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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixteenth 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 chapters on Indonesia, Monaco and Russia.

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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.

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 editor, Andrew Pitts of Cravath, Swaine & Moore LLP, for his continued assistance with this volume.

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Getting The Deal Through

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LEGAL AND REGULATORY FRAMEWORK

Laws and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The offering of securities by Swiss or foreign issuers in Switzerland is governed by a variety of rather fragmented rules and regulations, the applicability of which depends largely on the specifics of the offering, the securities offered, the issuer and the other parties participating in the offering.

For practical purposes, of most relevance are various provisions set forth in the Code of Obligations (CO), including those providing for the basic prospectus disclosure requirements for public offerings of equity and debt securities, and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) and its implementing ordinances and regulations, such as, in particular, the listing rules adopted by the relevant exchanges. The listing rules are not adopted by the governmental or regulatory authority, but by the relevant exchanges acting as self-regulated bodies entrusted with various supervisory and regulatory functions. The SIX Swiss Exchange (SIX) is by far the most important stock exchange in Switzerland.

If the offered product qualifies as a Swiss or foreign collective investment scheme under Swiss law, then such offering is subject to the requirements and restrictions set forth in the Federal Act on Collective Investment Schemes (CISA) and its implementing ordinances. The offering in or from Switzerland of structured products or notes (such as index- or fund-linked notes) to retail clients is also subject to specific requirements and restrictions under CISA.

The Swiss Financial Market Supervisory Authority (FINMA) is the key supervisory and regulatory authority in the Swiss financial market and, as such, is entrusted with various powers and responsibilities including the licensing and supervision of exchanges, banks, securities dealers (ie, brokers, own-account dealers, issuing houses, market makers and derivatives firms), insurance companies and collective investment schemes. Swiss law differentiates between the public offering of securities and their listing on an exchange. Although a government authorisation, filing or registration is neither required nor possible for the public offering of equity or debt securities, the listing of such securities requires prior filings with, and the authorisation of, the relevant exchange. Within SIX, it is the Regulatory Board that is in charge of admitting the listing of, the suspension of the trading in and the delisting of securities, and ensuring ongoing compliance.

PUBLIC OFFERINGS

Mandatory filings

2 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?

As explained in question 1, Swiss law differentiates between the public offering of securities and their listing. While the public offering of equity or debt securities in Switzerland does not by itself trigger the obligation to submit filings with or seek the approval from a governmental or regulatory authority, this is different with respect to securities to be listed on a stock exchange. Any such listing requires the issuer to submit a listing application together with various annexes (including, in principle, a listing prospectus to the relevant admission board for it to determine whether the listing requirements are met). On SIX, the application must contain various types of information, such as a short description of the securities, the requested date of the first trading day and a declaration that the listing particulars and the listing notice are complete and comply with the listing rules of SIX (the listing rules), and that there has been no material deterioration of the financial condition of the issuer since the publication of the listing particulars. The listing prospectus must contain specific information on the issuer, including its financial statements, the securities and the persons or companies bearing responsibility for the contents of the listing prospectus.

Review of filings

3 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?

If a listing of securities on the SIX is intended, an authorised representative (recognised as a listing expert by SIX) must submit a listing application and all relevant annexes to the Regulatory Board on behalf of the issuer no later than 20 trading days prior to the scheduled listing date or, as the case may be, prior to the start of the book-building period. The listing application and its annexes may be in German, French, Italian or English. The SIX may require further information and explanatory statements as it deems necessary and takes a final or, upon the request of the applicant, a preliminary decision on the requested listing. Debt securities and derivatives are eligible for provisional trading pending the final decision on the application, but are not considered to be listed pursuant to the listing rules during that period. The provisional admission of bonds and derivatives can be processed online (internet-based listing) and, provided that the issuer has been approved by the Regulatory Board, allows trading three business days or, under certain

circumstances as the case may be for derivatives, one day after the listing application is submitted.

Publicity restrictions

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

Except for the obligation to prepare a prospectus in accordance with the relevant provisions in the CO and, with respect to listed public offerings, also in accordance with the listing rules, no publicity restrictions apply to the public offering of equity or debt securities. Publicity restrictions apply, however, to the distribution of foreign collective investment schemes in or from Switzerland to retail clients, which require prior registration with FINMA. The distribution of foreign collective investment schemes exclusively directed at qualified investors does not require prior registration with FINMA but may trigger an obligation to appoint a Swiss representative and a Swiss paying agent depending on the type of qualified investor targeted in Switzerland. Also, restrictions on the ability of underwriters to issue research reports have been introduced by the Swiss Bankers' Association in its Directive on the Independence of Financial Research. The Directive is formally recognised by the FINMA as the minimum standard in the banking industry and is therefore applicable to all Swiss banks and securities dealers. Pursuant to the Directive, the business unit of a bank responsible for financial research must be organisationally, hierarchically, functionally and physically independent from the unit that is responsible for issuing securities or for the bank's investment banking activities. This implies that the investment banking operations and the financial research units of the relevant bank are structured in such a way that other units have no access to privileged information and that any such privileged information is made available simultaneously to the clients. A bank acting as a manager or co-manager in an IPO is barred from publishing research reports on, or releasing recommendations with respect to, the issuer during a certain 'blackout period'.

Secondary offerings

5 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?

Swiss law allows a shareholder to participate in any newly issued equity or equity-related securities (primary offering) pro rata to its existing participation in the share capital of the issuer. The general shareholders' meeting of the issuer may, however, resolve to exclude such pre-emptive subscription rights on particular grounds ('important reasons'), for example, a merger or an acquisition of a business, with the approval of a qualified majority of two-thirds of the shareholder votes and an absolute majority of the nominal values represented at the meeting (the articles of association of the issuer may provide for higher majorities).

If a prospectus has been prepared in a primary or secondary offering, the persons having assisted in its preparation and distribution may become liable based on prospectus liability (see question 19).

Settlement

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

Settlement of on- and off-exchange trades on SIX occurs through SIX SIS Ltd (SIS), Switzerland's central securities depository (CSD). In September 2007, SIX Securities Services Ltd introduced the single central counterparty (CCP) model with SIX x-clear (a wholly owned subsidiary of SIX Securities Services Ltd) acting as CCP for the clearing of most of the trades in clearing-eligible cash equities and ETFs listed and traded on SIX. These services have been extended to cover European equities and ETFs traded under SIX's Liquidnet Service. The 'Swiss value chain' comprises, among others, SIX, SIS x-clear, SIC4 (the updated Swiss interbank clearing system, which was introduced in April 2015 and is operated by SIX Interbank Clearing Ltd) and SECOM (the securities settlement system operated by SIS), and allows full automation and real-time integration of trade, settlement and payment involving central bank funds (SFIDVP – simultaneous, final, irrevocable delivery versus payment). Once SIX has matched buy and sell orders, settlement instructions are sent to the CCP in the case of transactions matched on-exchange and to the appropriate CSD in the case of transactions that have not been cleared. After having verified that the seller's securities account is sufficiently covered, a payment instruction is released to SIC and after receipt of payment has been confirmed, the transfer of the securities is effected from the seller's to the buyer's account.

PRIVATE PLACINGS

Specific regulation

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

Swiss law does not provide for specific rules governing the private offering of equity or debt securities. As a general rule, the private placement of securities in Switzerland does not require a prospectus. A placement is deemed to be private if it is not made to the public (ie, if it is addressed to a limited circle of offerees). While no clear limitation on the permitted number of potential investors to whom securities can be offered by way of a private placement exists under Swiss law, the more conservative view in Switzerland is that an offering directed at or made to 20 or fewer potential investors (irrespective of their sophistication or wealth) qualifies as a private offering under Swiss law. For the purposes of determining the number of potential investors, the number of persons approached is relevant and not the number of persons who eventually purchase the relevant securities. This rule, which is or was used in other areas of Swiss financial legislation, may be viewed as a safe harbour rule. However, in light of the amended EU Prospectus Directive (although not applicable in Switzerland), pursuant to which an offering addressed to fewer than 150 persons per member state does not trigger an obligation to prepare a prospectus, the above-mentioned 20 offeree rule has been criticised as being too stringent. It is at the same time not disputed that the legal concept of a 'limited circle of offerees' has not only a quantitative, but also a qualitative aspect. Arguing that the focus should not primarily be on the number of offerees approached but on the manner in which potential investors are being approached, an offering to more than 20 potential investors should be permissible (without triggering an obligation to prepare a prospectus), provided that: the prospective investors are hand-picked and are being approached on an individual basis (eg, through personal letters or 'by invitation only' presentations); and the offering is directed at or made to a predefined circle of potential investors that share common qualifying criteria that distinguish them from the public at large.

However, this latter approach is still untested, and an offering of equity or debt securities directed at or made to more than 20 potential investors may not, in the present state of law and practice, be considered to be a safe harbour.

Privately placed debt securities issued by a non-Swiss issuer with the participation of Swiss banks or securities dealers are subject to the guidelines of the Swiss Bankers' Association on notes of foreign borrowers. If the issue of the debt securities is governed by Swiss law,

and the securities are denominated in Swiss francs with denominations of 10,000 Swiss francs or more, then the relevant Swiss lead manager is required, pursuant to the guidelines, to prepare a prospectus that complies with the disclosure requirements set forth in the guidelines.

No prior approval of FINMA is required for the offering of shares or interests in a non-Swiss collective investment scheme in or from Switzerland if such offering is directed at and made exclusively to 'qualified investors' (as defined in CISA and its implementing ordinance and guidelines). However, under CISA such offering may trigger regulatory requirements such as the appointment of a Swiss representative and a Swiss paying agent.

The concept of 'qualified investors' encompasses, inter alia:

- financial intermediaries that are subject to a prudential supervision (ie, banks, securities dealers, fund management companies, asset managers of collective investment schemes and central banks);
- supervised insurance companies;
- pension funds with professional treasury management;
- corporate investors with professional treasury management;
- high-net-worth individuals (ie, individuals that are holding, directly or indirectly, a minimum net wealth of 5 million Swiss francs in financial assets or holding a minimum net wealth of 500,000 Swiss francs and having sufficient technical knowledge), provided such individuals or, in the case a private investment structure has been set up for one or more high-net-worth individuals, the person responsible for managing the investment structure, have expressly requested, on a written basis, ('opt-in') to be considered as 'qualified investors';
- investors having entered into a written discretionary asset management agreement, provided that they do not exercise their right to 'opt out' of the 'qualified investors' status and the written discretionary asset management agreement is entered into with a regulated financial intermediary or with an independent asset manager that is subject to anti-money laundering supervision, rules of conduct meeting certain minimum requirements, and the relevant management agreement complies with the directives of a recognised professional organisation (eg, Swiss Bankers' Association guidelines); and
- independent asset managers (if the relevant independent asset manager meets the requirements of the CISA and undertakes in writing to exclusively use the fund-related information for clients who are themselves 'qualified investors').

In contrast, an offering of non-Swiss collective investment schemes that is exclusively directed at, or made to, financial intermediaries that are subject to a prudential supervision (ie, banks, securities dealers, fund management companies, asset managers of collective investment schemes, insurance companies and central banks) or to investors having entered into a written discretionary asset management agreement is not considered a 'distribution' within the meaning of CISA and therefore is not subject to any regulatory requirements whatsoever.

Further, the distribution of structured products in or from Switzerland limited to qualified investors as defined in CISA is not subject to regulatory requirements under CISA; in particular, no simplified prospectus will need to be prepared in connection with such offering.

Investor information

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

Except for specific information and prospectus requirements applicable to privately placed debt securities governed by Swiss law and issued with the participation of Swiss banks or securities dealers pursuant to the guidelines of the Swiss Bankers' Association on notes of foreign borrowers (see question 7), no specific information is required to be made available to potential investors.

Non-Swiss collective investment schemes to be distributed to qualified investors in Switzerland must use fund documentation mentioning the Swiss representative, the Swiss paying agent, the place of jurisdiction and the place where the relevant fund documents are available free of charge. In addition, and in order to comply with the Swiss Funds & Asset Management Association's (SFAMA) guidelines on the distribution of collective investment schemes (the Distribution Guidelines) and the SFAMA guidelines on duties regarding the charging and use of fees and costs (the Transparency Guidelines), certain information on fees and costs as well as on retrocessions and rebates must be disclosed in the relevant fund documentation.

Notwithstanding the above, information submitted to potential investors must be accurate and may not be misleading. If false or misleading statements are made in connection with a private placement, the issuer or the persons involved in preparing the relevant offering documents and the offering may become liable (see question 19).

Transfer of placed securities

9 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?

As explained more fully in question 7, any private offering of securities made with an aim to ultimately offer or distribute the relevant securities to the public is deemed to be a public offering. Otherwise, no restrictions apply to the transfer of securities acquired in private placements. In view of the foregoing, liquidity enhancing mechanisms are not commonly used techniques with respect to private placements in Switzerland.

OFFSHORE OFFERINGS

Specific regulation

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

With regard to offerings of debt securities by foreign issuers in Switzerland, the substantive disclosure requirements for debt securities referred to in questions 2 and 8 also apply to such foreign issuers.

Swiss rules on conflicts of law allow an investor to initiate legal actions for compensation of damages incurred in connection with the public offering of equity (and debt) securities, either under the (foreign) law under which the foreign issuer is organised or the law of the jurisdiction where the offering took place (which is assumed to be Switzerland in this case). Foreign issuers should therefore be advised to ensure that their offering of equity (and debt) securities in Switzerland is, in substance, fully compliant with Swiss disclosure requirements, irrespective of the law by which they are organised or by which the offering is expressed to be governed.

Also, specific listing rules exist for foreign issuers with respect to primary, secondary and dual listings of equity securities. Debt securities and derivatives listed on SIX may be governed by Swiss law or the law of any other OECD country. Upon the request of an issuer, the SIX may under certain conditions admit the laws of other countries as well. Eurobonds are eligible for trading on SIX in the 'international bonds' segment and for certain additional exemptions (eg, an issuer of eurobonds does not have to prepare a listing prospectus and is exempt from compliance with ongoing disclosure requirements provided that the relevant bonds are already listed on an exchange recognised by SIX). With regard to the private placement of debt securities of foreign

issuers governed by Swiss law with denominations of 10,000 Swiss francs or more in which Swiss banks or securities dealers are involved, the guidelines on notes of foreign borrowers issued by the Swiss Bankers' Association (referred to in question 7) are applicable.

PARTICULAR FINANCINGS

Offerings of other securities

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

Swiss law contains few specific rules governing the issue of exchangeable or convertible securities. These rules mostly address the circumstances under which the right of the issuer's shareholders to subscribe for the new securities by preference can be suppressed.

No issuance prospectus needs to be produced for the public offering of derivatives (although a listing prospectus may be required). However, the offering to the public of structured products, such as index- or fund-linked notes in or from Switzerland, requires a 'simplified prospectus', which, inter alia, must describe the key characteristics of the structured product, its profit and loss prospects and the important risks for the investors. Further, structured products within the meaning of CISA may only be distributed to retail clients in Switzerland if they are issued, guaranteed or distributed either by a Swiss bank, securities dealer or insurance company, or a non-Swiss bank, securities dealer or insurance company subject to an equivalent supervision and having an establishment in Switzerland whose duty is to make the relevant prospectus available to investors upon their request. If the non-Swiss issuer, the guarantor and the distributor do not comply with these requirements and, in particular, if none of them have an establishment in Switzerland, the structured products may only be distributed to retail clients in Switzerland through a financial institution regulated in Switzerland. The publication of a simplified prospectus is not required where a listing of the product on a Swiss stock exchange is contemplated.

The SIX has adopted specific rules for the listing of derivatives as well as convertible securities. These rules provide for substantive disclosure requirements with respect to both the derivative and the underlying securities.

UNDERWRITING ARRANGEMENTS

Types of arrangement

12 What types of underwriting arrangements are commonly used?

Fixed-price underwriting is a common form of underwriting arrangement in Switzerland, in particular with regard to debt offerings, and means that the whole issue is bought by the underwriter (or underwriters, in the case of a syndicate) at a fixed price. By contrast, 'soft' underwriting has increasingly become a customary underwriting arrangement for equity offerings, whereby the issue price of the securities is fixed after a book-building process. Arrangements by which the securities to be offered are 'underwritten' on a best-effort basis only are also often used.

Typical provisions

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

The underwriting agreement will typically contain an indemnity clause under which the issuer agrees to indemnify the underwriter against any losses, claims, damages or liabilities to which the underwriter may become subject, insofar as such losses, claims, damages or liabilities arise out of untrue statements or omissions in the prospectus or other materials prepared in connection with the issue, or the breach of representations, warranties and undertakings under the underwriting agreement. Depending on the nature and scope of the indemnification provisions, their enforceability may be limited by compulsory Swiss company law (such as the prohibition of redemption of the paid-in share capital). The underwriting agreement typically contains a clause allowing the underwriter to terminate the agreement in the case of force majeure (which may take the form of a suspension of trading, a moratorium on commercial banking activities, material adverse change to the financial condition of the issuer, material adverse change in international financial conditions, calamity, crisis and others). The underwriting arrangement usually provides for the payment of the fee only in the case of completion of the offering. In addition, the underwriting arrangement usually provides for an incentive fee paid by the issuer in its sole discretion. Finally, the underwriting agreement typically entitles the lead manager of the underwriting syndicate to over-allot and effect transactions in the newly issued securities with a view to stabilising or maintaining the market price of the newly issued securities at a level other than that which might prevail in the open market.

Other regulations

14 What additional regulations apply to underwriting arrangements?

Pursuant to the Act on Stock Exchanges and Securities Trading (SESTA), only firms with a securities dealer licence from FINMA may act as underwriters in Switzerland in a professional capacity unless the underwriting by a non-Swiss bank or securities dealer occurs on a mere cross-border basis.

The acquisition of securities of an issuer already listed on a Swiss exchange by the underwriters under the underwriting agreement is subject to the notification requirements for material shareholdings set forth in FMIA (which are usually met by disclosing the relevant information in the prospectus prepared for the offering), unless the underwriters have been granted an exemption by SIX. Also, underwriters are subject to the Swiss Bankers' Association's Directive on the Allocation of Equity-related Securities Offered by Way of a Public Offering in Switzerland (the Allocation Directive), which sets up minimum standards for the Swiss banking industry and whose purpose is to safeguard fairness and transparency of the allocation of securities in the context of a public offering.

ONGOING REPORTING OBLIGATIONS

Applicability of the obligation

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

Neither the offering and issue of securities of a Swiss or foreign issuer by way of private placement, nor the public offering of non-listed securities triggers by itself ongoing reporting obligations under Swiss law (except for the general obligation of, among others, corporations and limited liability companies to prepare financial statements). Rather, such reporting obligations (including ad hoc publicity) become applicable to the issuer only upon the listing of the relevant securities on a Swiss exchange.

Information to be disclosed

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

Companies incorporated in Switzerland are required to file certain corporate documents with the commercial registry, such as their articles of association and the documents related to certain corporate actions. These documents are publicly available.

Pursuant to the listing rules of SIX, the main duties that an issuer is required to comply with in order to maintain the listing of its securities consist of:

- producing periodic financial statements in accordance with an accounting standard recognised by SIX (in principle, within four months from the close of the relevant financial year);
- notifying specific information to the SIX (in particular certain corporate actions or changes to the terms of the listed securities); and
- disclosing price-sensitive information on an ongoing basis ('ad hoc publicity' rules).

Further, issuers whose equity securities have their primary or main listing on SIX are required to include a corporate governance report in their annual report (including information on their organisation and governance structure) and to disclose to SIX transactions in equity securities (and assimilated instruments) carried out by their board members and senior management (management transactions), which will then be published by SIX on its website. In addition, Swiss companies having equity securities listed on a stock exchange are required to include a remuneration report in their annual report, which contains information relating to the remuneration received by their (current and former) board members and senior management, and to disclose the stakes held by these persons and significant shareholders of the company. Similar rules apply to non-Swiss companies having equity securities listed on the SIX and not in their home jurisdiction.

In addition, if a third party notifies an issuer incorporated in Switzerland and whose equity securities are listed in Switzerland, or an issuer incorporated outside Switzerland and whose equity securities have a primary listing on a Swiss stock exchange, that it has (directly, indirectly or acting in concert with other third parties) acquired or disposed of shares (including certain financial instruments relating to such shares) and thereby reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the issuer's voting rights, the issuer must publish a notice regarding such a shareholding on the electronic platform maintained by the relevant disclosure office, if any, or, in the absence of such an electronic platform, in the Swiss Official Gazette of Commerce and in at least one of the main electronic media specialising in stock market data. The same duty applies if the issuer acquires or disposes of its own shares. Issuers are subject to additional reporting obligations if they are subject to a public takeover offer.

ANTI-MANIPULATION RULES

Prohibitions

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

The main rules prohibiting market abuse are the provisions of FMIA governing insider trading and market manipulation, which provide for both criminal law and regulatory remedies. The regulatory provisions define insider trading and market manipulation in a manner that goes beyond the criminal offences of insider trading and market manipulation set forth in FMIA (eg, no wilful intent is required) and apply to all market participants regardless of whether they are subject to the supervision of FINMA. Because the scope of those regulatory prohibitions is rather wide and also encompasses legitimate behaviour, the implementing ordinance to FMIA (the FMIO) provides for certain exemptions.

Additional rules of conduct are imposed on banks, securities dealers and other financial intermediaries subject to the supervision of FINMA. However, these additional rules of conduct only apply to financial intermediaries subject to the supervision of FINMA, and do not generally apply (subject to certain exceptions) to foreign firms acting in Switzerland on a cross-border basis exclusively.

PRICE STABILISATION

Permitted stabilisation measures

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

FMIO permits certain price stabilisation measures in connection with a public offering of securities. Such stabilisation measures are only permitted if, inter alia, both the contemplated stabilisation period and the securities dealer carrying out the market stabilisation are made public before the relevant securities start to trade, the market stabilisation occurs within 30 days of the offering, the trades in relation with the market stabilisation are made public and are carried out at a price not exceeding the respective issue price, or in the event of a trading with rights or convertible rights at a price not exceeding the relevant market price.

LIABILITIES AND ENFORCEMENT

Bases of liability

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

If there is a public offering of securities, the most common basis of liability is prospectus liability. The present view in Switzerland is that such liability is a liability in tort. Anyone who has participated intentionally or negligently in the preparation or dissemination of a prospectus or a similar instrument containing statements that are untrue, misleading or not in compliance with statutory requirements, is liable to compensate any person who acquires the relevant securities and suffers damage as a result. Improper securities transactions may also give rise to enforcement measures under FMIA and the Financial Market Supervision Act (eg, disgorgement of illicit profits) or criminal prosecution for insider dealing or market manipulation.

Remedies and sanctions

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

Although prospectus liability gives rise to civil litigation, insider dealing and market manipulation may give rise to criminal proceedings against the persons involved. Also, administrative proceedings may be initiated by FINMA, which may give rise to measures such as a suspension of the relevant trader, an injunction from assuming a supervisory function in a regulated firm or a disgorgement of illicit profit. Further measures may be taken against regulated firms, such as a licence withdrawal. Moreover, SIX has disciplinary powers in cases of improper activities in relation to securities listed on its markets and may decide to impose penalties on issuers, participant firms or individual traders.

UPDATE AND TRENDS

Proposed changes

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

The Swiss parliament has adopted a new Financial Services Act (FinSA) on 15 June 2018. It is currently expected that the FinSA and its implementing ordinances will enter into force on 1 January 2020.

The FinSA will introduce uniform prospectus rules, which generally shall apply to all securities offered publicly into or in Switzerland or admitted to trading on a trading platform in Switzerland. The obligation to prepare a prospectus under the FinSA will be triggered by any public offering, be it primary or secondary. Similar to the EU Prospectus Regulation, the FinSA will provide for a number of exemptions from the requirement to prepare a prospectus.

The prospectus rules also provide for an ex ante review and approval process by an independent authority. In addition, the prospectus liability rules that are currently included in the Swiss Code of Obligations will be transferred to the FinSA. Under the FinSA, the intentional disclosure of incorrect information and omission of material information in a prospectus or a basic information sheet will be subject to criminal sanctions. Furthermore, the intentional offering of financial instruments to retail investors without the required basic information sheet will be subject to criminal sanctions.

In 2018, Mt Pelerin Group SA, a Swiss company, broke new grounds by raising capital through a public offering of tokenised shares. Instead of being deposited with custodians, as is the case with traditional publicly traded securities, the shares that Mt Pelerin offered to the public were associated with digital tokens recorded on a blockchain. The transaction was structured based on a tokenisation model adopted by the Capital Markets and Technology Association, a Geneva-based association formed by representatives from Switzerland's financial, technological, legal and audit sectors, and whose purpose is to facilitate the use of new technologies in the field of capital markets. In December 2018, the Swiss Federal Council adopted a report on the legal framework for blockchain and distributed ledger technology (DLT) in the financial sector. The report acknowledges the possibility of creating new capital markets infrastructures in Switzerland to distribute and trade securities by using decentralised ledgers, rather than professional depositaries, as is currently the case. Making use of this potential is bound to be one of the key challenges for Swiss capital markets in the coming years.

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Competition Compliance
Complex Commercial Litigation
Construction
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