Switzerland

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Introduction

Regulatory System

Switzerland, as a federal state composed of 26 cantons, has a division of legislative authority between the federal government and the cantons.[1] The federal government

1 Based on the third revision by Rolf H. Weber, Christian Stambach, and Marc Ryser, this report intends to provide an overview on Swiss securities regulations and to outline some aspects that may be relevant for foreign market participants. Therefore, references to details of legal provisions and to specific scholarly opinions are deliberately avoided for ease of reading. Sources consulted in connection with this chapter include: Bahar, *Derivative Trading under the Federal Act on Financial Markets Infrastructure*, in GesKR (2015); Baker & McKenzie, *The SIX Swiss Exchange Listing Rules*, Stämpflis Handkommentar (2014); Bösch, *Das neue Schweizer Prospektrecht gemäss E-FIDLEG – eine Bestandesaufnahme und erste Würdigung*, in ZSR (2016); Honsell/Vogt/Watter, *Obligationenrecht II*, Basler Kommentar (2016); Kuhn, *Die Regulierung des Derivatehandels im künftigen Finanzmarktinfrastrukturgesetz* (2014); Sethe/Favre/Hess/Kramer/Schott, *Kommentar zum Finanzmarktinfrastrukturgesetz FinfraG* (2017); Bohrer/Rehm/Huggenberger/Spiegel/Emery, in Vogt (ed.), *Finanzmarktrecht – Entwicklungen* (2016); Spillmann/Meyer, FIDLEG – *Prospektregelung*, in Reutter/Werlen, *Kapitalmarkttransaktionen* X (2016); Straub, *SIX Exchange Regulation – Quo vadis?*, in Reutter/Werlen, *Kapitalmarkttransaktionen* XI (2017); Bauen/Bernet, *Swiss Company limited by Shares* (2007); Bauen/Rouiller, *Swiss Banking, An introduction for bank customers and their advisors. Bank Accounts — Banking Contracts — Banking Secrecy — Private Banking – E-Banking (2013)*; Bizzozero/Robinson, *Financial cross-border activities into and out of Switzerland* (2011); Bohrer, *Corporate Governance and Capital Market Transactions in Switzerland* (2005); Bohrer/Kubli, *Mandatory Offer or Opting-out? Guidelines for Companies listed on a Swiss Exchange*, in ST 72 (1998); Bovey/Peter, *Swiss Takeover Board: new and evolving issues*, in SZW (2011); Bühler, *Regulating Corporate Governance following the "Swiss Muesli" Recipe*, in SZW (2013); Daeniker, S*wiss Securities Regulation, An Introduction to the Regulation of the Swiss Financial Market* (1998); Du Pasquier/Fischer, *Cross-border financial services in and from Switzerland – Regulatory frameworks and practical considerations*, in GesKR (2010); Gnos/Hänni, *Acquisitions on the verge of Swiss takeover rules*, in GesKR (2011); Iffland, *Recent developments in securities regulation*, in SZW 71 (1999); Mettier/Zobl, *Switzerland's Stock Exchange Law* (1998); Nobel, *Swiss Finance Law and International Standards* (2002/latest update: 2006); Rehm/Sigismondi, *Ad hoc-Publizität aus Emittentensicht*, in GesKR (2012);

is authorized to enact laws only in the areas specifically enumerated in the Constitution. Given that Switzerland is not a member of the European Union (EU) / European Economic Area (EEA), respective capital market rules and regulations (including prospectus rules) are not applicable in Switzerland.

Capital markets and securities laws fall under the federal legislative authority.[2] In the past, as long as the federal government had not exercised such authority, the cantons were free to regulate stock exchanges; therefore, until 1996, several stock exchanges existed in different cantons. Since then, the main stock exchange activities have been combined, at first, in a civil law association and, subsequently, in a joint-stock company, SIX Swiss Exchange Ltd. (formerly SWX Swiss Exchange Ltd.), conducting the SIX Swiss Exchange (formerly SWX Swiss Exchange), in Zurich. SIX Swiss Exchange Ltd. is a subsidiary of SIX Group Ltd. (formerly SWX Holding Ltd.), which holds other subsidiaries such as SIX x-clear Ltd., SIX SIS Ltd. and SIX Corporate Bonds Ltd., through which clearing and settlement of securities transactions as well as central securities depository services are provided. Most recently, SIX Group Ltd. has announced to reorganize its structure in 2018. Another, less important stock exchange in Switzerland is BX Swiss in Zurich, currently authorized as an institution similar to a stock exchange but not as a stock exchange.

The Swiss regulatory system is based on two pillars, namely, the laws and ordinances of the formal legislator, constituting the legal framework, on the one hand, and the self-regulation of private organizations, on the other hand. The second pillar is of major importance, particularly to the stock exchanges, which are required to ensure that their operations, administration, and supervision are organized in a manner that is adequate for their business activities.

Legal Sources

In General

Following the financial market crisis of 2008 and in parallel to global regulatory efforts such as in the EU and United States, the Swiss legislator made significant

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Röthlisberger, *Disclosure of interests in shares: a comparative analysis United Kingdom – Switzerland* (1998); Röthlisberger/Nägeli, *Defending against a hostile bid: a defence support manual for SWX Swiss Exchange listed companies* (2004); Ryser/Weber, *Bekanntgabeaufschub gemäss Art. 54 KR*, in SZW 84 (2012); Ryser/Weber, *Hedging durch Spitzenkräfte aus börsen- und aktienrechtlicher Sicht,* in GesKR (2010); Weber, *Securities Structuring of a Modern Capital Market: The Swiss Example*, in Goo/Arner/Zhou (ed.), *International Financial Sector Reform: Standard Setting and Infrastructure Development* (2002). English versions of the governing laws and regulations can be found on the SIX Swiss Exchange Regulation's website: https://www.six-exchange-regulation.com/en/home/regulation.html and on the website of the Swiss Takeover Board: *see* http://www.takeover.ch/legaltexts/overview. Information on legal and regulatory developments with particular focus on Swiss capital markets is further provided by the electronic newsletter journal CapLaw: www.caplaw.ch.

2 Swiss Federal Constitution, article 98.

regulatory efforts to ensure a more stable financial market in Switzerland. In this regard, the new Financial Market Infrastructure Act already entered into force early in 2016 (*see below*). In addition, a new Financial Services Act and a new Financial Institutions Act, as of the time of writing, are pending in the Parliament.

While the Financial Services Act must ensure client protection and establish standard rules for providing financial services in Switzerland, including prospectus requirements in connection with a public offering of securities in Switzerland (*see* text, *below*), the Financial Institutions Act regulates the licensing requirements and further organizational conditions for financial institutions providing financial services to third parties. Both acts are expected to enter into force in summer 2019 at the earliest.

New Financial Market Infrastructure Act

The Financial Market Infrastructure Act entered into force on 1 January 2016. The Financial Market Infrastructure Act, which entered into force on 1 January 2016, constitutes the main legal source in the field of securities regulation, replacing to a large extent the former Federal Act on Stock Exchanges and Securities Trading (Stock Exchange Act). The Financial Market Infrastructure Act constitutes the legal basis for the enactment of several ordinances.

With the enactment of the new Financial Market Infrastructure Act and the respective and implementing ordinances, the Swiss legislator issued provisions which regulate the over-the-counter derivatives and which are to a large extent congruent with international standards and, more importantly, with the respective regulatory framework of the EU. In addition to the rules on derivatives trading, the Financial Market Infrastructure Act regulates the organization and operation of financial market infrastructures and the conduct of financial market participants in securities and derivatives trading.

The rules of the Financial Market Infrastructure Act are not only designed to govern and protect the players in the capital market (*i.e.*, financial market infrastructures, participants, issuers, and investors), but also take into account the functions of the financial markets in the economy, together with the Financial Services Act and the Financial Institutions Act. In general, the Financial Market Infrastructure Act contains provisions, in particular with regard to the admission, organization, and operation of financial market infrastructures (such as stock exchanges, multilateral trading facilities, central counterparties, and central securities depositories) as well as conduct duties of financial market participants, but also with regard to the disclosure of acquired or sold important participations in companies listed in Switzerland and the takeover of listed companies. Finally, the Financial Market Infrastructure Act comprehensively regulates trading in derivatives.

The Financial Market Infrastructure Act only regulates transactions on the secondary market. Initially, the legislator decided that the primary market should be left to the rules of the Federal Code of Obligations (Code of Obligations). The rules, currently still in force, are much less transaction-oriented and do not provide for

the same degree of transparency as the provisions of the Financial Market Infrastructure Act. However, the new Financial Services Act will introduce comprehensive regulation of the primary market. The new Financial Services Act will replace the current obligations under the Code of Obligation to issue a prospectus and the respective liability provision by a comprehensive and product-neutral regulation of the prospectus law that will be based on the Prospectus Directive of the EU. The most important ordinances and regulations enacted based on the Financial Market Infrastructure Act are:

- The Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Ordinance);
- The Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Ordinance-FINMA);
- The Ordinance of the Takeover Board on Public Takeover Offers (Takeover Ordinance);
- The Regulations of the Takeover Board; and
- Several Circulars (*Rundschreiben*) of FINMA and of the Federal Banking Commission (one of FINMA's predecessors, virtually all of which are taken up by FINMA Circulars).[3]

Based on its self-regulating competence, the SIX Swiss Exchange enacted a number of other self-regulating rules and directives. The most important rules and directives are:

- The Articles of Association of the SIX Swiss Exchange;
- The Rules of Organization of the SIX Swiss Exchange;
- The Rule Book of the SIX Swiss Exchange;
- The Rule Book of the SIX Corporate Bonds Ltd.;
- The Reporting Rules of the SIX Swiss Exchange;
- The Listing Rules of the SIX Swiss Exchange (Listing Rules);
- The Additional Rules for the Listing of Bonds;
- The Additional Rules for the Listing of Derivatives;
- The Additional Rules for the Listing on Exchange Traded Products;
- The Rules of Procedure of the SIX Swiss Exchange;
- The SIX Swiss Exchange Rules for the Appeals Board (Appeals Board Rules); and
- Several directives, prospectus schemes, and circulars governing the admission of participants, the trading of securities on the SIX, and reporting and disclosure requirements.

3 *See* https://www.finma.ch/en/documentation/circulars/#Order=2.

Moreover, the legal framework for clearing and settlement of securities transactions as well as for the central securities depository comprises, besides provisions of private law as well as the technical regulations of each system, the Federal Intermediated Securities Act (FISA). FISA came into force on 1 January 2010 and introduced a new category of assets called "intermediated securities" (*Bucheffekten*), thereby putting electronic book-entry changes which obviate the need for physical movement of securities — a practice which was already successfully used in Switzerland — on a more solid legal footing.

Investment Funds

The Federal Act on Collective Investment Schemes (Collective Investment Schemes Act), enacted in 2006, regulates the admission, promotion, and activities of Swiss collective investment schemes (*i.e.*, funds whose management is domiciled in Switzerland).

The scope of the Collective Investment Schemes Act covers all forms of collective investments irrespective of their legal status and structure, including collective investment schemes in corporate form (investment companies with variable capital (SICAVs), investment companies with fixed capital (SICAFs), and limited partnerships for collective investments.

Moreover, foreign collective investment schemes organized in whatever form (including corporation) under their respective legislation and which are distributed to non-qualified investors in or from Switzerland fall within the scope of the Collective Investment Schemes Act and may require authorization from FINMA to distribute their certificates in Switzerland.

In 2013, the Collective Investment Schemes Act has been revised in order to bring it into line with EU regulations. Following the revision, a binding subjection obligation under the Collective Investment Schemes Act for the asset managers of foreign collective investment schemes was introduced;[4] as regards foreign collective investment schemes distributed in or from Switzerland solely to "qualified investors", which were hitherto unregulated, these have now to meet certain conditions, including the appointment of a FINMA licensed representative in Switzerland.[5]

In the context of future Swiss financial market regulation, the Act on Collective Investment Schemes will only contain provisions on the creation and authorization of collective investment schemes. In contrast, licensing and supervision of the authorized operators of respective schemes are to be enshrined in the Financial Institutions Act, while the rules of conduct for financial service providers at the point of sale are to be comprehensively regulated in the Financial Services Act.

4 Collective Investment Schemes Act, article 2, al 1.

5 Collective Investment Schemes Act, article 120, al 4, and article 123, al 1.

Other Market Participants

The status of the major market participants (apart from the securities dealers) is governed by specific laws. Banking activities are subject to regulations of the Swiss Federal Act on Banks and Savings Institutions of 1934 (Banking Act), as amended, the primary purpose of the Act being to protect depositors; the secondary purpose being the protection of the banking system as such.

Private insurance business in Switzerland is regulated by the Federal Act on the Supervision of Insurance Companies of 2004, as amended, that aims to protect insured persons. Plans to integrate the regulation of the insurance industry into the Financial Services Act have since been abandoned.

Authorities

The Swiss securities markets and the Swiss banking markets are supervised by FINMA. FINMA has a management structure with a board of directors and an Executive Board. The board of directors of FINMA is composed of seven to nine members, all experts in the relevant subjects and independent from the market participants. FINMA is staffed with approximately 350 qualified professionals; formally, FINMA is constituted as an independent regulatory agency (*öffentlich-rechtliche Anstalt*), and it is not part of the general administration of the government.

The SIX Swiss Exchange is incorporated as a joint stock company in accordance with articles 620 *et seq.* of the Code of Obligations; its management and supervision structure follows general company law rules. The shareholders of its holding company, SIX Group Ltd., are banks and securities dealers. A special supervisory authority, the 'Disclosure Office', dealing with the reporting obligations under the rules on disclosure of shareholdings, has been established.[6]

The tender offer rules are supervised by another special supervisory authority, the Takeover Board,[7] whose task and function are to examine, in each case, whether the concerned offeror or other relevant market participants are acting in compliance with the applicable regulations.

The Takeover Board is composed of (part-time) experts active in the capital market field. It enacts in the form of legally binding decisions, which can be challenged before FINMA. Furthermore, the offering prospectus of the offeror must be examined prior to its publication by a special auditor approved by the Federal Audit Oversight Authority (FAOA) or a securities dealer.[8]

6 Financial Market Infrastructure Act, articles 123 *et seq*.; Financial Market Infrastructure Ordinance-FINMA, article 27; Rules for the Disclosure Office.

7 Financial Market Infrastructure Act, article 126; Takeover Ordinance; Regulations of the Takeover Board.

8 Financial Market Infrastructure Act, article 128.

Procedures

The procedural framework depends on the matter and the authority involved. The procedures for actions before the Takeover Board are with a few exceptions governed by the applicable procedural rules of the Federal Act on Administrative Procedure.[9] Decisions by the Takeover Board can be challenged before FINMA within five trading days. Decisions by FINMA can be appealed to the Swiss Federal Administrative Court.[10]

A further appeal to the Swiss Federal Supreme Court is, subject to certain limited exceptions, no longer possible.[11] Thus, the decision by the Federal Administrative Court is final. The SIX Swiss Exchange and its regulatory bodies apply their own rules (Rules of Procedure; Appeals Board Rules). With regard to the Appeals Board, unless special rules apply, the Federal Act on Administrative Procedure will be applied analogously.[12]

Disputes with the SIX Swiss Exchange and its regulatory bodies, in particular disputes concerning sanctions that have been imposed by the Swiss Exchange Regulation, are decided solely and finally by the Board of Arbitration based in Zurich, and only once internal remedies available at the SIX Swiss Exchange (Sanction Commission, Appeals Board) have been exhausted.[13]

Legal Order and Regulatory Interests

Admission

Market Participants

In General. The main participants in the capital market activities are the financial market infrastructures and the securities dealers. A good number of securities dealers are already licensed and admitted as banks; in such case, the banking license is automatically extended to the securities business.

Domestic Exchanges. The operation of a financial market infrastructure, such as a stock exchange and a multilateral trading facility, is subject to an authorization by FINMA.[14] The authorization is granted to legal entities that fulfil the legal requirements and undertake to ensure an appropriate organization with respect to their activity. In particular, the persons responsible for the administration and management of the financial market infrastructure must enjoy a good reputation and have the specialist qualification required for their function.

9 Financial Market Infrastructure Act, article 139, al 1.
10 Financial Market Infrastructure Act, article 140, al 1, and article 141.
11 Federal Supreme Court Act, article 83 (u), which states that decisions in takeover matters cannot be challenged by way of appeal in matters of public law before the Federal Supreme Court.
12 Appeals Board Rules, article 5, al 2.
13 Rule Book, article 24, al 2.
14 Financial Market Infrastructure Act, article 4, al 1 in conjunction with article 2.

In addition, the qualified participants in a financial market infrastructure (*i.e.*, persons who directly or indirectly control at least 10 per cent of the voting rights or the share capital or who can significantly influence the business activities by other means) must enjoy a good reputation and ensure that their influence is not detrimental to prudent and sound business activity.[15] Furthermore, the financial market infrastructure must be a legal entity under Swiss law and have its registered office and head office in Switzerland.

The acquisition or sale of significant participations in financial market infrastructures may only be made after notification to FINMA. The same applies if a financial market infrastructure establishes, acquires, or closes a subsidiary, branch, or representative office abroad or if it acquires or sells a participation in a company abroad.

Under the (former) Stock Exchange Act, the SIX Swiss Exchange in Zurich as well as the BX Swiss have been granted a license to operate a stock exchange, although BX Swiss is currently licensed as an institution similar to a stock exchange.[16] The BX Swiss is an electronic stock exchange with about 20 mostly mid-size or real estate companies currently listed. Legal entities controlled by foreign persons or organized under foreign law may be admitted to operate a stock exchange in Switzerland, provided that the principle of reciprocity is respected.[17]

Under the former Stock Exchange Act, FINMA authorized SIX Corporate Bonds Ltd. in Zurich as an institution similar to a stock exchange. SIX Corporate Bonds is the credit trading platform of SIX and is likely to be licensed as a multilateral trading facility as defined in the Financial Infrastructure Act in the near future.

Organization. The organization of the so-called trading venues, *i.e.*, stock exchanges and multilateral trading facilities, is governed by the principle of self-regulation (under FINMA supervision), as stated in article 27 of the Financial Market Infrastructure Act.

In particular, a trading venue must establish under FINMA supervision its own regulatory and supervisory organization, appropriate for its activity. These regulatory and supervisory tasks must be carried out by independent bodies whose directors must meet proper business conduct requirements. SIX Swiss Exchange, for example, has enacted respective provisions (*e.g.*, organizational rules and listing requirements; *see above* remarks).

Functions. A trading venue must issue regulations on the admission, duties, and exclusion of participants, thereby observing, in particular, the principle of equal

15 Financial Market Infrastructure Act, article 9.

16 Licences that had been granted prior to the implementation of the Financial Market Infrastructure Act remained valid on condition of submitting a new request for authorization: Financial Market Infrastructure Act, article 159, al 1.

17 Financial Market Infrastructure Act, article 40, al 1 and 2. As opposed to Swiss participants, foreign participants on trading venues did not require new authorization with the new Act coming into force: Financial Market Infrastructure Act, article 160.

treatment.[18] The SIX Swiss Exchange has issued regulations regarding the admission, duties, and exclusion of participants.

Foreign market participants (remote members), *i.e.*, anyone who is not domiciled in Switzerland and who uses financial market infrastructure services, must be authorized by FINMA before accessing a trading venue in Switzerland.[19] FINMA grants such authorization subject to certain circumstances, such as that the remote members are subject to appropriate regulation and supervision, they meet Swiss regulations in terms of equivalent conduct, recording, and reporting requirements, they ensure that their activities are kept separate from those carried out by authorized Swiss entities, the competent supervisory authorities do not object to the participants' activities in Switzerland, and the competent supervisor authorities provide international assistance to FINMA.

FINMA may reject respective authorization if the state in which the remote member has its registered office does not grant Swiss participants actual access to its markets or does not offer them the same competitive opportunities as those granted to domestic trading participants. If an already authorized foreign participant wants to participate in another Swiss trading venue, authorization must be sought from the competent supervisory authority.

The SIX Swiss Exchange has established an internal supervisory and controlling body for complaints raised by securities dealers.[20] The SIX Swiss Exchange issued regulations on the listing of securities (Listing Rules) that must take account of internationally recognized standards and in particular contain provisions on:[21]

- The admission and trading of securities;
- The information to be provided by the listed companies to the investors;
- The duties of the issuer for the entire duration of the listing or admission of securities to trading;
- The obligation, regarding the admission of equity securities and bonds, to comply with the Federal Act on the Licensing and Oversight of Auditors.

These Listing Rules have been amended several times, particularly in 2010, 2011, 2014, 2015, and 2016 to harmonize them with the prevailing European standards as well as to adapt them to the applicable law. The current version dates from May 2017. There are additional listing rules with respect to the listing of bonds, the listing of derivatives, and the listing of exchange-traded products. The SIX Swiss Exchange must monitor compliance with respective regulations and impose sanctions.[22]

18 Financial Market Infrastructure Act, article 34.
19 Financial Market Infrastructure Act, article 40.
20 Financial Market Infrastructure Act, article 37.
21 Financial Market Infrastructure Act, article 35; Financial Market Infrastructure Ordinance, article 33.
22 Financial Market Infrastructure Act, article 35, al 2.

The SIX Swiss Exchange has also issued regulations that are designed to organize the market to achieve efficiency and transparency. Furthermore, the very detailed rules of FINMA on the disclosure of acquisition or sale of important participations (disclosure of shareholdings) are particularly noteworthy.[23] In addition, the Financial Market Infrastructure Act requires that multilateral trading facilities issue regulations on the admission of securities to trading as well as that such multilateral trading facilities monitor compliance with respective regulations and impose sanctions in the event of violations.

Supervision. A trading venue must appoint an independent appeal body to which application may be made if a participant or a security is refused admission, a participant is excluded, or a security is delisted.[24] Subsequent to the appeal procedure, an action may be brought before the civil court. However, FINMA approval is required for the organization, the procedural rules, and the appointment of the members of the appeal body.

An internal supervisory and controlling body, composed of experts in financial market matters, has been established to allow the market participants to file a complaint against actions and decisions rendered by the management of the SIX Swiss Exchange. The final supervision lies with FINMA (*i.e.*, approval of the organization, the procedural rules, and the appointment of the members), with the possibility to appeal certain decisions at the Swiss Federal Supreme Court.[25]

Transnational Electronic Trading Systems. The SIX Swiss Exchange has entered into transnational trading system co-operations, each with its own regulations. SCOACH was a joint venture by the SIX Swiss Exchange and Deutsche Börse AG for the trading of structured products, which was, however, dissolved by mid-2013. Apart from that, SIX Swiss Exchange exited another such transnational trading system when in 2011 it sold its stake in the EUREX derivatives exchange to its joint venture partner, Deutsche Börse AG.

Trading in Other "Goods". Other "goods", generally not associated with capital markets, also are amenable to being traded on an exchange or other established marketplace. One such example is the electronic platform called "Swiss Emissions Trading Registry" for trading carbon dioxide emission credits, which was created under the purview of the Federal Office for the Environment.

Moreover, regarding the field of power derivatives, these are mostly traded on exchanges domiciled outside of Switzerland (such as the European Energy

23 Financial Market Infrastructure Ordinance-FINMA, articles 10 *et seq*.; FINMA-Circular 08/11 on reporting duties with regard to securities transactions; a revised version (FINMA-Circular 2018/2) will enter into force on 1 January 2018.

24 Financial Market Infrastructure Act, article 37, al 1.

25 Financial Market Infrastructure Act, article 37.

Exchange, EEX) which, pursuant to the Financial Market Infrastructure Act, fall under the scope of FINMA in as much as they provide Swiss participants access to their facilities.[26] Furthermore, the Financial Market Infrastructure Act specifically empowers the Federal Council to set up rules concerning the trading of electricity on a stock exchange.[27]

Off-Market Transactions. With the enactment of the Financial Market Infrastructure Act, Switzerland implemented the international standards with regard to over-the-counter derivatives markets, which are based on the G20 summit of Pittsburgh in 2009. The Financial Market Infrastructure Act directly regulates off-market transactions for the first time in Switzerland, based on two (main) obligations.

On the one hand, (in order to control counterparty risks) standardized OTC derivatives must be settled via central counterparties ("clearing obligation").[28] In the event of inadequate standardization, collateral and other risk mitigation obligations apply.

On the other hand, comprehensive disclosure requirements for derivative transactions exist, including a platform-trading obligation (*i.e.*, an obligation on counterparties to trade standardized derivatives via stock exchange or another trading platform).[29] In addition, it must be borne in mind that the Financial Market Infrastructure Act states certain minimum levels as to the purchase price of securities within a compulsory takeover action for the acquisition of the outstanding securities.

In particular, the price offered must be at least as high as the stock exchange price and may not be lower than the highest price paid by the offeror for shares of the target company in the preceding 12 months.[30] Therefore, the off-market purchases of shares prior to a takeover bid should not be made at prices that do not reflect the market situation.

Banks and Securities Dealers. By legal definition, the business of a bank consists of accepting deposits from the public and extending loans on its own account and risk to third parties/entities to earn its income from the spread between the interest paid to the depositors and the interest received by the debtors.

Irrespective of the fact that banks have been pursuing activities in many other areas of the financial sector (*i.e.*, asset management, private equity, or investment banking) for a long time, no separation had existed under Swiss law between the commercial banking and the investment banking business. Consequently, as outlined *above*, most securities dealers in Switzerland are banks. Banking activity

26 Financial Market Infrastructure Act, article 41.
27 Financial Market Infrastructure Act, article 47.
28 Financial Market Infrastructure Act, articles 97 *et seq*.
29 Financial Market Infrastructure Act, articles 112 *et seq*.
30 Financial Market Infrastructure Act, article 135, al 2.

is subject to authorization and supervision by FINMA. The license is granted if the conditions set forth in the Banking Act are met,[31] in particular:

- Organizational requirements – Swiss banks must have a place of business in Switzerland, a fully paid-in capital of at least CHF 10-million, a clearly defined scope of business in the articles of incorporation and, in the by-laws, an adequate internal organization, appropriate risk management procedures, and an effective internal control system (internal inspectorate).[32]
- Directors, managers, and qualifying shareholders – The Banking Act explicitly requires that directors and managing officers of a Swiss bank must have a good reputation and offer assurance of a proper business conduct. When interpreting the term 'proper business conduct', FINMA exercises a high degree of discretion. Likewise, so-called "qualifying shareholders" of a bank holding 10 per cent or more of the capital or the voting rights also are (similar to the regulations of the EU) subject to the test of 'proper business conduct'.[33] The Banking Act relies on the principle of strict separation between the management and the board of directors, thus aiming at a supervision of the management within the corporate organization.
- Particularities for banks controlled by foreign shareholders – A bank domiciled in Switzerland is considered to be under foreign control if one or more foreigners directly or indirectly hold qualifying shareholdings exceeding 50 per cent of the voting rights or if foreigners exercise a controlling influence on the bank otherwise.[34] The Banking Act makes it clear that a foreign bank incorporating a subsidiary in Switzerland must be aware of the fact that such subsidiary is subject to Swiss banking supervisory rules.[35] In particular, the license will be granted to a foreign-controlled subsidiary if the home country of the foreign bank grants reciprocal treatment to Swiss banks establishing banking operations under its jurisdiction, the foreign-controlled bank is not choosing a corporate name suggesting that the bank is controlled by Swiss persons, the foreign-controlled bank is complying with the information rules of the Swiss National Bank and, in case of a financial conglomerate, an adequate supervision on a consolidated basis is ensured.[36] Special rules apply if a foreign bank envisages to establish a branch or a representative office in Switzerland. In particular, FINMA will look at the supervision of such bank in its home country and the existence of reasonable internal rules defining the organization and the scope of business of the entity in Switzerland. The Banking Act also allows foreign-controlled banks in Switzerland to make data available to the foreign parent company without violating Swiss banking secrecy rules, to the

31 The conditions for obtaining a license as a bank will in the future be set forth in the Financial Services Act, which is expected to enter into force in summer 2019 at the earliest.

32 Banking Act, article 3, al 2(a) and (b); Banking Ordinance, articles 9 *et seq*. and articles 15 *et seq*.

33 Banking Act, article 3, al 2(c) and (c^{bis}); Banking Ordinance, article 8.

34 Banking Act, article 3^{bis}, al 3.

35 Banking Act, article 2, al 1(a).

36 Banking Act, article 3^{bis}; Banking Ordinance, article 19.

extent that such disclosure is strictly necessary for the purposes of a consolidated supervision.[37] Finally, it is important to note that the Financial Market Supervision Act, as amended, with regard to international consolidated supervision, allows foreign supervision agencies to operate controls in loco over Swiss subsidiaries of foreign banks that are subject to their jurisdiction.[38]

- Financial Soundness Rules/Accounting and Auditing – Swiss banks must provide for an adequate proportion between their equity as well as their total liabilities and their liquid assets, easily marketable assets, and their short-term liabilities. In this respect, the Banking Ordinance and the Capital Adequacy Ordinance provide for detailed capital adequacy requirements that are mainly the result of negotiations within the Basle Committee on Banking Supervision, as well as for detailed accounting and consolidation rules that apply in addition to the accounting and consolidation rules set forth under Swiss corporate law. The international rules on bank capital – known as Basel III – have been adopted into the Capital Adequacy Ordinance (and accompanying FINMA circulars) and entered into force on 1 January 2013 with transitional deadlines in line with the international framework. Moreover, enhanced capital, liquidity, and organizational requirements applicable to systemically important banks have been introduced.[39] The financial statements of a bank are subject to specific reviews by qualified auditors requested by law to assist FINMA in its supervisory activity.[40] Therefore, the auditors' reports for banks are generally much more detailed than those for other corporations. This system, however, may lead to potential conflicts of interest, the auditors having a duty of faithful and careful performance of the auditing mandate towards their client. Effective as of 1 September 2012, FINMA's competencies concerning the supervision of financial audits of listed banks have shifted to the FAOA.

The ordinance to the Stock Exchange Act defines various categories of securities dealers, namely:[41]

- Underwriters (making primary offerings of securities to the public on a professional basis);
- Derivatives firms (creating and offering derivatives to the public on a professional basis); and
- Broker-dealers, constituting three sub-categories, these being dealers trading on their own account, market makers, and brokers buying and selling in their own name but for the account of third parties.

To achieve an equal treatment among the market participants, the requirements for obtaining the securities dealer license are similar to those for obtaining a

37 Banking Act, article 4*quinquies*.
38 Financial Market Supervision Act, article 43.
39 Banking Act, articles 7 *et seq*.
40 Banking Act, article 18.
41 Stock Exchange Ordinance, articles 2 *et seq*.; Stock Exchange Act, article 2(d).

banking license,[42] although the law provides for some differences: The minimum capital requirement of securities dealers amounts to CHF 1.5-million (instead of CHF 10-million for banks).[43] Furthermore, securities dealers must observe the rules of conduct issued by the Swiss Bankers' Association with regard to the duties of information, of due diligence, and of loyalty towards the customer. Even though the Stock Exchange Act does not specifically require strict separation between the board of directors and management, FINMA has established a practice making this separation necessary, unless the organization is so small that a separation is not feasible.

Securities

Listing Rules and Additional Rules. The admission of securities to the trading on the SIX Swiss Exchange is governed by the Listing Rules of the SIX Swiss Exchange and its supplementary provisions. Additional listing rules with respect to the listing of bonds, the listing of derivatives, and the listing of ETPs exist.

Moreover, there are specific rules concerning the admission of international equity securities to trading in the SIX Swiss Exchange-Sponsored Foreign Shares segment, the admission of international bonds to trading on the SIX Swiss Exchange, and for the trading in delisted bonds on the SIX Swiss Exchange.

Regulatory Standards. On the SIX Swiss Exchange, the following, recently amended, regulatory standards can be distinguished (source: SIX Exchange Regulation):

International Reporting Standard. The International Reporting Standard is comparable with the former Main Standard and is used for listing of equity securities for companies using either IFRS or US GAAP. Respective listing requirements are set out in the Listing Rules and the Additional Rules. Foremost among these are requirements regarding the size and liquidity of issuers and stringent transparency requirements with which issuers must comply.[44]

Swiss Reporting Standard. The Swiss Reporting Standard serves as a means for listing equity securities of companies that have considered their reporting under IFRS or US GAAP as unsuitable and, thus, have decided to opt for a less strict standard, namely, Swiss GAAP FER or the Banking Act's accounting standard. The Swiss Reporting Standard particularly accommodates companies with local significance or a limited circle of investors, such as family-owned enterprises and certain international companies. Compared to the abolished Domestic Standard,

42 Stock Exchange Act, article 10.

43 Stock Exchange Act, article 10, al 2(b); Stock Exchange Ordinance, article 22, al 1.

44 Admission to the International Reporting Standard is governed by articles 10 *et seq*. of the Listing Rules.

the Swiss Reporting Standard is characterized by significantly higher requirements, largely identical to the International Reporting Standard (*e.g.*, minimum equity or minimum free float requirements).[45]

Standard for Investment Companies. Equity securities issued by investment companies are listed according to their own regulatory standard. Investment companies are joint-stock companies whose main purpose is the investment in collective investment schemes and thus earning yields and/or capital gains. They do not perform a commercial activity in the literal sense. Such companies can be compared with investment funds in regards to their investment strategy, but they are organized under company law.[46]

Standard for Real Estate Companies. Real estate companies are governed by their own regulatory standard. A company qualifies as a real estate company if it continually draws at least two-thirds of its revenue from real estate-related activities, specifically from rental or lease income, income from revaluations or sales, or from real estate services.[47]

Standard for Global Depository Receipts. The standard for global depository receipts serves as a means for listing global depository receipts (GDRs). GDRs are tradable certificates which are issued in lieu of deposited equity securities and enable the (indirect) exercise of the membership and proprietary rights attached to such deposited equity securities (the "underlying equities").[48]

Standard for Collective Investment Schemes. The listing of units (or shares) of domestic or foreign collective investment schemes that, pursuant to the Federal Act on Collective Investment Schemes, are subject to the supervision of FINMA is governed by articles 105 *et seq*. of the Listing Rules.

Standard for Bonds. Bonds (including conversion and warrant bonds) are listed in accordance with the Standard for Bonds.[49] In conjunction with the listing of bonds, the issuer has the option to make use of the procedure for provisional admission.

Standard for Derivatives. The Derivatives Standard serves as a means for listing derivatives.[50] Generally speaking, derivatives are financial instruments, the value of which is based on the price of the underlying securities or reference rates.

45 Admission to the International Reporting Standard is governed by articles 10 *et seq*. of the Listing Rules.
46 Listing Rules, articles 65 *et seq*.
47 Listing Rules, articles 77 *et seq*.
48 Listing Rules, articles 90 *et seq*.
49 Additional Rules Bonds; Rules for the Admission to Trading of International Bonds on SIX Corporate Bonds.
50 Additional Rules Derivatives.

Similar to bonds, derivatives may first be provisionally admitted to trading before being listed and the respective applications are submitted via Internet Based Listing.

Standard for Exchange Traded Products (ETPs). The Standard for ETPs serves the listing of collateralized, non-interest-paying bearer debt securities (debentures), which are issued as securities and are sold and redeemed in the same structure and denominations on a continuous basis.[51] In addition, ETPs replicate the price trend of an underlying instrument, either unchanged or leveraged (tracker certificate).

Admission and Maintenance Criteria. Depending on the regulatory standard, differing criteria with regard to admission and maintenance of listing must be observed.

National Treatment and Reciprocity. The Listing Rules do not make any substantial distinction as to whether the issuer of securities is a domestic or a foreign entity. A foreign issuer need only provide documentary evidence that it is validly organized and existing under its own legislation and that the securities to be traded have validly been issued under the applicable law.

Issuer Requirements. The Listing Rules establish minimum requirements for the issue of securities on the SIX Swiss Exchange listed under the International Reporting Standard. The issuer must have existed as a company for a minimum of three years (track record) and presented its annual accounts for the three complete financial years that precede the submission of the listing application (financial record).[52]

This requirement is intended to show to the investors whether the course of business of the issuing company is stable or whether its business results are subject to large unforeseen fluctuations from year to year. The SIX Swiss Exchange, however, allows exemptions to this rule, if such exemption is in the interest of the issuer or the investors and if the issuer represents that the investors have been provided with all information necessary to form a well-founded decision on the investment.[53]

In this context, the SIX Swiss Exchange may require that additional information be included in the listing particulars.[54] Provided the above-mentioned conditions are fulfilled, the SIX Swiss Exchange may grant an exemption from the 'Three Years Rule' to banks or securities dealers subject to the supervision of FINMA or an equivalent foreign supervisory authority.

51 Additional Rules Exchange Traded Products and Additional Rules Derivatives.

52 Listing Rules, articles 11 *et seq.*; Directive on Exemptions regarding Duration of Existence of the Issuer (Track Record); Directive on Financial Reporting; Directive on Presentation of a Complex Financial History in the Listing Prospectus.

53 Directive Track Record, article 2.

54 Directive Track Record, article 2.

The net equity of the issuer must, on the first day of trading, amount to at least CHF 2.5-million. If the issuer is the parent company of a group, this requirement refers to consolidated capital resources. The SIX Swiss Exchange may establish stricter requirements for issuers, particularly with respect to supervision by the authorities, as well as to capital resources and the evidence thereof.[55] Accordingly, for issuers of derivatives, bonds, ETPs, and collective investment schemes, the SIX Swiss Exchange requires a minimum capital of CHF 25-million and CHF 100-million, respectively.[56]

If the issuer is a state, a municipality, or any other public sector body, the requirements must be fulfilled by analogy. It is possible that a third party fulfils certain listing requirements in lieu of the issuer if such third party provides a guarantee commitment with respect to the obligations associated with the securities. In such case, the listing prospectus also must contain information about the guarantor.[57]

The SIX Swiss Exchange has established special rules for certain categories of issuers. Investment companies (*i.e.*, companies with the purpose, either exclusively or at least as their principal activity, of generating yields and/or capital gains, without pursuing active entrepreneurial activities) are exempted from complying with the requirements to have been in existence, and to present annual accounts, for at least three years.[58]

Investment companies incorporated abroad, not obliged to apply for an authorization to trade under the Swiss Investment Fund Act, must show that investors are able to similarly exercise their participation and property rights as under Swiss company law.[59] Real estate companies (companies which earn at least two-thirds of their income from real estate activities, i.e., from rental or lease income or from real estate services) also are exempted from complying with the 'Three Years Rule'.[60]

Companies listed on the SIX Swiss Exchange under the special provisions for young companies are characterized by their purpose of opening up new markets for their products, utilizing innovative technologies, or developing new products or services. These companies must produce audited financial accounts for a minimum of one full fiscal year.[61]

The applicant must provide evidence that he himself and any of his shareholders, including members of management, who, prior to the placement of their securities, directly own more than three per cent of the issuer's outstanding share capital or control more than three per cent of the voting rights of the issuer, jointly

55 Listing Rules, articles 15 *et seq*.
56 Additional Rules Derivatives, article 5; Additional Rules Bonds, article 5; Additional Rules Exchange Traded Products, article 4; Listing Rules, article 108.
57 Directive on Guarantee Commitments.
58 Listing Rules, article 66; Directive Track Record.
59 Listing Rules, article 68; Directive on the Listing of Foreign Companies.
60 Listing Rules, article 78; Directive Track Record.
61 Listing Rules, article 11, al 2; Directive Track Record, articles 3(3) and 7 *et seq*.

and severally agree not to sell any of their equity securities within six and 12 months, respectively, subsequent to the first trading day of the securities being placed (lock-up undertaking).[62]

Securities Requirements. Equity securities listed under the (International and Swiss) Reporting Standards must be issued in accordance with the law to which the issuer is subject to and correspond to the provisions validly applicable on the issue of such securities. The SIX Swiss Exchange issued provisions with respect to the applicable law and the place of jurisdiction of debt securities and derivatives to be listed on the SIX Swiss Exchange, thus taking account of the practice on international markets.[63]

Under respective provisions, debt securities and option conditions must no longer be subject to Swiss law and it is no longer required that investors have the right to sue the issuer in Switzerland with respect to their contractual relationship. However, the issuers must provide for an alternative place of jurisdiction in the country the laws of which govern the securities. The requirement of a place of jurisdiction in the country to whose law the terms of the securities are subject can be derogated in case of securities issued by public sector issuers, provided that national law requires a domestic place of jurisdiction for a public sector issuer and the issuer waives its legal immunity in terms of due process and enforcement law in the framework of the applicable law.[64]

The fact that the debt securities are subject to foreign law and a foreign place of jurisdiction must be stated in a prominent place in the listing particulars. If these circumstances imply special legal consequences for investors that are different from usual market practice in Switzerland, they need to be clearly disclosed.[65]

Substantive Requirements. Distribution of equity securities listed under both (International and Swiss) Reporting Standards among the public ("free float") must, at the latest by the time of listing, have reached a level at which proper market trading can be expected to take place. An adequate level of free float is considered to have been reached if at least 20 per cent of the issuer's outstanding equity securities of the given category are in the hands of the public and the capitalization of those securities in public ownership amounts to at least CHF 25-million[66] — for issuers of the previous Domestic Standard, this means an increase of CHF 20-million. These provisions apply in case of equity securities to be listed for the first time. The nominal value of a debt issue must amount to at least CHF 20-million;[67] the minimum capitalization requirement for ETP is CHF 1-million; and an identical provision for derivatives was cancelled.[68]

62 Directive Track Record, article 10, al 1.
63 Listing Rules, articles 17 *et seq*.; Directive on the Form of Securities.
64 Additional Rules Bonds, articles 6 *et seq*.
65 Additional Rules Bonds, article 14, al 3; Prospectus Scheme E – Bonds.
66 Listing Rules, article 19; Directive on the Distribution of Equity Securities.
67 Additional Rules Bonds, article 10.
68 Additional Rules Exchange Traded Products and Additional Rules Derivatives.

Tradability and Servicing. Securities must be tradable. Securities whose transfer is subject to approval or securities that are subject to sales restrictions may be listed if their tradability is guaranteed and there is no risk to the fulfilment of a transaction.[69] The issuer must ensure that services pertaining to dividend, interest, and capital payments, as well as all other normal administrative duties, including the receipt and handling of exercise notices for derivatives, are provided in Switzerland.

The issuer may assign these duties to a third party if such party has the required professional and technical capabilities available in Switzerland. The party must be a bank or a securities dealer, subject to supervision by FINMA or the Swiss National Bank.[70] Equity securities of an issuer incorporated in a third state which are neither listed in that state nor in the state in which a majority of its shares are held may only be listed if it can be proven that the absence of a listing in such state is not due to non-fulfilment of investor protection regulations.[71]

Convertible debt securities may be listed if the equity securities to which they relate have already been admitted to the SIX Swiss Exchange or to another regulated market, or are being admitted at the same time. The SIX Swiss Exchange may waive this requirement if it is satisfied that the information necessary for investors to reach an informed assessment of the value of the underlying equity securities is accessible.[72]

In 2016, SIX Corporate Bonds Ltd. enacted new Rules for the Admission to Trading of International Bonds, *i.e.*, bonds denominated in USD, EUR, or GBP. International bonds may be admitted to trading on SIX Corporate Bonds, if (a) they have an issue volume of at least 250-million and a minimum trading volume of 1-million in their respective currency of denomination, (b) the principal terms of the issue are publicly available, and (c) transactions may be settled through a settlement house recognized by SIX Corporate Bonds.[73] Issuers of international bonds are neither obliged to publish a prospectus nor to report on a regular or ad-hoc basis nor to provide this or other information to SIX Corporate Bonds or to SIX Exchange Regulation, in connection with the admission to trading. [74]

Conditions for Listing Foreign Shares. For the listing of foreign original shares, the deliverability in Switzerland of the legally certificated securities must be ensured.[75] For the safekeeping of such securities in the home country of the issuer, the following conditions need to be met in order to fulfil the 'deliverability requirement.'

69 Listing Rules, articles 21 *et seq*.; Trading Guides SIX Swiss Exchange, Rule Book.
70 Listing Rules, article 24.
71 Listing Rules, article 25; Directive on the Listing of Foreign Companies.
72 Additional Rules Bonds, article 11.
73 Rules for the Admission to Trading of International Bonds on SIX Corporate Bonds AG, articles 5 *et seq*.
74 Rules for the Admission to Trading of International Bonds on SIX Corporate Bonds AG, articles 9 *et seq*.
75 Listing Rules, article 23; Rule Book; Directive on the Listing of Foreign Companies, article 26.

The original shares are to be held in safekeeping at the national clearing organization with which SIX SIS Ltd. (formerly SIS Sega-Intersettle Ltd.) has direct connections. If no such national clearing organization exists in the home country or if a direct connection with SIX SIS Ltd. is impossible to be established for other reasons (primarily of a legal or technical nature), the SIX Swiss Exchange will rule on the matter on a case-by-case basis. The individual delivery of original shares to Switzerland must be ensured; the associated costs may not be prohibitively high and delivery time may not be too long.

Prospectus Requirements. The obligation to publish a prospectus is currently undergoing a significant change compared to the previous (still applicable) regulation. In contrast to the current rules, whereby the prospectus requirement is virtually merely based on the listing regulations of the respective stock exchange and only covers the issue of certain product types (accordingly, there is no general obligation to publish a prospectus for derivatives), the introduction of the Financial Services Act represents a new and much broader two-stage process: respective process not only affects the listing on the stock exchange but also comprises the prospectus preparation and examination in accordance with the Financial Services Act.

The Listing Rules of the SIX Swiss Exchange contain detailed provisions regarding the contents of the prospectus to be published in connection with the issue of equity or debt securities as well as derivative products.[76] In particular, the prospectus must contain information on the issuer, including its annual accounts and auditors' report, and on the guarantor (if any), on its corporate bodies and the business relations therewith (including stock option plans), on its business activity and investment policy, on its capital and the rights attached to the respective securities, on the securities to be issued, and on the persons or companies bearing responsibility for the contents of the listing prospectus.

The listing prospectus may not contain inflammatory or promissory representations. Detailed annexes to the Listing Rules (prospectus schemes) show the information to be provided in the prospectus in case of issued equity, debt, derivate securities, and ETPs. The SIX Swiss Exchange has established special requirements as to the contents of the prospectus for certain types of issuers. For example, investment companies and real estate companies are obliged to include a detailed description of their investment policy.[77] Furthermore, the information that the listing prospectus must contain depends on the regulatory standard under which the securities are listed.[78]

The listing prospectus may be published in German, French, Italian, or English and must be made available free of charge by the applicant in printed form at the

76 Listing Rules, articles 27 *et seq*.; Prospectus Schemes A – G; Directive on Financial Reporting; Directive on Presentation of a Complex Financial History in the Listing Prospectus.

77 Prospectus Schemes B – C.

78 Prospectus Schemes A – G.

issuer's head office as well as at those financial institutions that are placing or selling the securities (lead banks). Alternatively, the listing prospectus also may be published in electronic form on the issuer's website and possibly on the websites of the lead banks, in which case investors must have the right to download the listing prospectus free of charge.[79]

The listing prospectus must be published no later than the day of listing. If material changes are made to the information included in the listing prospectus or in any equivalent document between the date of publication and the day of listing, investors must be notified of such changes by means of an "Official Notice".[80]

Corporate Governance. The Financial Market Infrastructure Act and SIX Swiss Exchange-Directive on Information relating to Corporate Governance as well as the Banking Act and various FINMA-Circulars[81] contain various corporate governance rules (see above remarks) constituting a prerequisite for the granting of the license.

In addition, general corporate law provides for certain non-transferable duties of the board of directors of Swiss companies, in particular the ultimate management of the company and the organization of its financial control.[82] In 2013, the Swiss had decided in a nation-wide vote to amend the Constitution as proposed by a constitutional initiative (the so-called "Minder Initiative"). The Minder Initiative toughened the formal corporate governance regime for listed companies and establishes rules concerning say-on-pay:[83]

- The aggregate compensation of the board of directors and the senior management became subject to the approval of the general meeting of shareholders;
- The severance payments (golden parachutes), advance payments, and similar extraordinary payments to directors or senior managers, as well as multiple contracts between directors and senior managers and group companies, are prohibited;
- The articles of association must include rules for directors and senior managers on loans, retirement benefits, incentive and participations plans, and the number of positions outside the group;
- The chairman of the board, the board members, the members of the board's compensation committee, as well as the independent proxy must be elected annually by the general meeting; and
- The companies are no longer allowed to act as corporate proxies and need to allow shareholders to cast their votes electronically from a remote location.

79 Listing Rules, article 30.
80 Listing Rules, articles 31 and 33.
81 FINMA-Circulars 2017/01 "Corporate governance – banks", 2008/21 "Operationelle Risiken – Banken"; and 2010/01 "Remuneration Schemes".
82 Code of Obligations, article 716a, al 1.
83 Federal Constitution, article 95, al 3.

As a result of the constitutional amendment, a say-on-pay bill must be drafted and passed by the legislator. Before (and subject to) the enactment of the bill into law (a consultation proceeding is currently being held on such draft bill), the Federal Council issued an implementing ordinance so that the new constitutional principles became effective as soon as possible. The draft ordinance on the Minder Initiative became effective on 1 January 2014.

The rules on the election of the Chairman, the other members of the Board, and of the compensation committee had to be complied with from 2014 at the first ordinary general meeting.

The companies' articles and organizational regulations had to be amended within two years following the entry into force of the ordinance. Proper say-on-pay regimes covering fixed compensations had to be in place at the second general meeting following the entry into force of the ordinance and say-on-pay for variable compensation applied for the first business year beginning after the entry into force of the ordinance in 2014.

Listing Procedure. The listing procedure in respect of any kind of securities is regulated in the SIX Swiss Exchange Listing Rules.[84]

Listing Application. A listing application must be submitted to the Regulatory Board of the SIX Swiss Exchange at least 20 trading days prior to the intended listing date. This application must be submitted in writing by a person considered by the Regulatory Board of the SIX Swiss Exchange to be experienced (recognized representative).[85]

If the issuer does not employ a person with sufficient experience, the issuer must be represented by such an experienced person, usually a bank or a law firm. The listing application must include a short description of the securities, a request regarding the planned first trading day, a reference to the enclosures to the application required by the Regulatory Board as well as a declaration (issuer declaration) that:

- The responsible bodies of the issuer are in agreement with the listing;
- The listing prospectus and the "Official Notice" are complete;
- There has been no material deterioration of the issuer's financial position (*e.g.*, assets and liabilities or profits and losses) since the publication of the listing prospectus; and
- The issuer has taken note of the disclosure requirements and the sanctions' system under the Listing Rules and is prepared to subject itself to the

84 Listing Rules, articles 42 *et seq*.; Directive on the Procedures for Equity Securities; Directive on the Procedures for Debt Securities; Directive on the Procedures for Exchange Traded Products.

85 Listing Rules, article 43; Directive on the Recognition as Competent Issuers and Representatives.

procedures and decisions of the regulatory bodies of the SIX Swiss Exchange.[86]

The issuer must sign a separate declaration of consent in which it acknowledges the SIX Swiss Exchange's legal foundations and, specifically, its arbitration clause.[87] Furthermore, the application must be accompanied by several annexes that are required by the Regulatory Board, namely:

- Listing prospectus or equivalent document;
- Duly signed issuer declaration (as described above);
- Where necessary, duly signed declaration that the SIX SIS Ltd. Printing Regulations have been maintained (if applicable) or a photocopy of the global certificate;
- An "Official Notice";
- Copy of the current extract from the Commercial Register;
- Copy of the articles of incorporation;
- Declaration by the lead manager of the issuer that the securities are sufficiently distributed among investors; and
- Evidence from the issuer that articles 7 and 8 of the Federal Act on the Admission and Oversight of Auditors (FAOA) are fulfilled (copy of the appropriate entry on the website of the Federal Audit Oversight Authority).[88]

The SIX Exchange Regulation may require explanatory statements and further information. If the application complies with the Listing Rules, the SIX Swiss Exchange Regulation must approve the application.[89]

Provisional Admission to Trading. Debt securities and derivatives (but not shares) intended for listing may be admitted provisionally to trading. In its application, the issuer must describe the securities and provide an assurance that all listing conditions have been fulfilled, that the securities are structured in a way that has already been approved by the Regulatory Board, and that a listing application will follow. If the application for the listing is not lodged within two months from the start of trading, the admission to the provisional trading automatically lapses.[90]

86 Listing Rules, articles 44 *et seq.*

87 Listing Rules, article 45(4); Additional Rules for the Listing of Bonds, article 17(3); Additional Rules for the Listing of Derivatives, article 24 (3).

88 Directive on the Procedures for Equity Securities, article 5 and Annex 1; Directive on the Procedures for Debt Securities, article 4; Directive on the Procedures for Exchange Traded Products, article 4; Directive on the Listing of Foreign Companies, articles 17 *et seq*.

89 Listing Rules, article 47, al 1.

90 Directive on the Procedures for Debt Securities, articles 11 and 21 *et seq.*; Additional Rules for the Listing of Derivatives, article 32 *et seq*; Additional Rules for the Listing of Bonds, articles 26 *et seq*.

Foreign Issuers. For equity securities of foreign issuers that are traded on an official stock exchange with equivalent listing provisions in the home country, the Regulatory Board of the SIX Swiss Exchange has issued in a special directive general exemptions from particular obligations contained in the Listing Rules. Foreign issuers may choose between primary and secondary listings.[91]

Regular, Periodic, and Ad Hoc Disclosure

Regular Reporting Obligations

The stock-exchange regulations provide for regular reporting obligations within the context of maintaining a listing.[92] These reporting obligations are intended to ensure that the technical and administrative information on listed securities are made available by the issuer to the SIX Swiss Exchange and the market participants in a timely manner and suitable form.

The SIX Swiss Exchange has issued a Directive, which sets out the reporting requirements for equity and debt securities and derivatives as well as collective investment schemes, in order to make the technical and administrative work involved with the reporting requirements easier for issuers.[93] As of 2009, the SIX Swiss Exchange operates a reporting platform called CONNEXOR and, as of 1 April 2013, issuers of equity securities with their primary or main listing on the exchange are obliged to use CONNEXOR reporting.[94]

Periodic Disclosure

Financial Statements and Accounting Principles. Under Swiss corporate law, listed companies must publish their annual report, including business report and (audited) annual financial statements, in accordance with generally accepted accounting principles. If the company is listed on the SIX Swiss Exchange, these documents must be filed with the SIX Swiss Exchange within four months after the end of every financial year, too. Issuers of listed equity securities are obliged to publish semi-annual financial statements.[95]

In addition, the annual report must be made available in electronic form on the website of the issuer for five years after its publication.[96] Companies listed on the SIX Swiss Exchange must observe either IFRS or United States GAAP for

91 Directive on the Listing of Foreign Companies, in particular article 4.
92 Listing Rules, articles 49 *et seq*.
93 Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes; SIX Exchange Regulation guideline on the Directive Regular Reporting Obligations of 9 November 2015; with regard to Exchange Traded Products, see: Additional Rules for the Listing of Exchange Traded Products, articles 20 *et seq.* and its Annex.
94 Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes, article 9.
95 Listing Rules, articles 49 *et seq.*; Directive on Financial Reporting.
96 Directive on Financial Reporting, article 13.

most of the Reporting Standards or Swiss GAAP FER for the Swiss Reporting Standard (for smaller Swiss companies) as well as for real estate companies.[97] Following an increase in earlier application of IFRS or even United States GAAP FER, a trend towards the use of Swiss GAAP FER has emerged in recent years. With regard to the financial reporting of issuers listed on the SIX Swiss Exchange, the SIX Exchange Regulation is responsible for monitoring compliance with the Listing Rules and the recognized accounting standards.[98]

Corporate Governance Report. The SIX Swiss Exchange has issued a directive on corporate governance, which requires all issuers of equity securities with their primary or main listing on the SIX Swiss Exchange to disclose important information (or to give substantial reasons why this information is not disclosed ["comply or explain"]) in particular on their board and senior management, their group structure and shareholders, on their capital structure, as well as on compensation, shareholdings, and loans in a separate section of the annual report. In addition, the disclosed information also must refer to the provisions of the implementing ordinance on the Minder Initiative, if applicable.[99]

While maintaining decision-making capability and efficiency at the highest level of a company, these principles are intended to guarantee transparency and a healthy balance of management and control. The Directive on Corporate Governance establishes the respective basic principles. Details on what information is to be disclosed are indicated in the annex to the directive. The SIX Swiss Exchange has provided guidance to the issuers as to the disclosure requirements under the Directive on Corporate Governance in a guideline.[100]

Swiss public companies are required to disclose detailed information on the compensation of the members of the board and senior management and their shareholdings as well as loans received in a separate remuneration report (instead of the financial statements as was previously the case).[101] Foreign companies with their equity securities primarily or mainly listed on the SIX Swiss Exchange must disclose information on compensation in the Corporate Governance Report instead.[102]

97 Under the Swiss Reporting Standard, the financial reporting standard under the Swiss Banking Act also may be applied as accounting standard.

98 Listing Rules, articles 49 *et seq*.; Directive on Financial Reporting with its recognized accounting standards IFRS, United States GAAP, Swiss GAAP FER, and the financial reporting standard under the Swiss Banking Act.

99 Directive on Information Relating to Corporate Governance; Financial Market Infrastructure Act, article 35, al 2.

100 SIX Exchange Regulation Guideline re the Directive on Information relating to Corporate Governance Directive.

101 Implementing ordinance on the Minder Initiative, articles 13 *et seq.,* which have materially (but not formally) overridden by article 663b^{bis} of the Code of Obligations.

102 Directive on Information Relating to Corporate Governance, article 3.

Interim Statements. Under the SIX Swiss Exchange Listing Rules, issuers of listed equity securities are further obliged to publish an interim financial report. The interim financial report, which must be audited, must cover a time frame of six months or less. [103]

The same accounting principles that have been used in the annual financial statement are to be applied in the interim financial report. However, there is no requirement for the interim financial report to be audited. The interim report must be published within three months after the end of the relevant period and filed with the SIX Swiss Exchange no later than its publication and must be made available in electronic form on the website of the issuer for five years after its publication.[104]

Special Companies. In their (semi-annual and annual) financial statements, real estate and investment companies must fulfil disclosure requirements that extend beyond the stipulations of the given accounting standard. In justified cases, SIX Swiss Exchange may require the delivery of an interim report at shorter intervals.[105]

The interim report of investment companies comprises the composition of and changes in investments and in current value, as well as supplementary notes (*e.g.*, events of special significance). In addition, investment companies must publish the net asset value of their securities at regular intervals.

Foreign Issuers. The periodic reporting obligations under the SIX Swiss Exchange Listing Rules are not limited to issuers established in Switzerland, but apply to all (even foreign) issuers whose securities are listed on the SIX Swiss Exchange, regardless of their legal incorporation (not so for corporate law disclosure requirements).

However, respective foreign issuers must not only comply with the same reporting obligations but with all regulations regarding the maintenance of listing as issuers having their registered office in Switzerland.[106] An exception only exists for issuers whose equity securities are exclusively admitted on the basis of a secondary listing on the SIX Swiss Exchange.[107] With respect to such secondary listings, the aim is to ensure that all information that an issuer publishes in his home country

103 Listing Rules, articles 50 *et seq*.; Directive on Financial Reporting.

104 Directive on Financial Reporting, articles 11 *et seq*.

105 Listing Rules, articles 71 *et seq*. and 81 *et seq.*; Directive on Financial Reporting, articles 14 *et seq.*; Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes; cf. also Schemes B and C.

106 Directive on the Listing of Foreign Companies, article 10; Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes.

107 Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes, article 14 and Annex 6.

also is made available to the SIX Swiss Exchange and market participants in Switzerland.

When filing the listing application, the introducing bank must accept the responsibility to forward such information accordingly and provide evidence that the disclosure requirements of the primary stock exchange are substantially equal to those of the SIX Swiss Exchange Listing Rules. In addition, the SIX Swiss Exchange has concluded agreements with individual foreign stock exchanges having the purpose of information exchange.

Ad Hoc Publicity

Price-Sensitive Facts. The SIX Swiss Exchange Listing Rules state an obligation for the issuer to inform the market of any price-sensitive facts that have arisen in the issuer's sphere of activity and that are not of public knowledge.[108] Price-sensitive facts are facts that, due to their considerable effect on the issuer's assets and liabilities or financial position or on the general course of business, potentially result in substantial movements in the price of the securities.

This disclosure duty was essentially introduced in order to minimize insider trading and ensure equal treatment of all market participants to the greatest extent possible. Hence, the issuer may not only ensure that all market participants are informed in the same manner and at the same time but also structure the contents of the notification in such way that the statement can be instantly assessed by the average market player with regard to the price-sensitive fact.

The SIX Swiss Exchange has issued a directive as well as a detailed guideline as to the handling of the ad hoc publicity.[109] Nonetheless, it deliberately refrains from defining price sensitivity in percentage terms. The market parameters for the security in question, as well as the investors' expectations and level of information, are decisive factors in determining whether an event has a potential substantial price impact.

Examples of price-sensitive facts are changes in structure (such as mergers, substantial acquisition, and far-reaching reorganizations), changes in share capital, material changes in earnings situations ('profit warning' in so far as certain profit expectations were announced by the issuer), changes in the course of business (cessation of a main sphere of business, entry into a strategic alliance, or a major case of product liability), and changes in the board and senior management.[110]

Time of Disclosure. The issuer must provide information without delay as soon as it has knowledge of the main points of the price-sensitive facts in question. In certain exceptional cases (*e.g.*, prior to takeovers), however, it may postpone the disclosure of such information if the new facts are based on a plan or decision of

108 Listing Rules, article 53.
109 Directive on Ad Hoc Publicity; Commentary on the Directive on Ad Hoc Publicity.
110 Commentary on the Directive on Ad Hoc Publicity.

the issuer, and if its dissemination could negatively affect the legitimate interests of the issuer.

In such case, the issuer must guarantee the complete confidentiality of such facts. If an information leak occurs, the market must be informed about the fact immediately, in accordance with the rules on disclosing price-sensitive information.[111] When possible, ad hoc disclosures must be made outside of the ordinary trading hours and 90 minutes before trading commences at the latest, *i.e.*, before 7.30 a.m. and after 5.30 p.m. If that is not possible and an intraday announcement is necessary, for example, because of a leak, the SIX Exchange Regulation must be notified no later than 90 minutes before the planned publication and will then decide whether to stop trading until the information has been disseminated.[112]

Management Transactions. The rules of the SIX Swiss Exchange require the disclosure of management transactions, which imposes on issuers with their primary or main listing on the exchange to report transactions concluded by members of their board of directors as well as the executive committee in the given company's equity securities, convertible and purchase rights on the company's shares, and financial instruments whose price is materially dependent on the company's own equity securities.[113]

Members of the board of directors and executive committee must report to their issuing company all transactions that fall within the scope of these regulations within two trading days.[114] Within three further trading days, the issuer must then submit a report to the SIX Exchange Regulation through the electronic reporting platform disclosing, among other things, the name and function of the individual (*i.e.*, executive member of the board of directors, member of the executive committee, or non-executive member of the board). The SIX Exchange Regulation will afterwards publish the report on its website without the individual's name, but indicating the individual's function.[115]

Trading Rules

Securities Offerings

Offering of Shares. Basically, an offering can be a primary offering or a secondary offering. Primary offerings involve the creation and distribution of newly issued shares, whereas secondary offerings involve the sale of existing shares. Unless the shares are placed among a determined and small circle of

111 Listing Rules, articles 53 *et seq*.; Directive on Ad Hoc Publicity, articles 16 *et seq*.

112 Directive on Ad Hoc Publicity, article 12.

113 Listing Rules, article 56; Directive on Disclosure of Management Transactions; Directive on Electronic Reporting and Publication Platforms; Commentary re Art 56 of the Listing Rules and the Directive on the Disclosure of Management Transactions.

114 Listing Rules, article 56, al 2.

115 Listing Rules, article 56, al 4 *et seq*.; Directive on Disclosure of Management Transactions, article 8; Commentary re Art 56 of the Listing Rules and the Directive on the Disclosure of Management Transactions.

investors (private placement), a prospectus must be made available to the investors in either event. Often, the creation of new shares and their distribution to the public is accompanied by the selling of already existing shares in the market.

The law does not specifically define the concept of a private placement. Under the Banking Act and the Collective Investment Schemes Act, however, the prevailing view is that an offering made to a maximum of 20 persons is deemed to qualify as a private offering. If more than 20 persons are approached in the context of a promotional action, the offering is likely to be deemed public. According to the Draft Financial Services Act that, as of the time of writing, was pending in the Parliament, a prospectus does not need to be published if the public offer is (among other exemptions) addressed solely at investors classified as professional clients or at fewer than 150 investors classified as retail clients.[116]

In the context of a public offering outside of the SIX Swiss Exchange, a prospectus according to article 652a of the Code of Obligations must be issued if the new shares are issued and offered publicly. The information to be delivered in this prospectus is, however, quite limited (contents of the registration in the commercial register, existing amount and structure of the capital stock, provisions in the articles of incorporation concerning an authorized or a conditional increase of the capital, number of benefits certificates and specification of the rights associated therewith, the last annual financial statements, consolidated financial statements, together with a report of the auditors, dividends paid within the last five years or since the date of incorporation, and resolution concerning the issuance of new shares).

Article 652a is supplemented by article 752 of the Code of Obligations, which establishes a liability of the issuer of a prospectus and any person involved where information given in an issue prospectus is inaccurate, misleading, or in breach of statutory requirements. If the shares are offered on the SIX Swiss Exchange, the listing and publicity requirements of the Listing Rules and the applicable prospectus schemes apply.[117]

This hitherto highly rudimentary regulation of the issue prospectus in the Code of Obligations, however, is to be replaced by a comprehensive, largely product-neutral regulation of prospectus law in the Financial Services Act, which is largely oriented towards current EU law as well as intended to replace the current provisions in the Code of Obligations regarding both the issue prospectus for shares (article 652a) as well as the prospectus for bonds (article 1156). Accordingly, subject to the exceptions mentioned by law, a prospectus must be prepared by law for all publicly offered equity and debt securities, *i.e.*, for derivatives and

116 Draft Financial Services Act, article 38, al 1 (a) and (b). Furthermore, it is notable that under a draft amendment of the Swiss stock corporation law, which, as of the time of writing, is still pending in Parliament, a prospectus would not be required if the promotional action is solely directed at "qualified investors" as defined pursuant to the Collective Investment Schemes Act (cf. Draft-Code of Obligations, article 652a, al 4).

117 Listing Rules, articles 27 *et seq*.; Prospectus Scheme A – Equity Securities.

structured products, too. Thereby, any public invitation for the acquisition of a financial instrument, which contains sufficient information on the terms of the offer and the financial instrument, qualifies as public offer.[118] In addition, and contrary to the currently applicable law (apart from the listing prospectus), the prospectus according to the Draft Financial Services Act must be submitted to the reviewing body prior to publication. The reviewing body must check its completion, coherence, and comprehensibility.[119]

Furthermore, the Draft Financial Services Act provides for a so-called "key information document" that is to be drawn up for financial instruments offered to retail customers so that the latter may quickly evaluate and compare the essential characteristics of the financial instrument in question. The key information document, which must be made available at the point of sale and before the contract is concluded, particularly covers the identity of the producer, name, type, and characteristics of the financial instrument, and risk/return profile of the financial instrument, specifying the maximum loss the investor could incur on the invested capital or the tradability of the financial instrument.[120]

Underwriting Agreement. Usually, the offering of shares involves investment banks subscribing securities on a firm commitment basis, thus assuming the risk of the distribution. The main point to be agreed in the underwriting agreement between the issuer (or selling shareholder) and the investment banks is the offering price, which is not determined until just before the offering takes place as it must be in relation to the current market conditions.

Therefore, the underwriting agreement is usually finalized and signed on the day before the effective date of the offering. Until this point, the relationship between the parties is usually governed by a letter of intent or engagement letter that is for the most part a non-binding agreement. However, parties sometimes attach a standard underwriting agreement to the engagement letter according to which the final agreement will substantially be in line with the attachment.

Deposit and Subscription Agreement. In the event of a primary offering of Swiss shares, the entering into a nominal amount deposit and subscription agreement has become customary. This agreement ensures that the new shares are duly issued under Swiss law and covers the following topics:

- Confirmation that the shareholders' meeting has resolved or will resolve the increase of the share capital by issuing a certain number of shares and that the statutory pre-emption rights have been or will be waived;

118 Draft Financial Services Act, articles 3(h) and (i) and 37 *et seq*. However, the relevant provisions, as well as other exceptions, must be clarified by means of an ordinance still to be adopted.

119 Draft Financial Services Act, article 53.

120 Draft Financial Services Act, articles 60 *et seq*.

- Undertaking of the coordinators of the bankers' syndicate to subscribe the new shares and to deposit an amount equivalent to the nominal value of the shares in a blocked bank account;
- Undertaking by the company to procure the registration of the capital increase with the commercial register;
- Undertaking of the coordinators to sell the newly created shares in a public offering subject to the conditions of the underwriting agreement; and
- Exit clause for the banks in case the underwriting agreement is not signed or is terminated prior to the closing date.

Offering of Debts Securities. Public offerings of bonds require publication of a prospectus in accordance with article 1156 and, by way of reference, article 652a of the Code of Obligations. If the bonds are listed, additional information must be provided in the listing prospectus as required by the Listing Rules and the applicable prospectus schemes.[121] As mentioned above, no general requirement for a prospectus to be filed with, or pre-approved by, a supervisory body exists.

Notes are usually medium-term papers with a maturity of five to seven years and privately placed, usually with clients of the syndicate banks. In recent years, medium-term notes programs have become quite common, allowing an issuer to issue medium-term papers with maturity of up to five years in several tranches and on several stock exchanges. Even for private placements without a listing, in which case the Listing Rules of the SIX Swiss Exchange do not apply, foreign issuers of notes placed in Switzerland often prepare a prospectus in accordance with the rules of the Swiss Bankers Association, which are not mandatory law but define good industry practice.

Likewise, the offering of bonds and notes is usually purchased by a syndicate of banks that will place them either on the stock exchange or in a closed circle of investors, thus bearing the risk of distribution. The terms of the bonds are quite standard as they include:

- Form, denomination, printing, and reopening;
- Interest;
- Redemption;
- Transfer of funds by the issuer;
- Taxation;
- Status (*pari passu*) and negative pledge;
- Repayment in events of default;
- Consolidation, merger, or sale of assets;
- Replacement of debtor;

121 Listing Rules, articles 27 *et seq*.; Prospectus Scheme E – Bonds.

- Prescription;
- Listing; and
- Sales restrictions.

According to the Additional Rules for the Listing of Bonds and the Additional Rules for the Listing of Derivatives of the SIX Swiss Exchange, it is no longer required that debt securities and derivatives be governed by Swiss law to qualify for the listing on the SIX Swiss Exchange. Debt securities and derivatives may be subject to the governing law of any Organization for Economic Co-operation and Development (OECD) country as well as other legal systems recognized by the Regulatory Board of the SIX Swiss Exchange.[122]

Furthermore, it is no longer required that investors must be able to enforce their rights under the debt securities or derivatives in Switzerland. Issuers and the holders of the securities can agree to submit to the courts of any jurisdiction, provided that a place of jurisdiction must be available in the country the laws of which govern the securities.

The provisions of the SIX Swiss Exchange, however, allow an exemption from this rule with regard to debt securities and derivatives issued by an issuer of the public sector if local law requires a domestic place of jurisdiction for a public sector issuer and the issuer waives its legal immunity in terms of due process and enforcement law in the framework of the applicable legislation.[123]

Offering of Derivatives. Derivative instruments are traded either on EUREX, if they are standardized, or on SIX Swiss Exchange - Structured Products in case of warrants and structured products or over-the-counter market if they are customized. Derivatives may be listed on the SIX Swiss Exchange, provided the issuer is a licensed Swiss bank subject to the Federal Banking Act, a licensed Swiss securities dealer subject to the Stock Exchange Act, or is subject to a comparable foreign supervision.[124]

Issuers that issue derivatives on their own equity securities or on the equity securities of group companies in the context of broader transactions are exempt from this license requirement. Even though the contents and the documentation of over-the-counter derivatives securities may vary from product to product, the use of international market standards in Switzerland is common, in particular, the ISDA Master Agreements and the Swiss Master Agreement, together with their respective schedules. The main purpose of these agreements is to reduce capital adequacy requirements for the banks, on the one hand, and the counterpart risks, on the other hand, by stating far-reaching netting clauses.

122 Additional Rules for the Listing of Derivatives, article 7; Additional Rules for the Listing of Bonds, article 6.

123 Additional Rules for the Listing of Derivatives, articles 7 *et seq.*; Additional Rules for the Listing of Bonds, articles 6 *et seq*.

124 Additional Rules for the Listing of Derivatives, article 6.

With respect to the enforceability of such clauses in the event of a bankruptcy, the Federal Act on Debt Enforcement and Bankruptcy now provides for automatic termination of all transactions involving financial futures, swaps, and options, which can be valued based on market or stock exchange prices as at the time of the opening of the bankruptcy, thus preventing any 'cherry-picking' by the bankruptcy administration in enforcing individual rights of the bankrupt debtor.[125] Given that the aforementioned Master Agreements are generally subject to English or New York law, however, the enforceability of their clauses, in particular their netting clauses, under Swiss law must always be checked.

Disclosure of Acquisition of Substantial Holdings

In General. The Financial Market Infrastructure Act provides in its articles 120 *et seq*. for the obligation to have substantial holdings disclosed by their owners and thereafter by the concerned legal entity. The disclosure obligation applies to Swiss companies having at least one class of equity securities listed on a stock exchange in Switzerland and to companies not domiciled in Switzerland whose equity securities are mainly listed in Switzerland.[126]

Further (partial) disclosure rules exist in other laws. Article 663c of the Code of Obligations requires Swiss corporations having their shares listed on a stock exchange to disclose in their notes to the balance sheets the significant shareholders (owning more than five per cent of all voting rights), including their shareholdings, provided the management knows or ought to know of such shareholders. The effects of this provision, however, are limited due to many disadvantages, namely:

- It is difficult to know the shareholders in case of bearer shares;
- The corporation is charged with an inquiry duty not related to company matters; and
- The balance sheets are issued only once a year, hence not providing enough transparency for the capital market.

Furthermore, article 959c of the Code of Obligations provides for disclosure of the material participations in other companies. The Collective Investment Schemes Act, the Banking Act, and the Stock Exchange Act contain similar provisions as to the disclosure of significant shareholders or other qualified participants.

125 Act on Debt Enforcement and Bankruptcy, article 211, al 2^{bis}.

126 Pursuant to article 115, al 1 of the Financial Market Infrastructure Ordinance, the equity securities of a company not domiciled in Switzerland are mainly listed in Switzerland when the company must fulfil at least the same duties and maintenance of a listing on a stock exchange in Switzerland as a company domiciled in Switzerland. For a list of companies not domiciled in Switzerland that have their main listing on the SIX Swiss Exchange, *see* https://www.six-exchange-regulation.com/en/home/issuer/obligations/disclosure-of-shareholdings/capital-foreign-companies.html.

Shareholder Duties. Shareholders must report the acquisition and/or disposal of equity participations in a listed legal entity if certain thresholds are met. Disclosure is required if a title owner (directly or indirectly) or a group of title owners acquires or disposes of equity participations and thereby reaches, exceeds, or falls below the thresholds of three per cent, five per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33-1/3 per cent, 50 per cent, or 66-2/3 per cent of the voting rights of the concerned company, whether exercisable or not.[127]

Some thresholds correspond to specific minority rights (in particular, 10 per cent of capital stock provide the right to call up a shareholders' meeting, the right to initiate a special audit, and the right to claim for dissolution of the company) or majority quorums respectively (66-2/3 per cent of the votes and absolute majority of the par value present at the shareholders' meeting allow to take important decisions as described in article 704 of the Code of Obligations) under the Swiss stock corporation law.

The term "acquisition and disposal" includes all types of equity transfers including share exchanges, initial listing of equity securities, donations, inheritances, conversion of participation or profit-sharing certificates into shares, exercise of conversion, acquisition or sale rights, changes in the share capital (*e.g.,* increase, restructuring, or reduction), and usufructuary rights. Special disclosure events are given if a company buys or sells its own equity securities, and if in-house funds of financial intermediaries buy or sell equity securities or when transferring equity securities for legal reasons or following a court or authority ruling.[128] The obligation to notify arises at the time when the respective contract is concluded.

The disclosure obligation concerns equity participations. Given that most legal entities listed on the SIX Swiss Exchange are stock corporations, in practice all substantial share transactions must be disclosed. The key element is the voting right, not the capital amount; therefore, all transactions that have the effect of conferring the voting right relating to equity securities (*e.g.*, in the business of securities lending and repurchase agreements) are subject to the disclosure obligation.

Furthermore, after long discussions, the legislator has decided that the acquisition and disposal of equity derivatives, such as call options and conversion rights, regardless of whether the terms of the derivatives give the right of physical delivery of the underlying equity securities or allow for cash settlement, are subject to the disclosure obligation. Financial instruments, other than those mentioned, also must be reported if their structure permits an entitled person to acquire equity securities if these are acquired, sold, or granted (written) in respect to a public takeover offer.

The disclosure obligation in case of an acquisition of equity securities for the own account is obvious. The financing of an indirect acquisition, however, must be reported as well, meaning that a beneficial owner of equity securities remains as

127 Financial Market Infrastructure Act, article 120, al 1.

128 Financial Market Infrastructure Act, article 120, al 4; FINMA Financial Market Infrastructures Ordinance, article 16, al 1.

fully responsible for the notification as the formal owner. For example, in the framework of a fiduciary arrangement, the principal (beneficial owner) and the trustee (formal owner) must disclose if any of them exceeds any relevant threshold. Special rules apply in respect of investment funds, trusts, and pension funds: Their management is responsible to deliver the notification as only such body has a proper control of the investments.[129]

The ordinance specifying the disclosure requirements provides for eased requirements for foreign collective investment schemes that may take advantage of the exception regarding the obligation to consolidate with respect to the disclosure requirements.[130] Furthermore, it contains various exemptions from the disclosure obligation.[131]

As of 1 July 2015, the legislator enacted amendments to the Swiss stock corporation law and implemented FATF recommendation Number 24 on "transparency and beneficial ownership of legal persons". The amendments oblige any person to report any (direct or indirect) acquisitions of bearer shares in non-listed companies (irrespective of any thresholds), and persons who alone or acting in concert with third parties acquire shares in non-listed companies and thereby reach or exceed the threshold of 25 per cent of the share capital or votes, to give notice to the company of the beneficial owner of such shares.[132]

Organized Groups. Organized groups of equity securities holders and such holders acting in concert have the privilege of complying with the disclosure obligation as a whole.[133] The privilege applies to groups of companies and companies under common control, to equity securities holders who establish or terminate agreements relating to the exercise of voting rights, and/or to relationships to acquire or dispose of equity securities.

In specific cases, however, it might be debatable whether an 'agreement' or only a loose (not directly discussed) understanding between titleholders exists; the supervisory authority has established some guidelines in the meantime.[134] The group must report the grand total of its title holdings, the identity of its members, the nature of the arrangement, and the representation of the group.[135] Title transactions within the group, however, are not subject to the disclosure obligation.[136]

129 Financial Market Infrastructure Ordinance-FINMA, article 18, al 1.
130 Financial Market Infrastructure Ordinance-FINMA, articles 18, al 2 - 4.
131 Financial Market Infrastructure Ordinance-FINMA, article 10, al 3.
132 Code of Obligations, article 697i and article 697j.
133 Financial Market Infrastructure Act, article 121.
134 According to FINMA, any party whose conduct regarding the acquisition or sale of shareholdings or exercising of voting rights with third parties by contract or other organized procedure or by law, is acting in concert or as an organized group. Financial Market Infrastructure Ordinance-FINMA, article 12, al 1.
135 Financial Market Infrastructure Act, article 121.
136 Financial Market Infrastructure Ordinance-FINMA, article 12, al 2.

Procedural Aspects. A holder of equity securities subject to a disclosure obligation must report the relevant transaction, both to the concerned company as well as to the stock exchange on which the securities are listed.[137] The details to be mentioned in the specific notice are specifically listed in the FINMA-Ordinance to the Financial Market Infrastructure Act; special forms for various situations are available on the SIX Swiss Exchange website.[138]

The SIX Swiss Exchange has issued procedures that must be observed by the concerned holders of equity securities. In case of doubt about the scope and contents of the disclosure obligation in respect of a specific transaction, the possibility exists to obtain a preliminary ruling from the competent supervisory authority of the stock exchange that will be given according to a special ordinance.

The Disclosure Office of the stock exchange may, for good cause, either exempt a holder of equity securities from a reporting requirement or ease respective requirement. Good cause for such an exemption or easing is given, *e.g.*, if the relevant threshold is only exceeded for a short time, if the acquirer has no intention to exercise the voting rights of the concerned company, if the transfer of the equity securities is subject to a condition precedent, or if a securities dealer is building a trading position for several customers. To obtain the exemption, in principle, the application must be made to the Disclosure Office in good time, before carrying out the transaction in question.[139]

Company Duties. The company must publish any information it receives relating to changes in the ownership of its voting rights. The details about timing (two business days after receipt of the titleholder's report), form, and relevant media are regulated in the ordinance to the Financial Market Infrastructure Act. Publication takes place via electronic publication platform operated by the Disclosure Office and can be accessed on the website of the Disclosure Office.[140]

Aforementioned publication duty refers to the information received by the company. Therefore, the question arises of how the company should react if no information is given by the titleholder but the fact of having exceeded a threshold has become known to the company otherwise. Pursuant to article 122 of the Financial Market Infrastructure Act, the company or involved stock exchange must inform FINMA if they have reason to believe that a shareholder is in violation of the notification duty. The legal doctrine is of the opinion, however, that a company merely must react to suspicions and report them without an obligation to investigate or initiate proactive investigations.

137 Financial Market Infrastructure Act, article 120.

138 Financial Market Infrastructure Ordinance-FINMA, article 22; *see* https://www.six-exchange-regulation.com/en/home/issuer/obligations/disclosure-of-shareholdings/board.html.

139 Financial Market Infrastructure Act, article 123, al 2; Financial Market Infrastructure Ordinance-FINMA, articles 26 *et seq*.

140 Financial Market Infrastructure Act, article 124; Financial Market Infrastructure Ordinance-FINMA, articles 22 *et seq*.

Insider Trading and Price Manipulation

New Market Abuse Regime. The regulation of the offences of insider trading as well as price manipulation are now enshrined in the Financial Market Infrastructure Act. Both offences will be prosecuted by the Office of the Attorney General of Switzerland and judged by the Swiss Federal Criminal Court, and no longer by cantonal prosecution authorities.

The new rules in the Financial Market Infrastructure Act provide standards in both criminal and administrative law that sanction market abuse on a broad basis and take account of international standards. The Financial Market Infrastructure Act first addresses the administrative law sanctions to be imposed on enterprises[141] and then the criminal law sanctions applied on individuals.[142]

Criminal Law Provisions. In 2013, the scope of the insider trading prohibition, as enshrined today in the Financial Market Infrastructure Act, has been considerably broadened as it now encompasses the liability of every individual person. It includes several categories of insiders:

- A body or a member of a managing or supervisory body of an issuer or of a company controlling or controlled by the respective body or a person who, due to his holding or activity, has legitimate access to insider information (primary insider);
- One who receives insider information disclosed to him by a primary insider or acquired through a crime or a misdemeanor (secondary insider); and
- One who accidentally receives insider information (fortuitous insider).

All three groups of insiders are liable if they gain a pecuniary advantage for themselves or for others by exploiting insider information to acquire or dispose of securities or to use derivatives relating to such securities. Primary insiders are moreover sanctioned if they gain a pecuniary advantage for themselves or for others by disclosing insider information to others or by exploiting it to recommend to others to acquire or dispose of securities or to use derivatives relating to such securities.[143] In this context, insider information means confidential information whose disclosure would significantly affect the prices of securities admitted to trading on a Swiss stock exchange or a multilateral trading facility.[144]

The insider trading prohibition is completed by a further provision which penalizes whosoever substantially influences the price of securities with the intention of gaining a pecuniary advantage for him- or herself if he disseminates false or misleading information contrary to his better knowledge as well as effects

141 Financial Market Infrastructure Act, articles 142 *et seq*.
142 Financial Market Infrastructure Act, articles 154 *et seq*.
143 Financial Market Infrastructure Act, article 154.
144 Financial Market Infrastructure Act, article 2(j); accordingly, the primary market does not fall within the scope of the mentioned provision.

acquisitions and sales of such securities directly or indirectly for the benefit of the same person or persons connected for this purpose.[145]

Territorial Link. Both criminal law provisions require that the affected securities are securities admitted to trading on a trading venue in Switzerland, *i.e.*, on a Swiss stock exchange or a multilateral trading facility.[146] This fact corresponds to the intention of the legislator to ensure transparency and the proper functioning of domestic capital markets as well as equality in the treatment of investors.

Swiss criminal law is basically applicable to persons committing a criminal offence in Switzerland. A criminal offence is considered to have been committed at the place where the person concerned commits it and at the place where the offence has taken effect ('Ubiquity Rule').[147] With regard to the above-mentioned offences, Swiss criminal law will therefore apply if the person committing the offence is acting in Switzerland or if the unjustified gain is realized in Switzerland. If the offender acts from abroad but through an agent in Switzerland (generally, a bank or other securities dealer), the rules of the Swiss criminal law provisions will apply, regardless of whether the agent acted with knowledge of the offence or not.

Under the former insider trading prohibition as then enshrined in the Swiss Criminal Code, several investigations had been initiated on suspicion of insider trading. The major part of the court decisions concerned cases of international legal assistance requests originating from the United States, France, Germany, and other countries in or outside of Europe, where it had to be decided whether the alleged offence was punishable under Swiss law. Owing to its too narrow formulation, however, practically none of the investigated cases resulted in a criminal conviction. After the aggravation of the provision in question, however, convictions are likely to increase in the future as it has already been shown in the past.

Administrative Law Provisions. The Financial Market Infrastructure Act further provides for specific administrative law provisions against market abuse. These provisions prohibit all individuals and legal entities acting as marketing participants in connection with securities admitted to trading on a Swiss trading venue from engaging in insider trading and market manipulation.[148]

As compared to aforementioned criminal provisions, the administrative law provisions against market abuse are defined more broadly – in particular, as they do not differentiate between different categories of offenders. In its Circular 2013/08 on "Market conduct rules", FINMA has specified the administrative law provisions, mainly by listing various activities to be subsumed under market abuse.

145 Financial Market Infrastructure Act, article 155.

146 Financial Market Infrastructure Act, article 26(a).

147 Criminal Code, article 8, al 1.

148 Financial Market Infrastructure Act, articles 142 *et seq*. Prior to this, FINMA and its predecessor, the Federal Banking Commission, could only enforce market conduct rules against supervised market participants.

The aforementioned administrative law provisions on market abuse, however, would be too far-reaching, as they cover economically justified conduct, too. Hence, the executing Ordinance of the Financial Market Infrastructure Act sets out conduct, which, albeit being covered by the regulatory provisions on insider trading and market manipulation, is permissible (so-called "safe harbors").

Subject to various preconditions, these exemptions exclusively include buyback of own equity securities, securities transactions for the purposes of price stabilization after a public placement of securities, securities transactions in preparation of a public takeover offer, securities transactions effected by public bodies in connection with their public mandate, and a special legal status on the part of the recipient of the information.[149]

Public Takeover Bids

In General. With the enactment of articles 125–141 of the Financial Market Infrastructure Act, the legislator has adopted the legal provisions related to tender offers in Switzerland unchanged from the former articles 22–33d of the Stock Exchange Act.

As under the former provisions of the Stock Exchange Act, the law only provides for some (not always coherent) general principles; major parts of the legal sources are contained in ordinances.[150] Furthermore, the case law and circulars of the Takeover Board are of utmost importance.[151]

Territorial Application. The provisions on tender offers apply in respect of equity securities of Swiss companies of which at least one class of equity securities is listed on a Swiss exchange and of companies not domiciled in Switzerland whose equity securities are at least in part mainly listed in Switzerland.[152]

The Financial Market Infrastructure Act does not contain any provisions as to the domicile and the nationality of the offeror (bidder); consequently, these elements are not of importance for tender offers in Switzerland. Certain formalities that usually need to be fulfilled (*e.g.*, annual balance sheets) may even be waived by the Takeover Board if the foreign law of the offeror's incorporation place does not know a respective requirement.

Description of Tender Offer. The Financial Market Infrastructure Act governs any kind of public tender offers, including share buy-back programs (fixed-price offers to the public by an issuer to purchase its own listed equity securities), and public buy-back programs at market prices or executed by

149 Financial Market Infrastructure Act, article 142, al 2 and article 143, al 2; Financial Market Infrastructure Ordinance, articles 122 *et seq*.

150 Financial Market Infrastructure Ordinance-FINMA; Ordinance of the Takeover Board on Public Takeover Offers; Regulations of the Takeover Board.

151 *See* http://www.takeover.ch.

152 Financial Market Infrastructure Act, article 125, al 1.

issuing put options (public offers by a company to repurchase its own listed equity securities at fixed-price).

The Takeover Board may exempt an offeror from compliance with individual takeover rules if its offer relates to its own equity securities; equal treatment, transparency, fairness, and good faith are guaranteed; and there are no indications of any circumvention of the requirements of the Financial Market Infrastructure Act or other provisions.[153] The Stock Exchange Act does not exempt restructurings from the scope of application; however, the Takeover Board may release an exemption recommendation for good reasons subject to the given individual circumstances.

Substantive and Procedural Requirements of Tender Offer. An offeror is obliged to extend equal treatment to all holders of equity securities of the same class.[154] A tender offer must extend to all categories of listed equity securities. The principle of equal treatment applies to all categories of equity securities and to all participation derivatives to which the offer relates.[155] If an offer also extends to unlisted equity securities or participation derivatives, the principle of equal treatment also applies to these.[156]

Furthermore, the best price rule requires from the offeror that the highest price paid from the date of the pre-announcement of the tender offer to any titleholder is offered to all titleholders. The best price rule applies to acquisitions of equity securities during the six months following the close of the offering period.

The offer price of a mandatory offer must equal or exceed the stock market value of the target, i.e., that is, the volume-weighted average share price of exchange-based transactions over the last 60 trading days prior to the pre-announcement or publication of the offer,[157] and may not differ from the highest price paid by the bidder for equity securities in the target during the 12 months preceding the pre-announcement or publication of the offer (minimum price rule).[158]

Where a voluntary tender offer is launched, *i.e.*, the bidder launches a tender offer before the relevant threshold triggering a mandatory offer has been reached or exceeded, the minimum price rule stated above must nevertheless be complied with, to the extent that the offer is made for a number of equity securities the acquisition of which would reach the applicable threshold triggering a mandatory offer.[159]

The offeror may publish a pre-announcement before the publication of an offer prospectus. The pre-announcement must contain the substance of the subsequent

153 Takeover Ordinance, article 4, al 2; TOB Circular Number 1: Buyback programmes.
154 Financial Market Infrastructure Act, article 127, al 2.
155 Takeover Ordinance, article 9, al 1.
156 Takeover Ordinance, article 9, al 2.
157 Financial Market Infrastructure Ordinance-FINMA, article 42, al 2.
158 Financial Market Infrastructure Act, article 135, al 2.
159 Takeover Ordinance, article 9, al 6.

tender offer, including particulars of the offeror and of the target company, the equity securities at stake, the offering price, the tentative timetable of the tender offer, and its conditions, if any. The offeror must publish the pre-announcement by:

- Publishing it on its website or on a website dedicated to the public offer;
- Delivering it to the major Swiss media, to the major news agencies active in Switzerland and to the major electronic media which distribute stock exchange information (financial information providers); and
- Delivering it to the Takeover Board.[160]

The details of the tender offer must be published in a prospectus that is correct and complete containing all relevant information suitable and necessary for the investors to appropriately evaluate the tender offer and make an informed decision.[161] The exact contents of the prospectus are described in the Takeover Ordinance, including but not limited to information about the offeror, the financing of the offer, the object and the price of the offer, the target company, the publication of the announcement and a brief report of the auditor verifying that the offer prospectus complies with the Financial Market Infrastructure Act and the ordinances as well as with a decision by the Takeover Board in connection with the offer.[162]

Furthermore, the offeror must confirm in the prospectus that it has received no information about the target company that is not publicly available and which might have a critical influence on the decision of the recipients of the offer. In practice, the offeror usually indicates in the prospectus if he allowed to perform a due diligence review. In such situation, the Takeover Board requests from the target company that a competing offeror should be granted with the possibility to exercise a similar due diligence review. Pursuant to a recent amendment of the Takeover Ordinance, the offer prospectus must be published electronically only. The same rules as for the pre-announcement apply.

If the offeror has a legitimate interest, the offer may be made subject to conditions; however, only conditions may be imposed in the offering documentation that cannot be influenced to a significant extent by the offeror. However, in case the offeror is obliged to make an offer, such offer cannot be attached to conditions unless there is good cause for doing so. Usually, conditions concern a tender rate, material adverse change, the entry of the offeror as titleholder in the share register with voting rights, and the availability of regulatory approvals (competition authority, financial market supervisory authority). A published offer may only be amended if the amendment concerned is generally favorable to the recipients (*e.g.*, an increase of the offer price or removal of conditions).[163]

160 Takeover Ordinance, article 7, al 1.

161 Financial Market Infrastructure Act, article 127, al 1 and Takeover Ordinance, article 17, al 1.

162 Takeover Ordinance, articles 19 *et seq*.

163 Takeover Ordinance, article 15, al 1.

To achieve full transparency, certain holders of equity securities must report all acquisitions and sales of equity securities in the target company, namely, the offeror, parties acting in concert with the offeror, the target company, significant shareholders of the target company, and all parties to the offering proceedings.[164] The parties to the proceedings are obliged to publish all transactions in equity securities and related instruments of the target company (and of any securities offered in exchange) on a daily basis, allowing the market participants to closely follow their investments.

Moreover, after the announcement of the tender offer, the offeror and anyone acting in concert with the offeror are restricted from buying equity securities from the target company at a premium (principle of equal treatment; best price rule). After the publication of a tender offer, a mandatory "cooling period" applies that will normally last 10 exchange trading days. This allows the board of directors of the target company to prepare a report to its titleholders and the Takeover Board to examine the offer and to render a decision. The tender must be open during an offer period of not less than 20 and no more than 40 exchange-trading days, subject to a special permission by the Takeover Board to the contrary.

On the first trading day following the offer period, the offeror must report the provisional announcement of the interim result of the offer and the auditor must confirm the preliminary result of the offer. Thereafter, if an offer is successful, irrespective as to whether conditions of the offer do or do not exist, the offeror is obliged to extend the offer period for another 10 exchange trading days, thereby giving the holders of equity securities of the target company an additional possibility to tender the titles.

In the case of competing offers, it is imperative that the recipients of the offers, irrespective of the order of publication, be able to choose freely between the various offers and to withdraw their acceptance declaration of the initial offer at any time up to its expiry. Therefore, any competing offer must be published not later than the last exchange-trading day of the initial offer period. The competing offer must be open for acceptance for as long as the initial offer but not less than 10 exchange trading days. If the competing offer expires after the initial offer, the period of the initial offer is automatically extended until the expiry date of the competing offer to synchronize the offers.[165]

The initial tender offer and the competing tender offer may be amended no later than the fifth trading day prior to its expiry and must then remain open for 10 trading days. If several competing offers are made, the target company is obliged to grant equal treatment to all offerors.

A tender offer may be prohibited, by court order or administrative decree, if the terms of the offer or the conduct of any party involved in the offer, including the

164 Financial Market Infrastructure Act, article 134, al 1; Takeover Ordinance, articles 38 *et seq*.

165 Takeover Ordinance, article 51, al 1.

target company, violate applicable laws. Under these circumstances, holders of equity securities have the right to withdraw their acceptances of the tender offer.[166]

Duties of Target Company. The board of directors of the target company is obliged to issue an accurate and complete report on a tender offer containing all information necessary to allow shareholders to make an informed decision.[167] The report must be amended in the event of significant developments.

The board of directors may recommend in the report that the offer be accepted or rejected or may, however, also enumerate the advantages and disadvantages of the offer without making a recommendation. The report also should contain information about intentions of significant holders of equity securities of the target company (*i.e.*, shareholder holding more than three per cent of the voting rights) and about potential conflicts of interest involving board members and directors.

This topic is very sensitive in practice. If the board is emphasizing negative aspects, it is likely that, following a successful tender offer, the members of the board will be immediately replaced; if the board of directors is overestimating the positive aspects, the holders of the equity securities may be misled.

Furthermore, the target company must treat all competing offerors equally. According to the Takeover Board, this principle particularly applies in respect of the possibility of all competing offerors to execute a due diligence review in respect of the non-public (and not specifically protected) information of the target company. However, the report of the board of directors can differentiate in the evaluation of the tender offers, meaning that the board may recommend an offer, which the board deems to be favorable for the shareholders, be accepted, *i.e.*, offer submitted by a 'white knight' offeror, while the competing offer, which the board deems to be disadvantageous, be rejected.

The board of directors of the target company is restricted in its ability to introduce defensive measures against tender offers.[168] The board of directors of the target company must, in particular, not enter into any legal transactions that would have the effect of significantly altering the assets or liabilities of the company from the moment the offer is published until the publication of the results.

In practice, disallowed defensive measures are primarily the (conditional) sale of important parts of the business (approach of "scorched earth", "crown jewel defense", and "lock-up agreements"), the conclusion of special agreements in favor of management and directors ("golden parachutes"), the conditional increase of the capital with a unilateral allocation of subscription rights ("poison pills"), and the issuance of new shares or convertible debts with exclusion of subscription rights of existing title holders.

166 Financial Market Infrastructure Act, article 129.

167 Financial Market Infrastructure Act, article 132, al 1.

168 Financial Market Infrastructure Act, article 132, al 2 and Takeover Ordinance, articles 35 *et seq*.

Within the legal framework, the "pac-man" defense and the "white knight" defense are possible. Notwithstanding the intensive discussion, these legal provisions have not yet gained a substantial practical importance, with the exception of some preventive effects. After the tender offer has been launched, only the shareholders' meeting of the target company may decide on any relevant defensive measures.

Mandatory Offer Obligation. Anyone who directly, indirectly, or acting in concert with third parties acquires equity securities which, added to the equity securities already owned, exceed the threshold of 33-1/3 per cent of the voting rights of the target company must make an offer to acquire all listed equity securities of the target company.[169] Target companies may raise in their articles of incorporation the threshold to 49 per cent of the voting rights (so-called 'opting-up'). This obligation could make the acquisition of a substantial part of a company expensive given that the smaller titleholders also have the possibility to sell their investments.

Nevertheless, a Swiss company may dispose of the obligation to be submitted to the mandatory offer obligation in its articles of association (so-called 'opting-out'). An opting-out may be resolved before or after the equity securities of the company are listed on a Swiss stock exchange.[170] Prior to the listing, a resolution in the meeting of the titleholders must be passed by absolute majority. After the listing of the equity securities, such a resolution may not be illegitimately disadvantageous to the existing rights of the titleholders.[171]

The Financial Market Infrastructure Act and its ordinances contain a number of exemptions from the mandatory offer obligation, such as the acquisition of voting rights as a result of a donation, succession, or partition of an estate, matrimonial property law, or execution proceedings. Moreover, the Takeover Board may grant a discretionary exemption from the mandatory offer obligation if this appears to be justified under the given circumstances.

The offeror is obliged to buy all outstanding equity securities of the target company at no less than the stock exchange price. This price is designed as the volume-weighted average price on a Swiss stock exchange for the 60 exchange trading days before the publication of the offer or the advance announcement. Additionally, if the offeror has purchased equity securities prior to the tender offer, the minimum price for the tendered equity securities must be the higher of the stock exchange price or of the highest price paid by the offeror for equity securities of the target company in the 12 months preceding the announcement of the offer.[172]

169 Financial Market Infrastructure Act, article 135, al. 1.

170 Financial Market Infrastructure Act, article 125, al 2, and 3.

171 Code of Obligations, article 706.

172 Financial Market Infrastructure Act, article 135, al 2. Except for companies that have opted out of the mandatory offer requirement, the Stock Exchange Act no longer allows the payment of a control premium.

The price for the tendered equity securities may vary if the target company has issued several classes of equity securities. However, there must be an appropriate relationship among the prices offered for the various classes of equity securities. Under certain specific circumstances, exceptions from the minimum price rule may apply. The mandatory offer must be published within two months after the holder of equity securities (and subsequent offeror) has crossed the relevant threshold except if the Takeover Board extends this period for important cause. Basically, the same procedural rules apply as in a voluntary tender offer.

An offeror may request a squeeze out (being a buy-out right) of the remaining holders of equity securities if, after the tender offer, it holds more than 98 per cent of the voting rights of the target company, including shares already held prior to the tender offer.[173] The cancellation of equity securities is effected by court order.

Jurisdictional Conflicts

Conflicts of Jurisdiction

In 2013, the legislator enacted a revision of the Stock Exchange Act and introduced several new provisions relating to conflicts of jurisdiction resolving, to some extent, the questions that arise when companies are neither subject to Swiss nor to foreign rules (negative conflicts of jurisdiction) or when companies are subject to the laws of both jurisdictions at the same time (positive conflicts of jurisdiction). These provisions have been incorporated in the Financial Market Infrastructure Act unchanged in the course of the most recent revision of the capital market law in Switzerland.

First, according to the wording of the Financial Market Infrastructure Act, the provisions of disclosure of substantial acquisition and sale of participations as well as the takeover rules may not only apply, as hitherto, to Swiss companies, *i.e.*, companies incorporated in Switzerland, but also, as mentioned above, to companies not domiciled in Switzerland whose equity securities are mainly listed in Switzerland.[174]

Second, the applicability of the Swiss takeover bid rules may be relinquished if both Swiss law and a foreign law are simultaneously applicable to a public takeover offer, providing that the application of Swiss law would lead to a conflict with the foreign law and the protection provided by the foreign law to the investor is equivalent to that provided by Swiss law.[175]

These conflict rules in the Financial Market Infrastructure Act have brought much needed clarity to the question of the Act's applicability on international situations, thereby bringing a long-standing evolution of regulatory practice and supporting scholarly debate to a temporary conclusion.

173 Financial Market Infrastructure Act, article 137, al 1.
174 Financial Market Infrastructure Act, article 125, al 1.
175 Financial Market Infrastructure Act, article 125, al 2.

Until 1999, the leading scholars had considered the Swiss domicile to be the decisive criteria to establish territorial application of the Stock Exchange Act (today, most of the provisions of the Stock Exchange Act are incorporated in the Financial Market Infrastructure Act). In 1999, however, the Federal Banking Commission (now a part of FINMA) overruled a recommendation, issued by the Takeover Board, and stated that the takeover bid made by the French company LVMH Moët Hennessy Louis Vuitton (LVMH) for the shares of TAG Heuer International SA, a company domiciled in Luxembourg and having shares listed on the SWX Swiss Exchange (now the SIX Swiss Exchange), was subject to the Stock Exchange Act and had, therefore, to comply with its provisions.

Although the Stock Exchange Act (now the Financial Market Infrastructure Act) wording clearly restricted the application of the takeover bid rules to "Swiss companies", the Federal Banking Commission argued that the Luxembourg company, a mere holding company, was actually managed through its Swiss subsidiary (effective management, presentation of the product as a Swiss product). In doing so, the Federal Banking Commission pierced the corporate veil.

This decision has much been criticized by the legal doctrine which claimed for a new conflict rule in the Stock Exchange Act (now the Financial Market Infrastructure Act) resolving the question of its applicability on international situations. The place of the first listing and not the domicile of the company should be the decisive criteria for the application of disclosure and takeover bid rules. Some scholars even suggested applying this principle under the present wording, as far as this is needed for the protection of investors.

In a second case, De Beers Centenary AG asked the Takeover Board to state that the takeover bid on all its 'Centenary Linked Units', *i.e.*, all securities traded on the SWX Swiss Exchange (now the SIX Swiss Exchange), would not fall into the application of the Stock Exchange Act (now the Financial Market Infrastructure Act). The Takeover Board issued a recommendation according to which, notwithstanding the Swiss domicile of the target company, the transaction was not considered to be subject to the Stock Exchange Act (now the Financial Market Infrastructure Act) takeover provisions.

In fact, the target company was only a holding company with practically no activity in Switzerland, whereas the main commercial activities of the group were executed in South Africa. Moreover, the affected securities listed on the SWX Swiss Exchange (now the SIX Swiss Exchange) were linked to securities of foreign, in particular South African, companies. This recommendation, however, was issued under the condition that the South African Exchange would recognize its competence and the takeover bid, as well as its result be published in the Swiss media. In this way, the goal of the Stock Exchange Act (now the Financial Market Infrastructure Act), *i.e.*, the protection of shareholders of the target company in Switzerland, was fulfilled.

Multilateral Approaches

Substantive Law Solutions

Harmonization. For many decades, Switzerland has actively participated in the efforts of international harmonization in the field of securities and banking law. Switzerland is a member of the Basle Committee on Bank Supervision under the auspices of the Bank for International Settlement (BIS). The Committee released the Basle Capital Accord in 1988 (again in revision) and the Market Risk Accord in 1995. The 'Basel III' rules have entered into force as per 1 January 2013 and aim to strengthen the regulation, supervision, and risk management of the banking sector.

Furthermore, Switzerland has adhered to the Core Principles of the Basle Committee of 1997 (revised in 2006 and 2012) for the Surveillance of Banking and Financial Systems. In general, Switzerland is taking up the international principles in its own legislation. Switzerland is actively engaged in the preparation of harmonization principles in the securities markets under the auspices of the International Organization of Securities Commissions (IOSCO). The IOSCO objectives and principles of securities regulation include 38 principles that are based upon three objectives:

- Protecting investors;
- Ensuring that markets are fair, efficient, and transparent; and
- Reducing systemic risks.

The IOSCO principles need to be implemented in the national legal frameworks. Switzerland is a member of the Financial Action Task Force on Money Laundering (FATF); having a substantial finance and banking market, Switzerland has a major interest in avoiding money laundering and criminal activities in capital markets.

Under the GATS, each World Trade Organization (WTO) member state, such as Switzerland, is required to accord most-favored-nation treatment to services and service suppliers of other WTO members. The GATS specifically applies to financial services. Moreover, the member states of the WTO have negotiated additional protocols to GATS in respect of the financial services; the key document is the Fifth Protocol on Financial Services of 12 December 1997, together with the annexed Schedules of Specific Commitments and Exemption Lists, brought into force in Switzerland on 1 March 1999. Switzerland has signed the Fifth Protocol and adjusted, to the extent necessary, its internal legislation.

Previous policies, applying the approach of measured reciprocity and thereby introducing limited access to home markets for foreign financial products and financial institutions, have now been overruled by the Fifth Protocol; apart from specific restrictions on trading services, the reciprocal approach has lost its importance.

Recognition. Trading venues domiciled abroad must obtain recognition from FINMA before granting Swiss participants, supervised by FINMA, direct access

to their facilities. With the enactment of the new Financial Market Infrastructure Act and for practicability and efficiency reasons, however, foreign stock exchanges, multilateral trading systems and trade repositories must no longer request recognition by FINMA on a case-by-case basis and are generally considered to be recognized, provided that the state, in which they are domiciled, appropriately regulates and supervises its financial market infrastructures.[176] It can be assumed that this is generally the case for EU member states.

Recognition of a foreign trading venue, however, may be refused by FINMA if the state in which the foreign trading venue has its registered office does not provide Swiss trading venues the same competitive opportunities as they do to the domestic trading venues.[177] This reciprocity requirement is not applied anymore in respect of enterprises originating in countries being members of the WTO and having ratified the Fifth Protocol on Financial Services. With regard to other countries, the practical application by FINMA is quite liberal.

The same rules also apply in respect of the authorization and supervision of securities dealers. However, since Switzerland is not a member state of the EU, the single passport principle does not directly apply; therefore, the administrative application must be made by a foreign enterprise.

Procedural Solutions

FINMA is actively engaged in administrative legal assistance related to supervisory authorities in other countries.[178] In particular, publicly inaccessible information and documents can be delivered to foreign supervisory authorities under certain conditions.

With the recent enactment of the Financial Market Infrastructure Act, the provisions pertaining to administrative assistance of the various financial market laws have been merged into the Financial Market Supervision Act. The Federal Court usually dismisses complaints against administrative legal assistance in the light of the necessity that supervisory authorities need to get a crossborder view of international financial conglomerates.

176 Financial Market Infrastructure Act, article 41, al 3.
177 Financial Market Infrastructure Act, article 41, al 4.
178 Financial Market Supervision Act, articles 42 *et seq*.