Swiss bank or securities house confirms that all information pertaining to the issuer and the securities is available at the time of publication.

In connection with a public offering, the main exemptions from publishing a prospectus are offerings:

- addressed solely to investors classified as professional clients;
- addressed to fewer than 500 investors;
- to investors acquiring securities in the value of at least 100,000 Swiss francs;
- with a minimum denomination per unit of 100,000 Swiss francs; or
- that do not exceed a total value of 8 million Swiss francs over a 12-month period.

Under certain conditions, there are also exemptions from the publication of an offering prospectus in connection with certain types of securities including, among others:

- the exchange of outstanding equity interests outside the scope of a capital increase;

© Law Business Research 2021

- offering of securities to employees, board members or managing officers; or
- medium-term bonds or money market instruments.

The prospectus must contain essential information on the issuer, guarantor and security provider, the securities (including associated rights, obligations of and risks for investors) and the offer, specifically the type of placement and net proceeds of the issue. The prospectus must further contain a clearly understandable summary of essential information. If the final issue price and the issue volume cannot be determined at the time of publishing the prospectus, it must state the maximum issue price and the criteria required to determine the issue volume. Further information to be included in the prospectus depend on the nature of the issued securities. The prospectus must be in one of the Swiss official languages or English.

In the case of the issue of bonds in an offer programme or in a continuous or repeated manner by Swiss banks or security firms (as defined in the FMIA), it is possible to draft a base prospectus that contains all information available at the time of publication on the issuer, the guarantee and security provider and the security but not the final terms. These may be stated at the time of the public offering in a prospectus supplement with indicative terms.

It must be mentioned that the private placement of debt instruments to more than 20 investors is considered to be deposit taking under the Swiss Banking Act (limited exemptions apply), which requires a banking licence unless the Swiss based issuer provides certain minimum information (name, seat and purpose of the issuer, information about the terms of the debt instruments, its financial statements, security provided and the representation of the holders, if any) in accordance with the Banking Ordinance. This minimum information can be provided in the form of a prospectus or in other written form and must be published in one of the ways prescribed by the Federal Act on Financial Services (FinSA). Non-compliance may result in severe enforcement consequences.

Review of filings

4 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

A representative authorised by SIX must submit a listing application and relevant annexes to the Regulatory Board 10 trading days, in the case of new issuers 20 trading days, prior to the scheduled trading date (in the case of a capital increase without book-building, date of the capital increase) or, as the case may be, start of the book-building period. The listing application must contain a short description of the securities and a request regarding the planned first trading day as well as evidence that there is a prospectus that has been approved by the Review Body. Should the offeror be exempt from the preparation of the prospectus in accordance with the exemptions under FinSA, this must be explained in the listing application.

The Regulatory Board will approve the listing application if all requirements under the relevant SIX listing rules have been satisfied. Such approval may be subject to further information duties or other conditions to be satisfied by the offeror. Prior to the planned listing date, the offeror must submit to the Regulatory Board a declaration stating that the competent corporate bodies of the issuer agree with the listing and that it has acknowledged the applicable SIX listing rules.

On the date of listing, an official notice will be made to potential investors about the contemplated listing and the possibility to obtain the prospectus free of charge.

In the case of listing of debt securities and derivatives, it is possible to apply for provisional trading in the form of an internet-based listing. Trading may commence within one trading day (in the case of debt securities) or three trading days (in the case of derivatives) following a positive decision by the Regulatory Board on the provisional admission. The offeror must submit a definitive application within two months of such a decision. The debt securities will only be considered officially listed following a final decision by SIX.

Publicity restrictions

5 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Advertising for financial instruments is only possible if it is clearly designated as such. It must indicate for the relevant financial instruments the prospectus or the key information documents (see below) as well as where these can be obtained. The advertising and any other information on financial products addressed to investors must correspond to the details given in the prospectus and the key information document. As a general rule, in the absence of a duty to publish a prospectus, FinSA requires that offerors of securities have to make sure that investors will be equally treated when communicating essential information in connection with a public offering.

If certain financial instruments are offered to retail clients outside of the scope of a portfolio management agreement, there is an obligation to draw up a key information document. The key information document is comparable to the Key Investor Document required under the EU rules on packaged retail investment products. It is not subject to review or approval.

Restrictions on the ability of underwriters to issue research reports may apply pursuant to the Directive on the Independence of Financial Research by the Swiss Bankers' Association, which is recognised by FINMA as a minimal standard in the Swiss banking industry. This directive requires that the bank unit in charge of financial research is organisationally, hierarchically, functionally and physically independent from the bank unit that is responsible for issuing securities or for a bank's investment banking activities. Exchange of privileged information that is not concurrently disclosed to clients must be prevented by Chinese walls.

Secondary offerings

6 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Previous differences between primary and secondary offerings have been vastly eliminated under the regime of FinSA, which was introduced on 1 January 2020. Prospectus requirements are generally applicable for both primary and secondary offerings to the extent such offerings are made to the public and no other exemptions apply. In particular, no new prospectus must be published by financial service providers if a valid offering prospectus is already available and if the issuer or the person responsible for the prospectus has consented to the reuse of the prospectus.

A difference between a primary and secondary offering that is worth noting is the right of shareholders under the Swiss Code of Obligations to participate pro rata in any new issuance of equity (primary offering). However, the general meeting of shareholders may resolve to exclude pre-emptive rights of existing shareholders for important reasons with a two-thirds majority of the shareholder votes (the articles of association of the issuer may manifest higher majorities) and an absolute majority of the nominal values represented at the meeting. Important reasons may include mergers or acquisitions of a business or participations of employees.

© Law Business Research 2021

Settlement

7 What is the typical settlement process for sales of securities in a public offering?

SIX Group offers securities processing on the Swiss financial market. Its clearing and settlement model offers full automation via straight-through-processing of all steps involved from entering an order on the Swiss Stock Exchange through into the settlement infrastructure (Swiss Value Chain).

Settlement typically occurs two trading days after the first day of trading.

PRIVATE PLACINGS

Specific regulation

8 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

For non-public offerings in or into Switzerland that are not admitted to trading on any trading venue, there is no duty to prepare or publish a prospectus. The requirement to publish a prospectus is triggered if a 'public offer' (ie, an invitation to the public to purchase a financial instrument with essential information needed for an investment decision) is made and if no statutory exemption under the Federal Act on Financial Services (FinSA) applies.

In connection with a public offering, the main exemptions from publishing a prospectus are offerings:
- addressed solely to investors classified as professional clients;
- addressed to fewer than 500 investors;
- to investors acquiring securities in the value of at least 100,000 Swiss francs;
- with a minimum denomination per unit of 100,000 Swiss francs; or
- which do not exceed a total value of 8 million Swiss francs over a 12-month period.

Under certain conditions, there are also exemptions from the publication of an offering prospectus in connection with certain types of securities including, among others:
- the exchange of outstanding equity interests outside the scope of a capital increase;
- offering of securities to employees, board members or managing officers; or
- medium-term bonds or money market instruments.

In any case, the private placement of debt instruments to more than 20 investors requires a Swiss based issuer to publish certain minimum information in accordance with the Swiss Banking Act and Ordinance, be it in the form of a prospectus or in other written form, in one of the ways prescribed by the FinSA. Non-compliance would require the issuer to hold a banking licence and may result in severe enforcement consequences by the Swiss Financial Market Supervisory Authority.

Swiss law does not prescribe special procedures for the private placement of securities, but such placings are subject to the general principles of Swiss law, in particular of the Swiss Code of Obligations and its civil liability provisions.

Investor information

9 What information must be made available to potential investors in connection with a private placing of securities?

No prospectus must be made available to potential investors in a private placement of securities (except that certain information must be made available to prevent being qualified as a bank requiring a licence if debt instruments of a Swiss based issuer are placed with more than 20 investors).

If no prospectus must be published, the offeror or issuer is required by FinSA to share material information equally with all of its investors.

Transfer of placed securities

10 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

In general, no restrictions apply to the transferability of securities acquired in a private placement. However, if the holder of securities acquired in a private placement intends to sell the securities by way of a public offering in Switzerland, it will be required to publish a prospectus. In such a case, there is no duty on the issuer to provide support.

OFFSHORE OFFERINGS

Specific regulation

11 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

In general, the Federal Act on Financial Services (FinSA) requirement to publish a prospectus prior to an offering is only triggered if a public offer is made in or into Switzerland. FinSA has replaced the previously known Swiss corporate law provisions that required certain specific information to be included in any, that is, also foreign law-governed, prospectus of a Swiss issuer. In any case, appropriate selling restrictions in accordance with the FinSA rules providing exemptions from the publication of a prospectus in Switzerland are recommended to be inserted into a foreign law prospectus.

In the case of debt instruments (bonds and notes) issued by an issuer with a seat or business domicile in Switzerland (and not only just guaranteed by such an entity), mandatory Swiss law provisions regarding the meeting of bondholders and their voting will apply.

An offer of securities outside Switzerland must comply with the securities laws of the jurisdictions in which the offer is made.

PARTICULAR FINANCINGS

Offerings of other securities

12 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Convertible/exchangeable debt securities

The underlying equity securities of convertible/exchangeable debt securities must be listed, at the latest, at the same time when the convertible instrument is listed. Exemptions may be granted by the regulatory body if sufficient information for the valuation of the underlying is available.

In the case of convertible debt securities, Swiss corporate law requirements regarding the procedure and timing of the issuance of equity securities must be taken into account.

© Law Business Research 2021

Rights offerings

Rights offerings can be conducted as discounted rights issues and as at-market rights issues.

In a discounted rights issue, the new shares are offered at a discount to the market price at launch resulting in the rights having an economic value. In most cases, the rights are tradable so that existing shareholders who do not want to participate in the capital increase, can at least monetise the value of their subscription right. The main advantage of a discounted rights issue is the relative high certainty of proceeds; due to the discount and the tradability of the rights, the exercise ratio is typically close to 100 per cent.

In an at-market rights offering, the offer price is not set at the launch of the offering but determined via a bookbuilding. This typically allows the issuer to broaden its shareholder base.

Swiss corporate law requirements regarding pre-emptive rights of existing shareholders must be complied with and can only be excluded under limited circumstances.

Warrants (derivatives)

The requirements for listing of warrants and derivatives in general are subject to specific rules by SIX for such instruments.

UNDERWRITING ARRANGEMENTS

Types of arrangement

13 | What types of underwriting arrangements are commonly used?

The most common underwriting arrangement is a best efforts (soft) underwriting. In this case, the underwriters merely agree to use their best efforts to sell and market the securities to investors on behalf of the issuer with the offer price typically being determined in a bookbuilding procedure. The underwriters then only purchase the securities that they were able to place successfully with investors. Hence, the underwriters do not assume an underwriting risk.

In the case of a hard underwriting (which is more common for secondary placements than primary issuances), the underwriters firmly commit to purchase a certain number of securities at a certain minimum price. Hence, they assume the full placement risk with regard to these securities. If a higher number of securities can be placed in the market or the price agreed with investors is higher than the minimum price, the upside is typically shared between the underwriters and the issuer or selling shareholder.

In a volume underwriting, the underwriters firmly commit to purchase securities to raise a fixed amount of gross proceeds. However, when the volume underwriting is entered into, the purchase price per share is usually very low (in most cases the nominal value of the shares) resulting in a theoretically very high number of shares to be sold. Over time, the issuer and the underwriters can agree to a higher offer price in one or more step-ups. The final offer terms are then agreed at launch of the transaction (often shortly after an extraordinary general meeting of shareholders) and the volume underwriting becomes a hard underwriting. Volume underwritings are most common in acquisition and rescue scenarios when the issuer needs certainty that a certain amount can be raised.

In rights issues, the banking syndicate can agree to an offer price at a fixed discount to the theoretical ex-rights price; so-called relative underwriting. Similar to a volume underwriting, the theoretical number of shares can be very high. We have not seen this approach often in recent years.

Typical provisions

14 | What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?

Swiss law underwriting agreements typically provide for a rather comprehensive indemnity in favour of the banking syndicate covering, in particular, losses and claims resulting from (alleged) misstatements in the offering materials as well as breaches of representations or covenants. While the scope of the indemnity is fairly standardised, one of the key negotiation points in initial public offerings (IPOs) with a secondary component is the extent to which the indemnity is granted by the issuer or the selling shareholder.

Underwriting agreements commonly also include termination rights in the case of material adverse changes and significant events affecting the national or international financial, political or economic conditions. In particular, in volume underwritings, the wording of these termination rights is fiercely negotiated.

While the expenses of the banking syndicate are typically reimbursable (at least partially) by the issuer or selling shareholder irrespective of whether the offering is completed, the underwriting fees are typically only payable if the offering is completed successfully. An important exception are volume underwriting fees that are also payable if the offering is ultimately not launched.

A majority of IPOs contain an overallotment option to stabilise the market price of an equity securities offering after the first day of trading. The securities are often made available by way of a securities lending agreement between the underwriters and major shareholders. Stabilisation activities benefit from a safe harbour from the prohibition of market abuse adopted by the Swiss Federal Council if they comply with the requirements of article 126 Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading).

Other regulations

15 | What additional regulations apply to underwriting arrangements?

If, due to the size of an equity offering, the number of shares underwritten by the banking syndicate exceeds the threshold triggering a mandatory takeover bid (ie, 33.3 per cent of the voting rights) the underwriters may benefit from a specific exemption from the duty to launch a mandatory takeover bid (so-called underwriter exemption). This requires that the banks undertake to sell the securities exceeding the threshold within three months and the sale actually takes place within this period.

ONGOING REPORTING OBLIGATIONS

Applicability of the obligation

16 | In which instances does an issuer of securities become subject to ongoing reporting obligations?

In Switzerland, the vast majority of ongoing reporting obligations for companies with listed securities is not set out in statutory law, but in the applicable stock exchange regulations. Hence, issuers become subject to these obligations, once it lists securities on a Swiss stock exchange. The two major statutory reporting obligations relate to the disclosure of board and management compensation as a result of the popular 'say on pay' initiative and the reporting of major shareholdings. Shareholders of a Swiss public company are obliged to report shareholdings of 3 per cent 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

© Law Business Research 2021

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.

Information to be disclosed

17 | What information is a reporting company required to make available to the public?

Companies that have issued securities listed in Switzerland are subject to several reporting obligations that 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. However, the applicability of some of the obligations depends on whether the issuer has issued equity or debt securities.

Financial reporting

Both Swiss stock exchanges require issuers of equity or debt securities to publish and file annual and, in the case of the listing of equity securities only, bi-annual reports, which must be drawn up in accordance with one of the eligible accounting standards (those currently being IFRS, US 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.

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 market abuse regulation. Issuers are required to inform the market of any facts that are capable of triggering a significant change in market prices and that 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 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 the case of a leak. The rules on ad hoc publicity apply to issuers of equity and debt securities.

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 and require the issuer 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 that provide for or permit the actual delivery of shares or cash settlement (eg, 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 (ie, without disclosing the name of the director or manager). The obligations to report management transactions only applies to issuers of equity securities.

Say on pay

The OaEC primarily implements rules on the remuneration of directors and executive management, as well as the election of directors and an independent proxy. It is not applicable if the company merely lists debt securities.

The key elements of the OaEC relate to 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, limitations on severance payments, golden handshakes and payments in connection with M&A transactions as well as mandatory elections of corporate bodies by the shareholders' meeting. These requirements are supplemented by the obligation to publish an annual remuneration report, which is typically part of the annual report.

Corporate governance and sustainability reporting

The main corporate governance codex 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, for example, 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 advisers have also become more and more important for an issuer's corporate governance set-up.

ANTI-MANIPULATION RULES

Prohibitions

18 | What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The two main rules prohibiting manipulative practices are the prohibition of insider dealing and market abuse, both set out in the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA).

The FMIA prohibition of insider dealing 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: (1) the misuse of insider information through the purchase or sale of shares or the use of financial instruments derived from such shares; (2) the communication of insider information; and (3) 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 of imprisonment or 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.

© Law Business Research 2021

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: (1) spreading false or misleading information; or (2) 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 of 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.

PRICE STABILISATION

Permitted stabilisation measures

19 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

A majority of initial public offerings in Switzerland include an overallotment option (green shoe) which allows the banking syndicate to engage in stabilisation activities following the offering. Technically, such activities would also be possible in the case of other public placements of securities (such as a rights issue), but this is not common. Stabilisation activities benefit from a safe harbour from the prohibition of market abuse adopted by the Swiss Federal Council if they comply with the requirements of article 126 Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, which include, that they may only be effected within 30 days of the public placement, are executed at a price that is no higher than the issue price or, in the case of trading with subscription or conversion rights, at a price that is no higher than the market price, the key parameters of the (potential) stabilisation are published beforehand and certain information about the activities is published following the stabilisation.

LIABILITIES AND ENFORCEMENT

Bases of liability

20 What are the most common bases of liability for a securities transaction?

The main liability risk for participants in a securities transaction stems from the prospectus liability set out in article 69 of the Federal Act on Financial Services (FinSA). Under this provision, any person who fails to exercise due care and thereby furnishes information that is inaccurate, misleading or in violation of statutory requirements in a prospectus, key information document or similar communication is liable to the acquirer of a financial instrument for losses caused. However, court cases of prospectus liability have – so far – been very rare in Switzerland.

In addition, the violation of key securities law provisions can result in sanctions (publication of a supervisory ruling 'naming and shaming', fines and, in some cases, imprisonment). These key provisions include, the prohibition of insider dealing and market abuse, offering of securities to the public without a prospectus, failure to report major shareholdings and wilful failure to adhere to the mandatory takeover rules.

In addition to the statutory obligations, the Swiss stock exchanges can impose sanctions on

issuers (but not other market participants) in the 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.

Last but not least, the private placement of debt instruments to more than 20 investors is considered to be deposit taking under the Swiss Banking Act (limited exemptions apply), which requires a banking licence unless the issuer provides certain minimum information (name, seat and purpose of issuer, information about the terms of the debt instruments, its financial statements, security provided and the representation of the holders, if any) in accordance with the Banking Ordinance. This minimum information can be provided in the form of a prospectus or in other written form and must be published in one of the ways prescribed by the FinSA. Non-compliance may result in severe enforcement consequences.

21 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

The mechanisms for seeking remedies and sanctions for improper securities activities are administrative proceedings conducted by the Swiss Financial Market Supervisory Authority. Criminal prosecution by the federal prosecutor and proceedings based on the self-regulatory proceedings of the Swiss stock exchanges. Civil litigation can be sought in cases of violations of the corporate law requirements and based on a claim stemming from prospectus liability.

UPDATE AND TRENDS

Proposed changes

22 Are there current proposals to change the regulatory or statutory framework governing securities transactions?

The new FinSA (Swiss Financial Services Act) and its ordinances have only just entered into force on 1 January 2020. Currently, no further reforms of the regulatory or statutory framework governing securities transactions are on the horizon except for the Corporate Law reform, which is expected to enter into force at the beginning of 2022 (depending on progress on its accompanying ordinances), which will, inter alia, contain important new features for the increase and decrease of the equity capital of Swiss corporations.

Lukas Roesler
lukas.roesler@baerkarrer.ch

Micha Schilling
micha.schilling@baerkarrer.ch

Alexander von Jeinsen

Brandschenkestrasse 90
CH-8002 Zurich
Switzerland
Tel: +41 58 261 50 00
www.baerkarrer.ch

© Law Business Research 2021

23 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In spring 2020, covid relief loans at zero or low interest rates were made available to Swiss companies by Swiss banks the exposure of which was backed by state guarantees. The relief loans were only available until summer 2020 and can currently no longer be applied for. The relief loans came with restrictive covenants on their use and, in particular, payment of dividends and other shareholder-related payments and transactions that, however, only apply to the entity that is the borrower of the relief loan, not to its group of companies, if any. The relief loans need to be repaid to be released from the restrictive covenants.

Further, temporary relief was granted in relation to the duty of directors to file for bankruptcy or similar proceedings in the case of a financial crisis.

© Law Business Research 2021

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-715-7

© Law Business Research 2021