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## Securities Law in Switzerland

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**The securities markets of Switzerland belong to the most important and competitive securities markets in the world, and Switzerland is one of the world market leaders in cross-boarder asset management.**

**Switzerland also has, because of its main exchange SWX Swiss Exchange, notable weight in capital market transactions and became one of the leading financial markets in the world.**

# 1 Description of the Securities Markets

## 1.1 Over-the-Counter Markets and Regulated Markets

Switzerland's securities market can be divided into over-the-counter markets, on the one hand, and regulated markets, on the other hand.

### Over-the-Counter-Markets

The over-the-counter markets enable their participants, usually large firms as end-users, on the one hand, and banks as well as securities firms and insurance companies as dealers, on the other hand, to trade individually-tailored finance products, often to hedge the market risks which the end-users are facing.

### Regulated Market

The regulated market of Switzerland consists mainly of the SWX Swiss Exchange (**SWX**), which operates a fully electronic exchange in Zurich. In addition to the SWX, there is only one other (domestic) exchange, i.e. the BX Berne Exchange, where a limited number of securities of mainly regional companies are traded. Recently, the BX Berne Exchange attracted several new issuers that applied for listing. BX Berne Exchange intends to position itself, inter alia, as training ground for issuers not yet qualifying for the SWX. However, given the comparably small size of the BX Berne Exchange, this paper deals only with the SWX and its regulations (for more information on the BX Berne Exchange, see [www.berne-x.com](http://www.berne-x.com)).

## 1.2 The SWX Swiss Exchange

### Market Segments

At the SWX, the trading activities are divided in the following segments:

- a) Main Market, for the trading of almost all sorts of securities such as shares, bonds and derivatives that are not traded on the other segments of the SWX;
- b) SWX "EU-Compatible" Segment, for companies forming part of the Swiss Market Index (**SMI**) which would like to benefit from the advantages the harmonized EU capital market offers (e.g. the "EU Passport");
- c) Investment Companies, for companies that invest their funds in order to realize proceeds or capital gains but do not perform specific entrepreneurial activities (since January 1, 2007 investment companies that are not listed or whose circle of investors is not restricted to qualified investors are governed by the provisions set forth in the Swiss Federal Act on Collective Investment Schemes of June 23, 2006; see below, page 16). These companies are very similar to collective investment schemes;
- d) SWX Local Caps, for companies that – pursuant to corporate history, capitalization or spread of investments – do not, respectively not yet, qualify for listing on another SWX segment. This segment is intended and designed for companies with a local range of operation or a – personally or geographically – restricted circle of investors, such as for example family-owned enterprises;
- e) Real Estate Companies, for companies which earn  $\frac{2}{3}$  or more of their income from real estate activities and whose portfolio is invested at a level of at least  $\frac{2}{3}$  in real estate property;
- f) Collective Investment Schemes, for domestic or foreign collective investment schemes.

In addition, the SWX has established the *SWX-Sponsored Segment*: This trading segment allows SWX participants (the so-called *Sponsoring Securities Dealers*) to trade, but not to list, equity securities of Swiss or foreign issuers that have a primary listing on a stock exchange other than, but recognized by, the SWX. The purpose of this segment is to enable the trading of equity securities without having to apply for listing on the SWX.

### 1.3 SWX Europe (formely, virt-x)

#### Pan-European Exchange

The SWX is also engaged in SWX Europe Ltd. (formerly, virt-x) (**SWX Europe**), the pan-European exchange for blue chips having its registered seat in London. SWX Europe intends to bring together the Swiss and UK markets and thereby facilitates cross-border transactions. All stock included in the SMI is traded on SWX Europe which qualifies as a recognized investment exchange pursuant to U.K. law. SWX Europe operates a fully integrated trading, clearing and settlement platform under the supervision of the U.K. Financial Services Authority (**FSA**), although most of the services are outsourced to the SWX nowadays.

#### EU Directives

The regulatory framework applying to issuers whose shares are traded on SWX Europe (i.e. listing and admission to trading of securities) is the one of the home country of the respective issuer; i.e. to all issuers listed in Switzerland the Listing Rules of the SWX apply. In addition, depending on the segment of SWX Europe the respective issuer is admitted to trade (i.e. whether or not the issuer is admitted to the "EU-Regulated-Market-Segment"), different EU directives such as the Markets in Financial Instruments Directive (**MiFID**), the Prospectus Directive or the Market Abuse Directive may apply.

### 1.4 EUREX

Since 1998, the SWX operates jointly with Deutsche Börse AG the derivative exchange EUREX. EUREX provides a fully electronic trading platform for futures and options. In addition, EUREX operates an automated and integrated clearing house and thereby enables its participants to install a centralized cross-border risk management. EUREX, after having acquired a considerable interest in BOTCC, further expanded into the United States of America with its acquisition of New York based stock option exchange International Securities Exchange Holdings Inc. (ISE), thereby creating the biggest transatlantic market place for derivatives.

### 1.5 Scoach

A joint venture between Deutsche Börse AG and Swiss Financial Market Services (comprising the former SWX Group, SIS Group and Telekurs Group), Scoach allows the trading of structured products in Frankfurt and Zurich.

## 2 The Listing/Market Authority

### SWX Swiss Exchange

The Swiss listing and market authority is the SWX. The SWX is entitled, based on the respective regulations, to decide upon the application for listing of an issuer and to monitor the trading activities.

### Self-Regulation

These competences reflect the principle of self-regulation pursuant to which the admission of securities as well as the organization and supervision of the market are left, to a great extent, to the exchanges.

### Admission Board

Within the SWX, the competent authority to decide upon listing applications is the Admission Board. Decisions of the Admission Board may be appealed to the Appeal Board of the SWX and, ultimately, to the Arbitral Tribunal of the SWX.

The Admission Board respectively the SWX may be contacted as follows:

SWX Swiss Exchange  
Selnaustrasse 30  
P.O. Box  
CH-8021 Zurich  
Phone: +41 (0)58 854 54 54  
Fax: +41 (0)58 854 54 55

[www.swx.com](http://www.swx.com)

## 3 Regulatory Authorities

### Swiss Federal Banking Commission

The most important regulatory authority in the area of financial markets is the *Swiss Federal Banking Commission (FBC)*, which is in particular responsible for supervising banks, securities dealers, exchanges and collective investment schemes. Besides its supervisory function, the FBC issues regulations and ordinances in the fields mentioned above and acts as appeal body with regard to decisions rendered by different inferior bodies such as the Takeover Board.

Private insurance companies are supervised by *the Federal Office of Private Insurance (FOPI)*.

### FINMA

Following foreign samples, the FBC and the FOPI will be merged as per January 1, 2009 into one single financial services authority, the so-called FINMA (which shall, in addition, also comprise the Anti-Money Laundering Control Authority).

### Disclosure Board and Swiss Takeover Board

On a level below the FBC are the *Disclosure Board of the SWX* and the *Swiss Takeover Board*:

- a) The major tasks of the Disclosure Board are to receive notifications of shareholdings, grant exemptions or relief from the reporting requirements and render preliminary decisions on whether a duty to notify exists or not. All notifications are electronically collected in a database. The Disclosure Board has to be

notified by the relevant shareholder and the company if shareholdings reach, exceed or drop below the thresholds of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔% of the voting rights in such company;

- b) the Takeover Board supervises public takeover offers and issues rules and recommendations on that topic, especially in the fields of voluntary and mandatory offers as well as buyback offers (for details, see section “Takeovers” on page 22 below). Rulings of the Disclosure Board and the Takeover Board may be appealed to the FBC.

Finally, decisions rendered by the FBC and the FOPI may, if the relevant conditions are met, be appealed to the *Swiss Federal Supreme Court* in Lausanne

## 4 Principal Laws Regulating the Securities Markets

### 4.1 Statutory Provisions

#### Stock Exchange and Securities Trading Act

The principal laws regulating the Swiss securities market are the *Stock Exchange and Securities Trading Act* of March 24, 1995 (**SESTA**) and its implementing ordinances, i.e. the *Stock Exchange and Securities Trading Ordinance* of December 2, 1996 (**SESTO**), the *Ordinance of the FBC on Stock Exchanges and Securities Trading* of June 25, 1997 (**FBC-SESTO**), and the *Ordinance of the Takeover Board on Public Takeover Offers* of July 21, 1997 (**TOB-Ordinance**). The intention of the SESTA is to protect individual investors and to ensure the smooth operation of the market place. To achieve such purpose, the SESTA and its implementing ordinances regulate stock exchanges, securities dealers, the disclosure of shareholdings and public takeover offers.

### 4.2 Listing Rules

#### Listing Rules of the SWX

Companies that are listed on the SWX have, in addition to the statutory provisions, to comply with the various regulations issued by the SWX, such as in particular the *Listing Rules of the SWX (SWX Listing Rules)*, including, if applicable, the *Additional Rules for the Listing (i) on the SWX “EU-Compatible” Segment, (ii) of Investment Companies, (iii) Local Cap Companies, (iv) Real Estate Companies, (v) Collective Investment Schemes and (vi) Bonds*, as well as the directives, circular letters and communiqués of the SWX.

The SWX Listing Rules are currently being reviewed and revised by the SWX and its participants.

#### Swiss Code of Obligations

The different types of securities, in particular bearer shares, registered shares and bonds, as well as the prerequisites for issue prospectuses and certain rights of bondholders of Swiss domiciled companies are set forth in the *Swiss Code of Obligations* of March 30, 1911 (**CO**).

## 5 Participants in the Securities Markets: Requirements for Licensing

### 5.1 Licensing Obligation

#### Securities Dealer

Pursuant to article 10(1) SESTA, whoever intends to carry out activities of a securities dealer is required to obtain a license from the FBC. According to article 2(d) SESTA, "securities dealer" means any person who buys and sells securities, in a professional capacity, on the secondary market, either for its own account with the intent of reselling them within a short period of time or for the account of third parties, or makes public offers of securities on the primary market, or creates derivatives and offers them to the public. "Securities" are defined as (i) standardized certificates which are suitable for mass trading, (ii) rights not represented by a certificate with similar functions (book-entry securities) and (iii) derivatives (article 2(a) SESTA).

#### Asset Managers

Other than in the EU/EEA member states under the rules of MiFID, asset managers and investment advisors are basically not required to apply for authorization with the FBC. However, with respect to asset managers, the following exceptions have to be paid attention to:

- a) on the one hand, persons acting as managers of domestic collective investment schemes are required to apply for a license with the FBC; and
- b) on the other hand, persons acting as asset managers of foreign collective investment schemes may apply for a license with the FBC on a voluntary basis if they are required (by foreign law) to be subject to governmental supervision.

### 5.2 Requirements

#### Securities Dealer License

The FBC grants the securities dealer license if (i) the organization and internal rules of the applicant comply with the SESTA, (ii) the minimum capital of the applicant amounts to CHF 1,5 million, (iii) the applicant and its senior staff have sufficient professional knowledge in the area of securities trading, and (iv) the applicant, its senior staff and its principal shareholders are not engaged in unlawful or otherwise improper business (article 10(2) SESTA). In order to receive such license, the applicant has to submit an application to the FBC, wherein he has to provide evidence that he complies with the above-mentioned requirements.

#### Banking License

As a matter of fact, most securities dealers are not only licensed as securities dealers, but also as banks pursuant to the *Banks and Savings Banks Act* of November 8, 1934. This means, *inter alia*, that rather than CHF 1.5 million, the required minimum capital is CHF 10 million. In addition, unlike the SESTA, the Banks and Savings Bank Act requires, as a rule, that supervisory and executive functions be performed by two separated bodies (two-tier board system).

#### Asset Manager License

Except for the minimum capital requirements (asset managers are required to have a minimum capital of CHF 0.2 million only), the license requirements applicable to asset managers are to a substantial extent identical to the ones applicable to securities dealers.

### 5.3 Foreign Securities Dealers

Foreign securities dealers have to obtain a license from the FBC if they (a) employ persons in Switzerland who, permanently and in a professional capacity for it, in or from Switzerland (i) trade in securities, maintain client accounts or otherwise commit the foreign head office (branch); or (ii) operate in another way, in particular by passing on client orders to the foreign head office or representing it for advertising or other purposes (representative office); or (b) wish to become members of an exchange domiciled in Switzerland (article 39(1) SESTO).

## 6 Procedures and Methods for an Application for Listing

### 6.1 General Remarks

The listing procedures and methods – which are basically similar for all segments – are set forth in articles 50 to 63 of the SWX Listing Rules as well as in other publications of the SWX, such as in particular *Admission Board Circular No. 3 regarding the Listing Procedure for Equity Securities*.

In sum, the following applies:

#### Application

- a) The listing application must be lodged with the Admission Board by the issuer or by a representative recognized by the Admission Board either in German or in French. If the issuer does not possess the necessary knowledge, the Admission Board may require that it be represented by a recognized representative;
- b) the application must be submitted at the latest one month prior to the intended first day of trading;
- c) the application must include a short description of the securities and a request regarding the date of the first trading day. If a listing condition is not fulfilled, the application must contain a well-founded request for exemption;

#### Enclosures

- d) the application must be accompanied by various declarations and documents, such as a declaration of no material adverse change since publication of the listing prospectus, copies of the prospectus and the listing advertisements, and, in case of equity securities, a declaration of the lead manager that the securities are sufficiently distributed;
- e) the Admission Board invites the SWX participants to comment on the listing application;
- f) after examination of the listing application, the Admission Board either approves or rejects the application. The applicant may also request a preliminary decision from the Admission Board which remains valid until the final decision of the Admission Board.;
- g) debt securities and derivatives intended for listing may, upon request of the issuer, be admitted provisionally to trading. The admission to provisional trading automatically expires if the application for listing is not filed within two months.

## 6.2 Foreign Issuers

As a rule, foreign issuers have to meet the same requirements as domestic issuers. There are, however, some specific provisions for foreign issuers set forth in particular in articles 27 and 77 of the SWX Listing Rules and in the *SWX Directive on the Listing of Foreign Companies*.

Such specific rules distinguish between *primary listings and secondary listings*. The term “primary listing” refers to companies that are not yet listed on another exchange when they apply for listing on the SWX. On the other hand, “secondary listing” refers to companies that are already listed on another exchange with equivalent listing rules or which will be listed on such an exchange on the same day as they will be listed on the SWX (so-called “Dual Listing”).

### Primary Listing

The specific rules for *primary listings* can be summarized as follows:

- a) The issuer must demonstrate that it has not been refused a listing in its home country under legislation on investor protection;
- b) the issuer must name in the listing prospectus the publications in which the announcements required under the law of its home country will appear;
- c) the issuer must declare that it recognizes the Swiss courts as being the competent authorities for claims in connection with the listing.

### Secondary Listing

As regards *secondary listings, inter alia*, the following specific rules apply:

- a) The listing requirements are deemed to be met if the shares of the issuer are listed in its home country or a third country on an exchange where equivalent listing rules apply. The member exchanges of the Federation of European Stock Exchanges (**FESE**) and the International Federation of Stock Exchanges (**FIBV**) meet such requirements;
- b) the free float is considered sufficient if the capitalization of the shares circulating in Switzerland amounts to at least CHF 10 million or if the applicant otherwise demonstrates that there is a genuine market in the shares;
- c) subject to some additional technical information, the SWX recognizes the prospectus approved by the competent authority of the primary exchange if the issuer applies for listing of the same shares within six months of listing on the primary exchange;
- d) if the listing on the SWX does not take place at the same time or in connection with a transaction on the primary exchange, the issuer has to submit a brief prospectus for the secondary listing on the SWX. Such brief prospectus must include some information on the shares and a “no material adverse change” declaration.

### Common Issues

With respect to both *primary and secondary listings*, the following is of importance:

- a) The corporate documents of the foreign issuer, such as its articles of association, as well as the securities to be listed have to comply with the law of the home country of the issuer rather than with Swiss law;
- b) the foreign issuer has to make sure that it is in the position to perform all payments, such as dividends, as well as all administrative acts, including receipt and procession of declarations, within Switzerland;

- c) the foreign issuer does not have to comply with Swiss accounting standards if its foreign accounting standards are deemed to be equivalent with the Swiss standards;
- d) finally, the Admission Board may, in its own discretion, grant other exemptions to foreign issuers if this seems to be appropriate.

## 7 Listing Requirements

The listing requirements for the main market are dealt with in articles 6 to 31 of the SWX Listing Rules. Unless the specific rules for the other market segments contain diverging or supplementary provisions, which might be substantial, the listing requirements for the main market apply to the other segments as well.

Within the listing requirements, the SWX Listing Rules distinguish between requirements for the issuer and requirements for the securities:

### 7.1 Requirements for the Issuer

**Overview** The most important listing requirements for the issuer are shown in chart 1.

**Accounting History** As regards the minimum accounting history, the Admission Board may grant an exemption if such exemption appears desirable in the interest of the issuer or the investors, and if the investors possess the information required to make a well-founded assessment of the issuer and the securities to be admitted. Details are dealt with in the *Directive on Exemptions regarding the Duration of Existence of the Issuer (Track Record)*.

Issuers of derivatives, such as options and warrants, have to fulfill additional requirements laid down in the *Directive for the Listing of Derivatives*.

If the issuer is a state, a municipality or any other public sector body, the listing requirements for the issuer must be fulfilled by analogy.

**Guarantor** Finally, derogation may be made from the requirements laid on the issuer if in lieu of the issuer a third party (guarantor) which fulfills the listing requirements provides a guarantee commitment with respect to the obligations associated with the securities. In such event, the listing prospectus must also contain information about the guarantor.

## 7.2 Requirements for the Securities

**Equity Securities** The most important listing requirements for equity securities are shown in chart 2.

**Debt Securities** As regards debt securities, the nominal value must amount to at least CHF 20 million.

**Derivatives** The minimum capitalization of derivatives is CHF 1 million.

Additional provisions regarding requirements for securities deal with new issues, negotiability, denominations, printing, permanent global certificates, uncertified securities, clearing, paying agents, collective investment schemes, and convertible debt securities.

**Chart 1**

	Main Segment	SWX EU- Compatible Segment	Investment Companies	Local Caps	Real Estate Companies	Collective investment schemes
<b>Minimum Accounting History (Track Record)</b>	3 years	3 years	n/a	2 years	n/a	n/a
<b>Minimum Equity Capitalization</b>	CHF 25M	CHF 25M	CHF 25M	CHF 2,5M	CHF 25M	CHF 100M
<b>Other Requirements</b>	n/a	n/a	Determination of investment policy	n/a	Determination of investment policy	n/a

**Chart 2**

	Main Segment	SWX EU- Compatible Segment	Investment Companies	Local Caps	Real Estate Companies	Collective investment schemes
<b>Market Capitalization</b>	CHF 25M	CHF 25M	CHF 25M	CHF 5M	CHF 25M	CHF 25M*
<b>Minimum Distribution (Free Float)</b>	25%	25%	25%	20%	25%	25%*

\* These requirements do not apply if a SWX participant undertakes to create a market for the collective investment scheme in question.

## 8 Continuing Requirements for Listed Companies

### 8.1 Overview

The requirements for maintaining listing on the main market are laid down in articles 64 to 75a of the SWX Listing Rules. Unless the specific rules for the other market segments contain diverging or supplementary provisions, which might be substantial, the continuing requirements for the main market apply to the other segments as well.

The continuing requirements are divided in the following categories:

- a) periodical reports;
- b) accounting provisions;
- c) ad hoc publicity; and
- d) upholding of specific listing requirements.

### 8.2 Periodical Reports

#### **Business Report**

Every issuer has to publish and submit to the SWX its business report and the auditors' report. The business report encompasses the annual report and the annual financial statements in accordance with applicable accounting standards. Issuers of equity securities must, in addition, publish interim reports. Such interim reports have to cover a time period of no more than six months.

#### **Time Limits**

Chart 3 (page 13) lists the time limits for publishing and submitting the annual and interim financial reports as they are currently in force (in calendar months after the balance sheet date and the effective date of the interim financial report, respectively).

#### **Additional Requirements**

Additional reporting requirements (other than ad hoc publicity requirements) are contained in Admission Board Circular No. 1 on Reporting Obligations regarding the Maintenance of Listing as well as in the Additional Rules for the Listing of Investment Companies (special information in the annual reports; publication of net asset value; permanent compliance with the investment policy; etc.), and the Additional Rules for the Listing of Real Estate Companies (special information in the annual reports; permanent compliance with the investment policy; etc.).

### 8.3 Accounting Provisions

#### **True and Fair View**

The financial statements of the issuer must present a true and fair view of its assets and liabilities, financial position and profits and losses corresponding to the current circumstances.

Issuers of equity securities must comply with one of the accounting standards shown in chart 4 (page 13).

#### **Debt Securities**

Issuers whose only listed securities are debt securities may continue to apply Swiss GAAP FER as a minimum standard. Banks and securities dealers as well as foreign issuers remain subject to their special accounting rules.

## 8.4 Ad-hoc Publicity

### Price-Sensitive Facts

All issuers have to inform the market of any price-sensitive facts that have materialized in their field of business activity and are not yet known to the public. Price-sensitive facts means new facts that may, due to their substantial impact on the issuer's assets or liabilities or its general course of business, considerably change the price of the securities. Examples for such new facts are capital increases or modifications in the profit and gross revenue forecasts.

### Postponement

As a rule, the issuer must inform the market without delay as soon as it knows the main elements of the price-sensitive information in question. However, the issuer may postpone such disclosure if

- a) the new facts are based on a plan or decision of the issuer; and
- b) their disclosure would have a negative impact on the issuer's legitimate interests.

The most typical example where such postponement is justified are planned mergers or acquisitions. In any event, if an issuer postpones the disclosure, it has to make sure that the relevant information is treated as confidential. At the moment the information is disclosed, the issuer has to make sure that all participants in the market are, to the extent possible, treated equally, i.e. informed at the same time and to the same extent.

Details are set forth in the *SWX Directive on Ad hoc Publicity*. A useful tool of interpretation is also the *SWX Commentary on the Ad hoc Publicity Directive*.

## 8.5 Management Transactions

The members of the board of directors and the senior management of companies whose equity securities are at least in part listed on the SWX are required to report to the issuer the direct or indirect purchase or sale of (i) the issuer's equity securities, (ii) conversion rights, options and similar rights related to the issuer's equity securities, and (iii) all other financial instruments whose price is materially influenced by the price of the issuer's equity securities or rights related thereto. The issuer must notify the SWX of such transactions. These reports will be published on the website of the SWX.

Different rules apply with respect to shares or options received in the course of an employee stock option plan. With respect to such securities, the reporting duty is limited.

Details are set forth in the *SWX Directive on the Disclosure of Management Transactions* and the related *SWX Commentary*.

## 8.6 Continued Compliance with Specific Listing Requirements

All issuers have to continuously comply with the following listing requirements during the entire duration of the listing:

- a) compliance with the applicable law;
- b) negotiability of the securities;
- c) clearing through an official clearing house designated by the SWX; and
- d) maintenance of paying agency functions in Switzerland.

Chart 3

	Main Segment	SWX EU- Compatible Segment	Investment Companies	Local Caps	Real Estate Companies	Collective investment schemes
<b>Annual Reports</b>	4 months	4 months	4 months	4 months	4 months	4 months
<b>Interim Reports</b>	3 months	2 months	2 months	3 months	3 months	3 months

Chart 4

	Main Segment	SWX EU- Compatible Segment	Investment Companies	Local Caps	Real Estate Companies	Collective investment schemes
<b>Swiss GAAP FER</b>			X	X	X	X
<b>IFRS</b>	X	X	X	X	X	X
<b>US GAAP</b>	X	X	X	X	X	X

## 9 Civil and Criminal Liability for Securities Law Breaches

### 9.1 Civil Liability

#### Prospectus Liability

According to articles 752 and 1156 CO, if, upon the issue of shares, bonds, or other securities, statements have been made or disseminated which are incorrect, misleading or do not comply with the legal requirements for issue prospectuses or similar instruments, any person, without limitation, having intentionally or negligently contributed thereto is financially liable towards the acquirers of the security for any damage caused thereby (“prospectus liability”).

The above provision applies not only to public issues, but also to private placements where issue prospectuses or similar instruments have been used. In either case, only the initial issue of securities, but not secondary placements are covered by the scope of articles 752 and 1156 CO. It should be pointed out, however, that if the first purchaser of the securities, typically a bank or a consortium of banks,

acquires the securities with the intent to place them in the public, such public placement is deemed to be still part of the initial issue, i.e. in such case, not only the banks but also the investor who purchases the shares from the banks is protected by articles 752 and 1156 CO. In addition, in the event of a capital increase, not only the purchaser of the new shares, but also the purchaser of shares which already existed may assert a prospectus liability claim, provided that the already existing shares have been acquired at the same time as the new shares and that they belong to the same share category as the new shares. Finally, the Swiss Federal Supreme Court ruled in its famous Biber decision that even a purchaser acquiring shares after the end of the subscription and offer period may assert prospectus claims, however only if and to the extent such shareholder is in a position to provide evidence that a sufficiently close nexus existed between the (incorrect or incomplete) information set forth in the prospectus and its decision to buy those shares.

## 9.2 Criminal Liability

The criminal core provisions dealing with securities transactions are articles 161 and 161<sup>bis</sup> of the *Swiss Penal Code* of December 21, 1937 (**PC**).

### **Insider Trading**

Article 161 PC prohibits a specified group of persons (members of the board of directors, the management, the auditors, or mandated lawyers, etc.) to make use of or to disclose to third persons certain confidential information that is price-sensitive and to realize thereby – for themselves or any third party – a pecuniary benefit (“insider trading”). Perpetrators may face imprisonment of up to three years or a fine of up to CHF 1.08 million.

Issuers that are listed on the SWX EU-Compatible Segment are required, pursuant to applicable EU regulations, to keep a list of persons that dispose of inside information.

### **Market Rigging**

Article 161<sup>bis</sup> PC prohibits the manipulation of the price of securities traded in Switzerland (“market rigging”). Perpetrators are subject to imprisonment of up to three years or a fine of up to CHF 1.08 million.

Other provisions of the Penal Code relating to securities transactions deal with money laundering (article 305<sup>bis</sup> PC) and lack of due diligence in handling financial transactions (article 305<sup>ter</sup> PC).

## 10 Offering Securities

### 10.1 Distinction between Public and Private Offers

#### Limited Group of Persons

Pursuant to article 652a CO, which applies to shares and, in connection with article 1156 CO, also to bonds, any invitation for subscription is “public” unless addressed to a limited group of persons. Other than in the field of collective investment schemes (cf. below, page 16), the term “limited group of persons” is not defined in the CO or its implementing ordinances. In particular, unlike in other jurisdictions, there are no specific exemptions regarding offerings to institutional investors, high net worth individuals, employees, family members, and the like. To our knowledge, there are no court decisions which further define the term “limited group of persons”, either.

In the legal literature, some authors suggest that, as a rule of thumb, an issue may only be considered as public if more than twenty persons are contacted. Other authors reject such interpretation proposing that, regardless of how many investors are contacted, any invitation for subscription of the shares of a company with an open number of shareholders, i.e. in particular a listed company, is public. In any event, it is clear that not only issues in view of a public listing, but also issues not intended for a listing may qualify as “public” issues.

#### Liability

One of the major consequences of this distinction is the legal liability for the prospectus. Basically, only if an offering is considered to be a public one, the issuer has to publish a prospectus and is, therefore, subject to the respective liability rules set forth in the Swiss Code of Obligations and described above (page 13).

### 10.2 Prospectus/Disclosure Requirements

#### Issue Prospectus

If new shares are publicly offered for subscription, the company shall publish an issue prospectus containing specific information (article 652a(1) CO) (see page 17).

Such prospectus does not have to be approved by the Admission Board as Swiss law imposes the responsibility for a true and complete prospectus on the issuer and relies on the rules on the prospectus liability to have those issuers comply with the applicable regulations.

If bonds are submitted for public subscription, the above rules are to be applied by analogy. Moreover, the prospectus must contain detailed information concerning the loan, such as in particular the interest terms and terms of repayment, special security provided for the bonds and how the bondholders are represented (article 1156(2) CO).

#### Listing Prospectus

If it is intended that the publicly offered shares or bonds are listed on the SWX, in addition to the above, fairly simple rules on issue prospectuses, the much more detailed provisions of the SWX Listing Rules on listing prospectuses must be complied with as well (see page 18), whereby the issue prospectus and the listing prospectus are typically merged into just one document.

# 11 Quasi-Securities: the Offering of Collective Investment Schemes, Options and Structured Products

## Collective Investment Schemes

The offering of collective investment schemes is regulated by the *Swiss Federal Act on Collective Investment Schemes* of June 23, 2006 (**CISA**) and its implementing ordinances, i.e. the *Ordinance on Collective Investment Schemes* (**CISO**) and the *Ordinance of the FBC on Collective Investment Schemes* as well as by Circular Letters of the FBC.

Since the enactment of the CISA as per January 1, 2007 the structure of Swiss collective investment schemes may be either contractual or corporate, open end or closed end. Any Swiss collective investment scheme requires authorization by the FBC – however, certain standardized products are deemed authorized when filed with the FBC.

The CISA is also applicable to, and requires application for authorization with the FBC for, foreign collective investment schemes which are publicly advertised for within or from the territory of Switzerland. As a general rule, any advertising is to be considered public advertisement unless (i) it is directed exclusively towards qualified investors as defined by the law, and (ii) only advertising methods customary for that type of investors are deployed. Particular rules apply if and when foreign collective investment schemes shall be advertised for on the internet.

## Options and Derivatives

The offering of options and other derivatives is regulated in the SESTA and the SESTO pursuant to which a person who, in a professional capacity, creates derivatives and offers them to the public on the primary market for its own account or for the account of third parties is required to obtain a derivative firm license from the FBC. Derivatives are defined as financial contracts whose price is derived from (i) assets, such as shares, bonds, commodities or precious metals; or (ii) reference values, such as currencies, interest rates or indices. Further, in order to fall under the scope of the SESTA, the derivatives must be standardized and suitable for mass trading. Such requirement is deemed to be fulfilled if the derivatives are offered to the public, or placed with more than twenty customers, with the same structure and denomination, provided that they are not created for individual counterparties.

## Structured Products

The offering of structured products, such as capital-protected products, capped return products or certificates, is regulated by the CISA and the CISO. They may only be publicly offered in or from Switzerland if (i) they are issued, guaranteed or distributed by a bank, insurance company or securities trader; and (ii) a simplified prospectus is available. However, except for these rather generic rules, the CISA does not regulate structured products.

## 12 Prospectuses

### 12.1 Preliminary Remarks

**SWX Listing Rules** The general listing prospectus requirements for the main market of the SWX are contained in articles 32 to 44 of the SWX Listing Rules. Such general requirements apply to the other market segments as well, except where the rules for the other market segments contain diverging or supplementary provisions.

### 12.2 Form of Prospectus

**Brochure** The listing prospectus has to be published in German, French, Italian or English, either (i) in two or more newspapers with national coverage, or (ii) in the form of a brochure, obtainable free of charge. In practice, listing prospectuses are almost always published in the form of a brochure. In such case, in addition to the prospectus, the issuer has to publish a listing notice which briefly summarizes the most important information on the issue and contains a reference to the full listing prospectus.

**Electronic Form** In lieu of such paper-based publication of the prospectus and the listing notice, the Admission Board may approve publication in electronic form if it is of the opinion that such electronic publication provides for a sufficient degree of information and protection of the investors. In practice, the Admission Board has so far approved certain electronic publications with regard to standard options and bonds.

**Structure** As regards the structure of the prospectus, important information must be emphasized in a prominent place of the prospectus, in particular on the first page. In addition, the prospectus must be drawn up in a form which facilitates analysis and comprehension. Subject to such rules and the requirements regarding the content of the prospectus, the issuer may select, present and structure the information contained in the listing prospectus in its own discretion.

### 12.3 Content of Prospectus

**Types of Prospectuses** A distinction must be made between a public offer of securities, which triggers the duty to publish a prospectus in accordance with the provisions set forth in the Swiss Code of Obligations (so-called "*issue prospectus*"), and a public offer including the listing of such securities. Such public offering requires the publication of a prospectus complying both with the provisions set forth in the Code of Obligations and those set forth in the SWX Listing Rules (so-called "*listing prospectus*").

**Issue Prospectus** According to the provisions set forth in the Swiss Code of Obligations (article 652a(1)), the following information has to be provided in the issue prospectus:

- a) the content of the current entry in the commercial register, except the information concerning the persons authorized to represent the company;
- b) the current amount and composition of the share capital, including information on the number, par value and type of such shares and the preferential rights of each class of shares;
- c) the provisions set forth in the articles of incorporation regarding an authorized or a conditioned increase of the share capital;

- d) the number of profit sharing certificates, including the content of the rights connected therewith;
- e) the latest annual financial statement and the consolidated financial statement, including the auditor's report and, if the balance sheet dates back more than six months, interim financial statements;
- f) the dividends distributed within the last five years or, if the company was incorporated less than five years ago, all dividends distributed since incorporation;
- g) the resolution on the issue of new shares.

#### **Listing Prospectus**

Further, if those securities shall be listed on the stock exchange, a listing prospectus (which usually is integrated in the issue prospectus) has to be issued. The listing prospectus has, inter alia, to contain the following additional information on:

- a) the issuer, including its annual accounts and auditors' report;
- b) if applicable, the guarantor;
- c) the securities; and
- d) the persons bearing responsibility for the content of the listing prospectus.

#### **Annex to SWX Listing Rules**

The detailed regulations on the content of the listing prospectus are listed in the Annex to the SWX Listing Rules. Such Annex consists of nine schematic overviews which regulate the content required according to various types of securities and issuers, i.e.:

- a) Scheme A – Equity Securities
- b) Scheme B – Bonds
- c) Scheme C – Derivatives
- d) Scheme D – Real Estate Companies
- e) Scheme E – Registration Document for Standard Warrants
- f) Scheme F – Securities Note for Standard Warrants
- g) Scheme G – Registration Document (SWX "EU-Compatible" Segment)
- h) Scheme H – Securities Note (SWX "EU-Compatible" Segment)
- i) Scheme I – Global Depositary Receipts

The various Schemes correspond to a great extent with the relevant rules in the EU.

#### **Investment Companies**

As regards investment companies, among others, the following additional information must be included in the prospectus:

- a) description of the company's business purpose;
- b) description of the investment policy and the procedure to change such policy;
- c) the names of the managing persons or companies, including their professional qualifications, the material terms of their contracts, the duration of their mandates and their remuneration;
- d) accounting methods for investments that are difficult to assess and information on the liquidation of such investments;
- e) disclosure of potential risks and potential conflicts of interest.

**Abridgement of the Listing Prospectus**

Pursuant to article 39 of the SWX Listing Rules, the listing prospectus may be abridged, inter alia, under the following circumstances:

- a) if equity securities of the issuer are already listed and the new equity securities
  - (i) are offered to the holders of the securities already listed on the basis of preferential rights; or
  - (ii) have been made available for the servicing of convertible debt securities or derivative instruments;
- b) if debt securities are issued by an issuer who has already listed equity or debt securities.

**Omission of Specific Information**

Pursuant to article 43 of the SWX Listing Rules, the Admission Board may allow the issuer to omit certain information in the listing prospectus if, among others:

- a) such information is of inferior importance and is not necessary to assess the issuer's assets and liabilities and its financial situation; or
- b) the publication of such information would seriously harm the issuer.

## 12.4 Filing Requirements

The only filing requirement regarding non-listed securities applies to issue prospectuses for new shares. Such prospectuses must be filed with the commercial register office, which, however, does not conduct a material review of the prospectus.

Listing prospectuses for securities to be listed on the SWX must be filed with the Admission Board of the SWX. The Admission Board reviews such prospectuses as to whether they comply with the SWX Listing Rules.

The listing prospectus has to be published at the latest on the day of the listing.

Further, the issuer is required to keep the prospectus up-to-date. If there are material changes to information provided in such prospectus between the publication of the prospectus and the lodging of the listing application, the issuer has to publish this information the same way as is foreseen for the prospectus.

## 12.5 Continuing Disclosure Requirements & Supplementary/ Replacement Prospectuses

The only supplementary/replacement prospectus requirement applies if material changes have occurred between the publication of the (first) prospectus and the filing of the listing application, in which event such material changes must be disclosed in a supplementary prospectus (article 34 (2) SWX Listing Rules).

Other continuing disclosure requirements regarding the prospectus do not exist; with respect to continuing disclosure, Swiss law is restricted to the instruments described on page 11 et seq.

## 13 Offering Securities: Exemptions Available

### Private Offerings

This section covers the exemptions available under the SWX Listing Rules. As to the exemption for private offerings, please see page 15.

The SWX Listing Rules contain both a general “catch-all” exemption provision and several specific exemption rules:

### General Exemption

According to the *general exemption provision* (article 76 of the SWX Listing Rules), the Admission Board may grant exemptions with regard to individual provisions of the SWX Listing Rules if (i) such exemptions are not contrary to the interests of the public, the exchange or other market participants; and (ii) the issuer can show that the purpose of the provisions in question is sufficiently fulfilled by alternative measures.

In practice, the Admission Board is very reluctant to grant exemptions under such general rule. Exemptions are, therefore, in most cases only granted if the relevant conditions of the specific exemption provisions are fulfilled.

### Listing Prospectus

Pursuant to article 38 of the SWX Listing Rules, the Admission Board may grant an exemption from the obligation to publish a listing prospectus, *inter alia*, under the following circumstances:

- a) if the issuer has already published a prospectus which is in compliance with the SWX Listing Rules and if such publication is not more than three months old;
- b) if the securities to be listed are equity securities resulting from a capital increase not exceeding 10% of the registered capital or not exceeding 10% of the current market capitalization of the issuer;
- c) if equity securities are allotted to employees where equity securities of the same class are already listed;
- d) if equity securities to be listed replace equity securities already listed, provided that the issue of the new equity does not involve a capital increase.

### Foreign Issuers

A further important *specific exemption rule* applies to foreign issuers. For details, please see page 8 above.

## 14 Offering Securities for Resale and Secondary Trading: Further Requirements and Exemptions

### Dealer License

Persons who, in a professional capacity, deal with securities on the secondary market, are required to obtain a securities dealer license from the FBC (cf. page 6). As a rule, securities dealers must (i) record all orders received and all trades executed on and off exchange in a journal and (ii) report all transactions conducted in Switzerland in securities admitted for trading on a Swiss exchange to the SWX (articles 1 et seq. FBC-SESTO).

**Secondary Trading**

Apart from the requirements for listing prospectuses discussed in section “Content of Prospectus” on page 17 above, there are no prospectus and disclosure requirements concerning the sale of securities in a secondary trading transaction.

## 15 Special Cases

### 15.1 Employee Share Schemes

Pursuant to article 38(1)(4) SWX Listing Rules, no *listing* prospectus is required if equity securities are allotted to employees, provided that equity securities of the same class are already listed. Such provision does, however, not exempt the issuer from publishing an *issue* prospectus if the allotment qualifies as a public offer in the sense of the CO (see page 15).

Swiss companies may provide in their articles of incorporation for so-called conditional share capital in favor of their employees. Under such mechanism, the share capital of the company is automatically increased if the employees exercise stock options granted to them (cf. articles 653 et seq. CO). Further, the general shareholders’ meeting may cancel the advance subscription rights of the shareholders for new shares if such new shares are allotted to employees (article 652b(2) CO; see also below).

There are only limited tax incentives for employee share schemes.

### 15.2 Rights Issues

**Subscription Rights**

Swiss company law provides that, at the occasion of a capital increase, the existing shareholders are entitled to acquire a portion of the new shares which corresponds to their prior participation (article 652b(1) CO). Such advance subscription right intends to protect the existing shareholders to the extent as their respective interest in the company shall remain the same after the capital increase as it was before. Advance subscription rights are usually negotiable so that shareholders who do not wish to participate in a capital increase are in the position to sell their rights to third parties and thereby to realize a profit.

**Cancellation**

Under specific circumstances, there is a need to sell or convey new shares to persons other than existing shareholders, most typically in takeover transactions where new shares are used as contribution to acquire the target company. For such and similar situations, article 652b(2) CO provides for the possibility of canceling the advance subscription rights of the shareholders prior to the capital increase, provided, however, that nobody shall benefit from, or be discriminated by, such cancellation in an unfair manner. The respective resolution has to be taken by the general shareholders’ meeting with a majority of at least two thirds of the votes represented and the absolute majority of the par value of the shares represented (article 704(1)(6) CO).

## 15.3 Takeovers

The SESTA (articles 22 to 32) and its implementing ordinances (articles 54 and 55 SESTO; articles 24 to 43 FBC-SESTO; TOB-Ordinance passim) contain detailed provisions on public takeovers of companies which are incorporated (or deemed to be incorporated) in Switzerland and whose equity securities are, in whole or in part, listed on a Swiss exchange.

### **Offer: Review and Publication**

Pursuant to such provisions, the bidder has to submit the public takeover offer for review to an auditor recognized by the FBC or a securities dealer who has to give an opinion on whether such offer conforms with the SESTA and the implementing provisions. Subsequently, the bidder has to publish the offer in both a prospectus and two newspapers of national coverage as well as in at least one electronic media disseminating stock exchange information. On the same day, the prospectus has to be submitted to the Swiss Takeover Board.

### **Preliminary Announcement**

In practice, bidders often make use of the so-called preliminary announcement of the offer. This enables them to accelerate the offer process and thereby to put additional pressure on the target company.

After the publication of the offer and a grace period of ten days, which can be eliminated by a preliminary announcement, the offer has to remain open for at least twenty – and a maximum of forty – stock exchange days. This time limit may be reduced by the Takeover Board upon request if (i) the bidder owned the majority of the target's voting rights already prior to the publication of the offer; and (ii) the report of the board of directors of the target is included in the prospectus of the bidder.

### **Supplemental Period**

After the expiration of the offer period, the bidder has to declare whether the offer was successful. In case of a successful offer, the bidder has to grant a supplemental period of ten stock exchange days during which further shareholders may accept the offer, under the same terms and conditions as the shareholders who accepted the offer during the ordinary period. After the expiration of the additional period, the offer has to be completed within another ten stock exchange days.

As to the offer itself, the bidder has to make sure that all shareholders belonging to the same category are treated equally and that the information provided is accurate and complete. Further, the offer may be conditioned, as long as the fulfillment of the conditions does not depend solely upon the bidder's will, and the offer may be amended if such amendment is favorable for the shareholders.

### **Target Company**

As to the target company, the SESTA and the relevant ordinances contain various regulations on defensive measures and on the duties of the board of directors. For example, the board of directors has to publish a report wherein it has to state its position towards the offer. Further, such report has to contain accurate and complete information in order to enable the shareholders to take a fully-informed decision. Moreover, the board of directors is prohibited, as of the day of the publication of the bid, from adopting resolutions that would significantly alter the assets or liabilities of the target, except where the general shareholders' meeting, prior or after the publication of the bid, has authorized the board of directors to implement such measures.

## 16 Other Matters

### **Money Laundering**

Securities transactions may be subject to various provisions dealing with money laundering. Such provisions are contained, among others, in the *Money Laundering Law* of October 10, 1997, the *FBC Money Laundering Ordinance* of December 18, 2002, and the *Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence* between the Swiss Bankers Association and the signatory banks of December 2, 2002.

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