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Editors:
René Bösch
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Securities

Securities Lending—Lessons Learned from the Financial Crisis
By Urs Pulver / Petra Ginter 2

Takeover

Firm Sales vs. Irrevocable Tender Undertakings in Public Tender Offers
By Hans-Jakob Diem 6

Sale of Control at a Premium: An Overview
By Pascal Rüedi 11

Regulatory

Capital Raising in Light of "Too Big to Fail": the Swiss Government's View
By Thomas U. Reutter 15

Swiss Federal Supreme Court Judges on FINMA Circular 08/8 Definition of Public Advertisement
By Sandro Abegglen 20

Derivatives

Deutsche Bank loses first German High Court Case over Swaps
By Thomas Werlen / Stefan Sulzer 23

Deals & Cases

Kuoni Travel Holding Ltd. closes financing of its acquisition of Gulliver's Travel Associates 25

Johnson & Johnson and Synthes enter into definitive merger agreement 25

Takeover of Süd-Chemie AG by Clariant AG 26

Swiss Life AG closes placement of a CHF 325 million hybrid bond issuance 26

Events

28th International Financial Law Conference in Zurich 26

St. Gallen Corporate Law Forum (St. Galler Gesellschaftsrechtstag) 27

St. Gallen Banking Law Forum (St. Galler Bankrechtstag) 27

In the Controversial Field of Monetary and Financial Policy (Im Spannungsfeld von Geld- und Finanzpolitik) 28

Securities Lending—Lessons Learned from the Financial Crisis

Reference: CapLaw-2011-8

Securities lending transactions have come under special attention and scrutiny due to losses and difficulties that have become evident during the financial crisis. These negative experiences have led to higher awareness of the participants in these markets and have also caused important changes in the contractual documentation of these financial instruments. This article addresses, in a first part, the risks and issues experienced in connection with securities lending and, in a second part, lessons learned that have found their way into the international securities lending master agreements and protocols. In the next edition of this newsletter, we will address similar developments in other OTC financial instruments, such as cash equity transactions.

By Urs Pulver / Petra Ginter

1) Introduction

Securities lending instruments have come to the spotlight during the financial crisis. The struggle of many financial institutions has highlighted certain risks connected with these instruments which have not been apparant in the booming preceding years. This has caused major losses on the lenders' side and subsequently has led to a temporary decrease in these markets and finally to some important changes in the contractual documentation of these financial instruments.

2) Risks and Issues Connected with Securities Lending Transactions

The main risk involved with securities lending is that the borrower becomes insolvent *(borrower risk)* and the values of the collateral fall below the replacement cost of the securities that have been lent *(collateral risk)*. The financial crisis has made evident these risks.

In particular, some financial institutions lacked to have sufficient clarity on the *defaulting institution*. In particular, they were not clear on the group structure, which entities were in administration, set off/netting possibilities, and how to terminate transactions with other counterparties that were economically linked to the defaulting party. Even identifying which entity within a financial group was the counterparty for a contract was not always easy. With respect to *collateral,* identifying the collateral concerned was often an issue. In addition, difficulties arose when client positions were not segregated from the defaulting party's own positions. Since the value of collateral could deviate from the value of the covered positions, liquidation processes turned out to be time sensitive. Losses were reported when some collateral assets were liquidated due to the sharp decrease of the respective market prices. Regarding the valuation of collateral, the main issues to be addressed related to the precise default valuation time,

the different possibilities for evaluating the collateral and organising the right price feeds (to ensure the use of the same fixing as the counterparty in order to avoid a cause for dispute).

Some financial institutions faced issues in terminating existing contracts even when they became aware of the applicable termination procedure. Indeed, the rules were sometimes difficult to implement in the *highly volatile market environment,* depending on the contractually agreed method of close-out. Some institutions had problems in closing out deals as the relevant market was no longer accessible. There were no replacement/close-out prices available and it was difficult to obtain quotes from the brokers. Other financial institutions faced difficulties in dealing with certain *procedural aspects and formalities* of close-out procedures. In particular, there were uncertainties whether or not a termination notice was actually required, which resulted in implications for evidence of the early termination date. A number of problems related to supposably simple issues under the *contractual documentation.* In some cases, for instance, the contractual documentation was silent or impractical on several points with respect to the pricing of the transactions in question. In other cases, the address of the counterparty was outdated as the contracts were signed years ago. However, the address is of legal relevance for sending effective notification to the counterparty. Thus, respecting deadlines for notification sometimes became an issue.

Considering all these risks and issues, participants have not only become more realistic about what their financial instruments can deliver but they have also become much *more probing* and *risk averse*. There is no doubt that the Lehman Brothers collapse, bans on short selling and cash reinvestment problems have left their mark. Clients have put greater restrictions on their financial instruments, limiting how much they will lend, what type and quality of collateral are acceptable, as well as being more selective in with whom they do business. They are paying greater attention to the safety and protection of their assets and, as a result, are asking much more specific questions about risk and the potential exposure to both custodian and counterparty default.

3) Recent Developments in Securities Lending Transactions

Securities lending transactions are often concluded under market standard master agreements, such as the Global Master Securities Lending Agreement (GMSLA), the Overseas Securities Lender's Agreement (OSLA) or the Master Gilt Edged Stock Lending Agreement (GESLA). Under these master agreements the parties may enter into various loan transactions. As a consequence, all these loans are subject broad by to the same terms and conditions, are easy to be entered into, require only reduced capital (net basis) and reduce the risks of the parties by providing for a close-out netting mechanism. Accordingly, the agreements give the non defaulting party the right to terminate outstanding loans through a close-out netting mechanism if an event of default (such as the insolvency of one party) occurs. In this respect the master agree-

ments have proven their value in the financial crisis as they have offered a better level of legal certainty. However, the financial turmoil has also shown deficiencies of the master agreements which have led to some changes in the securities lending practice. As a consequence, a new set-off protocol (see section 4 below) has been introduced in order to replace the close-out netting clauses of outstanding older (or older versions of) securities loading master agreements. Besides, the GMSLA 2000 has been amended to some extent by the versions of 2009/2010 (see section 5 below).

4) ISLA 2009 Set-Off Protocol

The International Securities Lending Association (ISLA), a trade organisation established in 1989 to represent the common interests of participants in the securities lending industry, has published the ISLA 2009 Set-Off Protocol (Set-Off Protocol). The Set-Off Protocol is a means to replace the post-default provisions (close-out netting clauses) of outstanding older (or older versions of) master agreements, such as the 1994 OSLA, 1995 OSLA, MEFISLA, GESLA and/or 2000 GMSLA, between adhering parties with the post-default provisions of the 2009 GMSLA. The Set-Off Protocol is subject to English law.

Technically, financial institutions may declare to adhere to the Set-Off Protocol and be bound by its terms by completing and delivering a letter substantially in the form of the adherence letter (Exhibit 1 to the Set-Off Protocol). With the notice of adherence of both parties of a master agreement to the Set-Off Protocol the new provisions of the Set-Off Protocol prevail over the respective provisions under the older (or the older version of the) master agreement. As per January 2011, nine parties have declared adherence to the Set-Off Protocol which are published on the ISLA website.

5) Changes in the GMSLA

The 2000 GMSLA has been amended in 2009 and 2010 mainly to reflect lessons learned from the financial crisis. The changes from the 2009 to the 2010 version of the GMSLA are only minor in nature and do not alter or affect the Set-Off or events of deleted provisions in either the 2009 GMSLA or the Set-Off Protocol.

Amendments of the Default Valuation Provisions (See Paragraph 11 and Definition of "Market Value" in the 2010 GMSLA): The primary purpose for producing the 2010 GMSLA was to update the default valuation provisions. During the financial crisis, the default valuations of the 2000 GMSLA and its predecessor agreements proved to be less flexible than corresponding provisions in other master agreements, particularly in relation to illiquid securities. As a consequence, the default valuation provisions which are used to determine the value of securities that have to be delivered by and to the defaulting party have been amended significantly. The new provisions provide a non defaulting party with greater flexibility when valuing relevant securities. This is partic-

ularly relevant in the case of illiquid securities where it might not be possible to obtain market prices or quotes from market makers or dealers, or where such quotes are not commercially reasonable. In such case the provisions enable a non defaulting party to determine a "net value" of securities.

The new provisions also allow a non defaulting party to extend the five day default valuation period if "owing to circumstances affecting the market" in the securities in question, it is not reasonably practicable for the non defaulting party to determine a net value of such securities which is commercially reasonable.

Finally, the provisions for converting the currency into the "base currency" have been amended, again to provide greater flexibility for the non defaulting party. They now state that the conversion takes place using the spot rate at such date and times determined by the non defaulting party acting reasonably.

Events of Default (Paragraph 10 of the 2010 GMSLA): Under the 2009/2010 GMSLA, the transfer of, or the order to transfer, all or any material parts of the assets of the lender or borrower to a trustee (or a person exercising similar functions) by a regulatory authority pursuant to any legislation qualifies as an event of default. It will, however, no longer be an event of default if a party's assets are transferred to a trustee. Regulatory or exchange prohibition or suspension will constitute an event of default only if it is on the grounds of failure to meet financial resource or credit rating requirements. A failure to deliver equivalent securities or non-cash collateral is no longer an event of default (see comments on mini close-out below).

Automatic Early Termination (Paragraph 10.1 (d) of the 2010 GMSLA): Under the older agreements specific events had triggered an automatic early termination of the agreement (AET), *i.e.* the non defaulting party is not required to serve written notice on the defaulting party. Under the 2009/2010 GMSLA, however, AET only applies if, and to the ■■■ that, the parties have elected AET in the schedule to the agreement. The effect of such an election is that the presentation of a petition for winding-up (or any analogous proceeding) or the appointment of a liquidator (or analogous officer) is an event of default without the need to serve written notice. Parties will usually elect to do so when recommended in a legal opinion. The Swiss opinion recommends to elect AET to apply in the event of the opening of bankruptcy and the filing for composition proceedings regarding the Swiss ■■■ party in order to mitigate cherry-picking risks. For all the other events covered by the definition of an act of insolvency ■■■ opinion ■■■, however, to provide for an option of the non defaulting party to give a notice of early termination, as aposed to AET, in order to improve the position/flexibility of the non defaulting party under the respective agreement where enforceability under Swiss law is not at stake.

No Interest is Due if Counterparty is Unable to Receive a Payment (Paragraph 15 of the 2010 GMSLA): In the Lehman Brothers case some debtors could not affect payments to certain Lehman Brothers entities as there were no open accounts where the funds could be paid. As a consequence of this negative experience, the 2009/2010 GMSLA sets forth that no interest is payable in respect of any day on which one party endeavours to make a payment to the other but the other party is unable to receive it.

Mini Close-out (Paragraph 9 of the 2010 GMSLA): With the 2009/2010 GMSLA a so-called mini close-out has been introduced. The mini close-out allows for the liquidation of a single loan in an analogous manner as the close-out netting mechanism which concerns all transactions entered into under a master agreement. In particular, the mini close-out may be invoked by a party in case of (i) a failure by the borrower to deliver equivalent securities or ii) the lender to deliver equivalent (non-cash) collateral. Under the mini close-out mechanism, termination takes place in accordance with the default valuation provisions as if an event of default had occurred (but it is stated expressly that any failure to deliver is not an event of default). However, the "non defaulting" party is not allowed to effect the close-out netting of all transactions under the master agreement in these events.

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Firm Sales vs. Irrevocable Tender Undertakings in Public Tender Offers

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In the context of a public tender offer, the offeror often seeks to secure a significant stake in the target company before announcing the transaction. This article compares two of the routes available to a bidder for achieving this result: the firm sale and purchase of target shares and the irrevocable tender undertaking.

By Hans-Jakob Diem

1) Background

The outcome of a public tender offer is uncertain by nature. Usually, an offeror will explore possible ways designed at increasing the probability of success and maximizing its share interest in the target resulting from the offer. One of the instruments regularly considered in this process is the acquisition of shares before announcement of the transaction. In the context of an unsolicited bid, the offeror may contemplate building-up a stake by acquiring target shares on-exchange before approaching the target

board or announcing the offer. In negotiated transactions, the offeror more often considers entering into one-to-one discussions with significant shareholders with the aim of acquiring their shares off-market or obtaining their support of the offer. In such circumstances, the offeror regularly approaches shareholders who are privy to the negotiations, in particular controlling shareholders, board members and members of the management of the target company. The offeror may also approach outside shareholders, such as long-only or other institutional investors, although such approaches face their own risks and legal challenges and are, from experience, rarely successful.

2) Firm Sale or "Irrevocable"?

The offeror and the controlling shareholder, board member or member of the management may agree on a ***firm sale and purchase*** of the target shares held by the shareholder by entering into a written share purchase agreement before the tender offer is made. Depending on the circumstances, the purchase may be consummated immediately, followed by the announcement of the offer, or completion may be subject to certain conditions precedent, such as regulatory approvals, in which case the purchase is completed only after the tender offer has been made. However, the sale and purchase is firm and not conditional upon, and not otherwise dependent on, the success of the offer. As a result, the private sale and purchase will close even if the tender offer ultimately fails and the offeror does not acquire control of the target company.

In the case of an ***irrevocable tender undertaking,*** on the other hand, the target shareholder irrevocably agrees to accept the offer and to tender its shares to the offeror on the terms and subject to the conditions of the tender offer. The acquisition will close on the settlement date of the offer and on the terms set out in the offer prospectus, but only if the offer is successful. If the offer fails, the offeror will not be under any obligation to acquire any shares, and the target shareholder will continue to hold its interest in the target company.

There are a number of factors to be considered in determining whether a firm sale and purchase or an irrevocable tender undertaking is the preferred way to proceed. The first and probably most important factor relates to the ***revocability*** of tender undertakings, a rule that has its roots in the Centerpulse/InCentive case of 2003. In this case, the Takeover Board and the Federal Banking Commission ruled that the statutory right of a shareholder to withdraw its acceptance of a tender offer in case of a competing offer is mandatory and cannot be waived in advance. Therefore, purportedly "hard irrevocables" are not enforceable in the context of Swiss tender offers insofar as they are in fact revocable in the event of a competing offer. A firm sale and purchase, on the other hand, is not affected by the Centerpulse/InCentive practice and cannot be rescinded by either party if a competing offer is made. The irrevocability of a firm sale as compared to the revocability of a tender undertaking is evidently an advantage for the offeror. However, the offeror will have to weigh this advantage against the risk that the

offer will not be successful while it has incurred the cost for purchasing a minority interest without acquiring control of the target company.

An important factor to be considered by the target shareholder relates to the ***upside potential*** imminent to tender offers. As discussed, in the case of a firm sale, the shareholder will not be able to withdraw and tender his shares under a higher competing bid. In addition, a shareholder who has firmly sold his shares also forgoes the potential upside that the offeror may increase the offer price during the offer period. Either scenario—higher competing offer or price increase by the offeror absent a competing bid—would result in the selling shareholder being treated less favourably than the public shareholders, which is often a difficult proposition for controlling shareholders or members of the board or the management. In the event of a tender undertaking, on the other hand, the target shareholder will keep the upside of a higher price. Just like the public shareholders, it will benefit from a price increase by the offeror as well as a higher competing bid. However, the target shareholder should weigh the upside potential of a tender undertaking against the deal certainty offered by a firm sale which is independent from the success of the tender offer.

While the target shareholder may often prefer an irrevocable tender undertaking, a firm sale and purchase will be the only possible structure if the shareholder wishes to receive a ***premium*** on top of the price to be offered by the offeror to the public shareholders. Contrary to other jurisdictions and the EU Takeover Directive, the Swiss rules as currently in effect and the practice of the Takeover Board permit that a premium of up to 33% of the offer price is paid to shareholders in a private transaction entered into before the offer is announced, provided that the private sale and purchase is not conditional upon, and not otherwise connected with, the public tender offer. It follows that an irrevocable tender undertaking or a share purchase conditioned on the success of the offer will not be possible if the parties wish to provide for a premium on top of the offer price.

3) Alternatives and "In-betweens"

In view of the respective advantages and disadvantages of firm sales and tender undertakings, the parties may seek alternative or "in-between" structures in order to overcome difficult negotiation situations. However, the parties should be aware that such alternative structures will be scrutinized by the Takeover Board and may be challenged by qualified outside shareholders who see the potential to achieve a higher offer price.

One possible alternative is a ***firm sale with top-up right.*** It aims at locking the selling shareholder firmly into the sale, without depriving him of the upside potential. The agreement, which is made prior to announcing the tender offer, essentially provides for a firm sale at a fixed price, as outlined above. However, the parties agree that if the final tender price offered by the offeror or a competing offeror exceeds the agreed pur-

chase price, the selling shareholder will receive the resulting difference in addition. While the Takeover Board ruled in the matter SIG Holding in 2006 that such an agreement, if entered into after the announcement of a tender offer, triggers the best price rule, there are no published precedents confirming whether such agreements would be permissible under the best price rule if they were concluded before the offer is announced. Failing such precedents, firm sales combined with a top-up right are not entirely risk-free. In any event, the offeror should consider procuring a valuation of the top-up right in order to ensure that the price offered in its tender offer complies with the minimum price rule relative to the pre-offer acquisitions.

Another possible "in-between" structure consists in a ***tender undertaking with restricted revocability.*** In this alternative, the parties agree that the committing shareholder cannot revoke his commitment immediately upon the announcement of a competing offer, as it would otherwise be the case. Rather, the committing shareholder may withdraw his shares from the first offer only after completion of the auction, and only if the final offer of the competing bidder exceeds the final offer of the first offeror. As a result, the first offeror could rely on its tender agreement with the shareholder also in the event of a competing offer, provided that its last price offer equals or exceeds the last price offer of the competing bidder. The committed shareholder, on the other hand, could not "fuel" the auction by withdrawing the tendered shares at an early stage. Again, there are no published precedents which confirm whether such an agreement would be enforceable in a competitive situation.

There are various other conceivable structures to mitigate the respective advantages and disadvantages of firm sales and irrevocable tender undertakings, including more ***complex put or call option structures.*** However, such transactions are generally subject to an increased risk of challenge by the Takeover Board or qualified shareholders. Depending on the circumstances, it should be carefully considered whether it is in the best interest of the parties, including the target company, to agree on such more complex structures, because lengthy proceedings and an extended period of uncertainty for the target company and its stakeholders may result.

4) Other Considerations and Potential Pitfalls

In evaluating and negotiating a share purchase agreement or an irrevocable tender undertaking before a public tender offer, the offeror and the respective shareholder should also be aware of and evaluate specific legal requirements and certain pitfalls.

In either scenario—firm sale and irrevocable tender undertaking—the question arises whether and, in the affirmative, at which point in time, the parties are subject to ***disclosure duties*** under the rules relating to the disclosure of significant shareholdings according to the Stock Exchange Act and the disclosure of management transactions under the Listing Rules of the SIX Swiss Exchange. The execution of a firm share pur-

chase agreement will in principle trigger a disclosure duty if it relates to three percent or more of the voting rights of the target company or if the seller is a member of the board or the senior management of the target company. In contrast, the situation is less clear in case of irrevocable tender undertakings, where the disclosure is in practice often deferred until the additional acceptance period has expired. In any event, the offeror will have to disclose pre-offer transactions in target shares in the offer prospectus in accordance with the takeover rules. In addition, the parties should consider whether, as a result of the specific contents of their agreement, they might be deemed ***acting in concert*** with a view to the tender offer or under the disclosure rules. If the committing shareholder is a member of the board of directors or the management of the target company, ***conflict of interest issues*** may arise and have to be addressed at an early stage, for instance by creating an independent board committee leading the negotiations on behalf of the target company. Finally, the shareholder should carefully consider its personal ***tax situation*** before it commits to sell or tender its shares. While the proceeds of a sale of shares—whether on the basis of a firm sale or an irrevocable tender undertaking—are in principle not subject to income tax for private individuals resident in Switzerland, there are exceptions based on the concept of indirect partial liquidation or the qualification of the seller as a deemed securities dealer for tax purposes. To avoid negative surprises, it may be advisable for a target shareholder to seek an advance tax ruling under certain circumstances, in particular if he is asked to sell or tender more than twenty percent of the target's share capital, alone or together with other shareholders, such as other members of the board of directors or the management.

5) Conclusion

The question whether a firm share purchase or an irrevocable tender undertaking is the preferred route for an offeror to secure a significant stake in the target before making the bid, or whether it is more beneficial for an inside shareholder to enter into a tender undertaking rather than to sell its shares firmly, is more difficult than it might appear at first sight. Each party will have to take several factors into account and weigh them against each other in view of its specific preferences. Alternative or "in-between" structures which aim at balancing the respective advantages and disadvantages, such as a firm sale with top-up right, tender undertakings with restricted revocability or more complex put or call structures, can be explored. However, such alternative structures may lead to an increased risk for disputes with the authorities or qualified shareholders and unpredictable results. In any event, the parties should evaluate specific disclosure and similar duties and potential tax issues prior to entering into a definitive agreement.

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Sale of Control at a Premium: An Overview

Reference: CapLaw-2011-10

The minimum price rule provided by the Federal Act on Stock Exchanges and Securities Trading (SESTA) allows an offeror to pay individual shareholders a premium for their equity securities prior to a public takover offer of listed shares. In practice, premiums are paid regularly for controlling interests and they repeatedly have been the subject of decisions made by the Takeover Board in the past. This article deals with selected topics of the prevailing practice with regard to premium payments and addresses the latest attempts to revise current legislation.

By Pascal Rüedi

1) Legal Basis and Scope of the Minimum Price Rule

Article 32 (4) of the Federal Act on Stock Exchanges and Securities Trading (SESTA) provides minimum price rules that are binding on the offeror of a public takeover for shares of a Switzerland based company whose shares are listed on an exchange in Switzerland (*e.g.* SIX Swiss Exchange). The ***minimum price rules*** consist of the two following lower price limits, whereby the higher price limit always prevails:

a. The price offered shall be at least as high as the ***stock exchange price,*** that is, the volume-weighted average price of all stock exchange transactions completed in the 60 trading days preceding the publication of the prior announcement of the initial offer or, if no prior announcement has been published, the publication of the offer prospectus for the initial offer (article 48 [3] of the Ordinance of the Takeover Board on Public Takeover Offers [TOO]), and

b. the price offered shall ***not be lower than 25% of the highest price*** paid by the offeror or any third party who is acting in concert with the offeror for equity securities of the offeree company in the twelve months preceding the publication of the prior announcement of the initial offer or the publication of the offer prospectus, respectively.

The first lower price limit (a.), *inter alia,* ensures that the offer is subject to a fair and reasonable price and that the shareholders of the target company are not placed at a disadvantage by the public takeover offer as compared to a hypothetical sale of the shares in a stock exchange transaction prior to the publication of the initial offer. With the second lower price limit (b.), the offeror is given the opportunity to acquire blocks of shares of the corporation from certain, mostly controlling, shareholders prior to the initial offer by being in a position to pay a premium of a maximum of 33 1/3% of the offering price.

The SESTA minimum price rules apply to ***mandatory public takeover offers*** and, if the offer includes equity securities whose acquisition would entail an obligation to make an offer (article 9 (6) TOO), to voluntary public takeover offers as well. However, the minimum price rules do not apply to public takeover offers if the articles of association of the target company state that an offeror shall not be bound by the obligation to make a public offer pursuant to article 32 SESTA or if the offeror at the time of the offer already has an interest of more than 33$^1/_3$% of the voting rights in the target company.

2) Premium Payments in Practice

The current practice in Switzerland emphasizes the importance ascribed to premium payments relating to equity securities acquired prior to an offer. This is best illustrated by taking a look at the control premiums that were paid in the past in relation to takeovers of Switzerland based offeree companies with shares listed on a stock exchange in Switzerland.

a) Overview on Premium Payments

The Swiss State Secretariat for International Financial Matters conducted a survey of the control premium payments made since the SESTA has been in force. The idea behind this undertaking was to gather relevant data by mid-September 2010 with regard to a possible revision of article 32 (4) SESTA. The results can be summarized as follows:

Number of cash offers: 93

Cash offers with control premium paid: 33

Average premium: 19.68%

Premium median: 21.64%

A detailed account of selected transactions of the years 2005–2009 paints the following picture:

Year	Offeree Company	Price Offered (in CHF)	Preceding Purchase		
			% of the Voting Rights	Price Paid CHF	Premium
2009	Quadrant AG	86.0	21.5%	up to 114.5	33.1%
			11.2%	104.5	21.5%
2008	sia Abrasives	435.0	39.8%	516.6	18.8%
2007	Unilabs S.A.	28.8 (N)[1]	50.1%	35.8 (N)	24.3%
		57.5 (I)[2]		71.5 (I)	
2005	Büro-Fürrer AG	– (N)	79.9%	115.6 (N)	–
		500 (I)		578.0 (I)	15.6%

b) Selected Aspects Pertaining to Premium Payments

According to the SESTA, the payment of control premiums is solely possible under the condition that the respective equity securities were acquired by the offeror in the course of a ***purchase prior to the actual offer.*** Pursuant to article 10 (1) TOO, the ***Best Price Rule*** applies from the moment the preregistration of the public tender offer is issued, or, in case there is no preregistration, from the moment the public tender itself is published. The Best Price Rule requires that all shareholders be offered the same price for the same category of equity securities. In practice, it is therefore of crucial importance that a ***clear distinction*** is made between acquisitions made before and after the actual offer. No difficulties arise if the date of the ***acquisition*** *("Verpflichtungsgeschäft")* and the date of the ***consummation*** *("Verfügungsgeschäft")* pertaining to the acquisition of an equity stake overlap and if both, the acquisition and the consummation, are finalized before the preregistration and/or the offer itself are published. However, it is problematic if the dates of the acquisition and the consummation fall apart to such a considerable extent that the acquisition takes place before and the consummation after the publication of the preregistration and/or the offer. According to the Swiss Takeover Board such case is generally considered as an acqusition preceding the actual offer, except if the acquisition is subject to the condition of an offer or a successful offer, respectively. This would constitute a so-called ***overall transaction,*** which is also subject to the Best Price Rule and therefore requires that the price paid in such overall transaction has to be offered to all shareholders holding the same category of equity securities. However, the Takeover Board makes an ***exception*** of this principle if the transaction in question cannot be executed without fulfilment of

1 *(N) is the abbreviation for registered shares.*
2 *(I) is the abbreviation for bearer shares.*

such condition. In practice, only the condition of the approval of the transaction by the antitrust authority will constitute such condition.

Even though that in practice such premiums are paid for ***controlling interest*** for the most part, the wording of article 32 (4) SESTA does not exclude the possibility to pay premiums for non-controlling stakes as well. In the recent past, such premiums were paid for non-controlling stakes in the case of Quadrant AG. In this case the premiums paid to non-controlling shareholder were lower than those paid to controlling shareholders (see overview above).

Legislation has not defined the term "controlling interest". Given that there often exist shares which are not recorded in the share register and that in the general meetings rarely all voting rights are represented, a company may be ***controlled with an interest of under 50.1% of the voting rights.*** The SESTA assumes that an interest of at least 33 1/3% of the voting rights in a company may be considered a controlling interest. In practice, it is even thinkable that an interest of at least 10% is considered a controlling interest, because a shareholder holding such stake may not be excluded from the company by way of a squeeze-out merger according to article 18 (5) in connection with article 8 (2) of the Merger Act.

3) Revision Attempts

On 21 January, the State Secretariat for International Financial Matters SIF of the Federal Department of Finance EFD has conducted a consultation regarding the question whether the control premiums in public takeover offers should be abolished. In this connection, the Takeover Board has submitted two proposals for the revision of article 32 (4) SESTA. Proposal 1 provides for the complete ***annulation of control premiums*** and proposal 2 suggests that control premiums can only be paid for ***controlling interests,*** whereby the SESTA would define the term "controlling interest" as a stake which correponds to at least 33 1/3% of the voting rights in an offeree company.

So far, no results from the consultation process have been published and it remains open whether the proposed revision can be put into practice in one or the other form.

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Capital Raising in Light of "Too Big to Fail": the Swiss Government's View

Reference: CapLaw-2011-11

The Swiss government has proposed a variety of measures to make systemically important financial institutions more crisis-proof. Capital requirements beyond Basel III are a cornerstone of the proposed regime. These requirements are proposed to be satisfied by the issuance of straight equity instruments such as stocks or contingent convertible bonds (CoCo-Bonds). This potentially massive need for capital mandates capital raising flexibility beyond the current possibilities offered by authorized or conditional capital under corporate law. Hence, the Swiss government also proposes changes to the Swiss Banking Act to enable a more flexible issuance of equity and contingent equity instruments. The proposed amendment is aimed at facilitating capital raising by banking institutions or their parent companies even if the relevant banking group is not systemically important.

By Thomas U. Reutter

1) Overview of a Massive Overhaul

In its draft bill dispatch to parliament on 20 April 2011 (Draft Bill), the Swiss government proposes a series of measures to address and potentially avoid massive state intervention to rescue a banking institution that is systemically important. The Draft Bill and the corresponding explanatory notes (Explanatory Notes) are based on a report by a commission of experts appointed in November 2009 (Expert Report). The following are the main elements of the measures proposed in the Draft Bill to amend the Banking Act in order to foster resilience of systemically important financial institutions: (1) Strengthening of the capital base, (2) a more stringent liquidity regime, (3) improved risk diversification and (4) implementation of organizational measures with a view ensuring that systemically important functions such as clearing and settlement are unaffected by financial distress or even insolvency of the respective banking institution.

The proposed capital adequacy measures clearly go beyond the requirements of Basel III. The Draft Bill introduces three components of capital: (1) a basic capital requirement in common equity of 4.5% of the institution's risk weighted assets (RWA), (2) a capital buffer of 8.5% of RWA that must be satisfied with common equity in the amount of 5.5% of RWA and may be satisfied by CoCo-Bonds in the amount of up to 3% of RWA and (3) a progressive component of up to 6% of RWA depending on the degree of systemic importance of the respective financial institution. If adopted by the Swiss parliament, Credit Suisse and UBS, the two financial institutions that fulfill the criteria for systemic importance in Switzerland, will have to have capital in the form of common equity or CoCo-Bonds in an amount of up to 19% of RWA.

If the proposed stringent capital requirements will be adopted, systemically important banks will have to tap the capital markets in order to raise the funds needed to comply with these requirements. In order to facilitate the raising or conversion of capital in times of a crisis, the Draft Bill also introduces measures to enable a more flexible issuance of equity and contingent equity instruments such as CoCo-Bonds. The Draft Bill extends the proposed facilitation of corporate law provisions for raising capital to all Swiss banking institutions (or their respective parent companies) even if the relevant banking group is not systemically important.

2) Two New Baskets to Tap Capital

The proposed amendment to the Banking Act introduces two new "baskets" of capital issuing authorization that may be granted by the shareholder meeting to the board of directors as ultimate executive body of a Swiss corporation: Reserve Capital *(Vorratskapital)* and conversion capital *(Wandlungskapital).* Both of these baskets have a corporate law "cousin" on the basis of which they have been designed: Authorized capital *(genehmigtes Kapital)* in the case of reserve capital and conditional capital *(bedingtes Kapital)* in the case of conversion capital. However, many of the corporate law constraints and limitations have been removed or amended in the Draft Bill.

Both new capital baskets are aimed at strengthening the capital position and at averting financial distress. Reserve Capital is primarily designed as a "rescue tool" to facilitate the raising of equity capital in times of financial distress by allowing the board of directors to tap the market and place newly issued shares without seeking prior approval of the shareholder meeting. Such prior approval has, at least in principle, already been given by shareholders approving the reserve capital basket and the corresponding change in the articles of incorporation of such issuer. Conversion capital is a variation of the same theme: It also transfers capital raising power from the shareholder meeting to the board of directors but—rather than curing capital inadequacy by raising new capital—, is aimed at preventing such capital inadequacy altogether. This is achieved by automatic and forced conversion of CoCo-Bonds into shares and thus common equity of the issuer in case capital adequacy levels fall below certain trigger levels. Conversion capital is therefore designed to source shares to be issued upon a failure to meet certain predefined levels of core capital benchmarked against a bank's risk weighted assets (trigger event) and serves as underlying for CoCo-Bonds.

The Draft Bill lends particular weight to the fact that both new capital baskets may exclusively be used to strengthen a bank's capital position based on the applicable regulatory requirements and to avoid financial distress. Although neither the Draft Bill nor the Explanatory Notes do expressly say so, it is generally believed that the new capital baskets may also be tapped if a banking institution or group is already compliant with its respective regulatory capital requirements. As any issuance of equity or equity-like capital inherently bolsters a bank's capital position the thorny question of when the

new capital baskets may legitimately be used and when they would be simply abused can hardly be avoided. The Draft Bill or the Explanatory Notes offer lightly guidance in this respect. The commentary merely states that the new capital baskets cannot be used to fund mergers or acquisitions. This in turn raises the question of whether the proceeds of a capital increase out of the proposed new capital baskets may only consist in cash and, if so, what the permissible investments from these cash proceeds on the asset side of the balance sheet would be. An outright prohibition to invest capital raised in equity interests (for example a real estate company) would be unnecessarily harsh and impractical.

Both new capital baskets are generally "uncapped" in the sense that there is no regulatory maximum limit imposed on any of the baskets. It is up to the shareholder meeting to decide what maximum share capital and thus what maximum number of shares should be available to be tapped by the board of directors as reserve capital or to be used as underlying for CoCo-Bonds as conversion capital. Once tapped, the maximum authority granted by the shareholders is automatically reduced in such amount or such number of shares respectively. This is particularly important for reserve capital given that the Expert Report intended this basket to be "self renewable" and "perpetual" in the maximum amount approved by shareholders irrespective of any issuance of new shares thereunder. It is a good thing that the government was insightful enough not to include this oddity into the Draft Bill.

3) Reserve Capital

Although reserve capital as proposed in the Draft Bill is modeled along authorized capital under corporate law, there are significant differences: For example, the quantitative limitation providing that the maximum size of authorized capital may not exceed 50% of the issued capital has been abolished under the proposed amendment to the Banking Act. The two year limitation on the use of authorized capital has also been abolished for reserve capital. An earlier proposal in the Expert Report even provided that reserve capital could be created by way of resolution of a shareholder meeting approved by a simple majority of the votes present or represented. This far reaching empowerment of the board of directors and corresponding disenfranchisement of the shareholders has been dropped in the Draft Bill and thus brought in line with corporate law.

Even the pre-emptive rights of shareholders, almost a "sacred cow" of Swiss minority shareholder protection, has not been left untouched. Although the Expert Report stopped short of amending the corporate law provision mandating that pre-emptive rights may only be withdrawn based on certain limited valid reasons, the government dared to address this important issue: The Draft Bill specifically excludes an application by reference to the respective corporate law provision and states that an exclusion of pre-emptive rights may also be justified if necessary for a smooth and expeditious placement of shares issued out of reserve capital. Hence, the board of directors of a

bank conducting a private placement of shares under exclusion of pre-emptive rights will have much more legal certainty than it ever had without the proposed amendment. In fact, without such amendment and clarification PIPE investments or private placements out of reserve capital would hardly ever occur; banks would be left with the time consuming and costly route of a rights issue in order to tap capital on the market.

Another important feature for the use of reserve capital for private placements relates to the permissible discount. A board of directors that excludes pre-emptive rights damages its shareholders if the shares issued are subsequently placed at a significant discount. Therefore and as a general rule, the Draft Bill promulgates that any issues of new shares under exclusion of pre-emptive rights should be made at market conditions. By the same token, however, the Draft Bill recognizes that it may be difficult to gauge "market conditions" if a private placement needs to be conducted to improve the regulatory capital provision. Therefore, the Draft Bill also clarifies that "a discount is permissible to the extent there is a corporate benefit from a smooth and fully subscribed placement of shares". Thus, a substantial degree of business judgment by a board of directors issuing shares in a private placement will be warranted, if the Draft Bill becomes law.

4) Conversion Capital

Given that the differences between conversion capital and its corporate law cousin conditional capital have become more and more material in the lawmaking process, the Draft Bill no longer includes an application of the corporate law provisions on conditional capital to the proposed conversion capital. In the Draft Bill, a fundamental principle of conditional capital has been amended for conversion capital in order to increase legal certainty with respect to the creation of new shares upon conversion: A notarized board resolution of the financial institution upon occurrence of the trigger event replaces the conversion declaration by the investor foreseen under conditional capital.

Hence, the shares to be issued upon a trigger event under a CoCo-Bond will neither be issued based on a declaration of the investor nor "automatically", but will be created upon a specific resolution of the board of directors confirming that a trigger event has occurred. Although this will arguably increase legal certainty as to when a CoCo-Bond ceases to exist and when Shares (common equity) will be issued in lieu thereof, it may expose the board to threats of CoCo-investors and it is likely to only pass a resolution upon specific direction of the competent regulator. In that same resolution the board of directors will have to amend the articles of association to reflect the increased share capital and shares outstanding and to file an application to the competent commercial register to update the respective records. Even though the filing of this application is mandatory, it is the board resolution and not the filing that creates the new shares. An audit report necessary for a filing of newly created shares under conditional capital is not needed for shares issued out of conversion capital.

Contrary to the corporate law provisions for conditional capital and also contrary to the proposed rules for reserve capital, a simple majority of votes present or represented at a shareholder meeting is sufficient to create conversion capital in a maximum (nominal) amount and to be determined by such meeting. Apart from resolving on the maximum amount of share capital and hence the maximum amount of shares to be issued under conversion capital, the shareholder meeting also needs to resolve on, inter alia, the basics of determining the issue price of the new shares and the generic circumstances under which pre-emptive rights may be excluded. These basic provisions will be included in the bank's articles of association.

The exclusion of pre-emptive rights for equity linked instruments is generally much less controversial than for an outright issue of shares and should be even less so for the issuance of CoCo-Bonds, where conversion is not tantamount to a capital gain, but to a loss scenario that is intended to be avoided. Hence, the Draft Bill allows pre-emptive rights to be excluded in any issuance of CoCo-Bonds at market conditions or at a discount necessary to issue such bonds in a placement that is smooth and fully subscribed.

Within the generic parameters determined by the shareholder meeting, the board of directors of the respective financial institution may determine the detailed terms and conditions of a specific CoCo-Bond. It is noteworthy that the conversion price or issue price of any newly issued shares out of conversion capital does not have to be set forth as a numerical figure at the time of issuance of the bonds. It is sufficient that a rule or algorithm is in place to determine the issue price at the time of conversion (*e.g.* by reference to the then prevailing market price of the shares).

5) Conclusion

There is no doubt that the amendments proposed to the Banking Act by the Swiss government, if approved by parliament, will facilitate capital raising by Swiss banks by removing many of the corporate law constraints that are still applicable today. If reserve capital or conversion capital has been approved by shareholders, no more shareholder vote will be needed to conduct even a massive capital increase. Yet, the Draft Bill clearly presents a more balanced approach than any of the previous proposals in terms of weighing shareholder rights against the need to avoid having to spend taxpayer's money to bail-out a bank.

The Swiss parliament is likely to approve the new capital provisions in the Draft Bill without any substantial changes and the proposed amendments to the Swiss Banking Act could become effective as early as in 2012. A proposed abolition of stamp duty on debt capital instruments is intended to become effective concurrently with the amendments to the Banking Act. Thus, the legal and tax basis is likely to be there, but will

there also be a market? If the recent issuance of USD denominated CoCo-Bonds by Credit Suisse is indicative, there is a good reason to assume that this will be the case.

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Swiss Federal Supreme Court Judges on FINMA Circular 08/8 Definition of Public Advertisement

Reference: CapLaw-2011-12

The Federal Administrative Court on 14 December 2009 held that FINMA Circular 08/8 on Public Advertisement of Collective Investment Schemes violates federal law in so far as in note 9 the term "public advertisement" is defined as any type of promotion not exclusively directed to qualified investors pursuant to article 10 (3) and (4) Collective Investment Schemes Act (CISA) and article 6 (2) of its implementing ordinance (CISO). On appeal by FINMA on this point, the Federal Supreme Court on 10 February 2011 upheld the decision of the Federal Administrative Court and also followed the reasoning of the lower court.

The case concerns a number of other financial services regulatory questions many but not all of which were decided in favour of FINMA; most notably, the Federal Supreme Court–in line with the Federal Administrative Court–protected FINMA's practice to apply a group perspective when assessing whether activities engaged in by related persons and companies are subject to financial services regulation. Hereinafter will only be addressed the CISA issue of what constitutes a public offering and the following elaborations remain short due to the Federal Supreme Court not bringing up substantially new arguments when compared with the decision by the Federal Administrative Court; the latter is discussed by the author in detail in CapLaw 3/2010 pages 19 et seqq.

By Sandro Abegglen

1) Issue at Hand, Statutory Background and Overview

In the case at hand, 14 persons and an investment volume of approx. CHF 6 million in the aggregate were invested in a foreign collective investment scheme. FINMA had considered the underlying sales activity as public promotion of foreign collective investment schemes (without proper licenses) whereas the complainant argued successfully in the Federal Administrative Court that the promotion had not been made on a public basis.

The question on whether foreign collective investment schemes are publicly promoted (as opposed to non-public offerings) is decisive as in such case both the foreign fund and distributing persons require licenses under CISA (in the absence of which the activity may even constitute a criminal offence).

As reported in CapLaw 3/2010 page 20 et seqq., the Federal Administrative Court, based on quite extensive elaborations, came to the—correct—conclusion that the promotion in the case at hand had not been public; FINMA unsuccessfully appealed to the Federal Supreme Court on this point.

2) Federal Supreme Court's Considerations

The Federal Supreme Court—not very surprisingly—upheld the view of the Federal Administrative Court.

After having recapitulated once again that the FINMA Circular 08/8 is not binding for the courts but constitutes a mere interpretation by FINMA of the applicable law, the Federal Supreme Court states that Note 9 FINMA Circular 08/8 with the very broad definition of the term public advertisement (see introductory paragraph above) has no statutory basis in article 3 CISA. Namely, so the court, if one were to follow the interpretation of FINMA, article 3 para. 1 CISA providing for a general definition of public promotion ("Als öffentliche Werbung im Sinne dieses Gesetzes gilt jede Werbung, die sich nicht an das Publikum richtet.") would not make any sense: The Federal Supreme Court correctly states that the first sentence of article 3 CISA provides for the basic definition of a public offering whereas the two following sentences constitute statutory exemptions to the basic definition; sentence 2 in respect of the term promotion, sentence 3—relevant in the case at hand—in respect of the term public (grammatical and systematical interpretation).

Accordingly, the Federal Supreme Court holds that besides promotion which is addressed to qualified investors, only, and due to the just mentioned statutory exemption automatically deemed non-public, from a purely logical point of view there need be left some room for other types of non-public offerings. Such non-public promotion, so the court, may be pertinent if the circle of approached persons is limited either (i) qualitatively on the basis of the relationship to the approached potential investors or (ii) quantitatively on the basis that a limited number of persons per se cannot be deemed a public. The court stresses that each case has to be considered according to its specific circumstances and that in the case at hand there was no need to analyse as up to what number the quantitative element would be fulfilled. Namely, in the case at hand besides relatives/family members of the fund promotors/distributors there had been investment discussions with as little as two persons, only, and such even on a coincidental basis. To the other investors there existed a family relationship for which reason the Court considered the promotion to be qualitatively limited.

3) Assessment

The Federal Supreme Court follows both the decision as well as the reasoning of the Federal Administrative Court and therefore for details in such respect it may be referred to the article (which includes an assessment of the decision) in CapLaw 3/2010 pages 19 et seqq. Further to the views uttered in such article remains to be said that when read literally, the decision of the Federal Supreme Court could be interpreted to the effect that even an offering to a very large number of persons (hundreds, thousands) to whom a pre-existing specific relationship exists could be non-public. However, as elaborated in CapLaw 3/2010 page 22 such would not be an appropriate interpretation of the law. Namely, it is neither correct to state that a private offering always requires cumulatively a quantitative and qualitative element, nor is it correct to hold that in case the qualitative element is pertinent the number of persons approached is completely irrelevant. Rather, the correct answer should be based on a flexible interplay of the quantitative and qualitative elements meaning that a small(er) number of persons approached may compensate for the non-fulfilment (or minimal fulfilment) of the qualitative element, and—at least as a rule of thumb—vice-versa.

The decision of the Federal Supreme Court is welcome also from a rule of law point of view as it reminds FINMA to stick narrowly to the generally accepted, traditional methods of interpretation of statutory law when drafting guidance notes and circulars. This is even more important in a case as the one at hand where the violation of the statutory provision may even lead to criminal sanctions.

4) Outlook and Implication for Distribution Practice

In reaction to the decision FINMA announced that it will take into account the judgment when being confronted in the future with similar cases; the FINMA statement further seems to imply that a formal amendment of the FINMA Circular 08/8 were not (already) planned and were not welcome. FINMA further stated that it considers a revision of article 3 CISA necessary in order to ensure investor protection and avoid uncertainty of law (see FINMA Mitteilung 23 (2011)–29 April 2011).

As was stated in the previous article in this matter in CapLaw 3/2010 page 20 et seqq., in practice for strategic offerings into the Swiss market of non-licensed funds, only the qualified investor exemption remains a safe harbor. However, opportunistic placements within the above described—unfortunately vague—quantitative and qualitative limits to non-qualified investors will now be possible.

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Deutsche Bank loses first German High Court Case over Swaps

Reference: CapLaw-2011-13

Germany's highest civil court recently ruled that Deutsche Bank AG failed to properly advise a client of the risks of interest rate swaps and ordered the bank to pay more than EUR 541,000 in damages. The decision could lead to greater restrictions on the sale of derivatives in Germany and potentially in other jurisdictions.

By Thomas Werlen / Stefan Sulzer

1) The Case

In 2005, Ille Papier Service GmbH (Ille), a German supplier of paper products, entered into a swap contract branded as a "CMS spread ladder swap" with Deutsche Bank AG (Deutsche Bank). The swap had been marketed by Deutsche Bank to assist clients to reduce their interest payments. By entering into the swap, Ille was essentially betting that the spread between long-term and short-term interest rates would increase over time. Under the swap's terms, Ille would pay Deutsche Bank 1.5 percent on EUR 2 million during the first year and later a variable rate based in part on the spread between two-year and 10-year Euribor rates, with the bank paying a fixed interest rate of 3 percent on EUR 2 million for five years.

Prior to Ille entering into the swap contract, Deutsche Bank prepared and made available to Ille presentation documents which indicated that the spread was to widen over time with long-term interest rates rising and short-term interest rates falling—making the investment profitable for Ille. These indications were given even though Deutsche Bank was aware that the swap, as structured by the bank, had a negative starting value of approximately EUR 80,000, a fact that was not disclosed to Ille. Following the execution of the swap contract, the spread narrowed in the second half of 2005 as long-term interest rates did not, as had previously been expected, rise more sharply than short-term rates, causing losses to Ille. In January 2007, Deutsche Bank agreed to close out the swap in return for a payment of EUR 566,850 by Ille. Ille filed suit to recover its loss. Deutsche Bank won dismissal of the suit in lower courts.

2) The Decision

On 23 March 2011, the highest civil appeals court in Germany (Bundesgerichtshof) overturned two prior decisions from lower courts (*LG Hanau*, decision of August 4, 2008–9 O 1501/07; *OLG Frankfurt am Main*, decision of December 30, 2009–23 U 175/08) and ordered Deutsche Bank to pay EUR 541,000 plus interest in damages to Ille for failing to properly advise Ille as to the risks of the interest rate swap product sold (BGH XI ZR 33/10).

Although prior to entering into the swap Ille had been advised by Deutsche Bank that its losses under the contract were "theoretically unlimited", the court held that the customer must be told "clearly and without trivialization" that the risk of unlimited loss for the customer is not only "theoretical" but could be "real and ruinous".

The court was particularly critical in light of the fact that Deutsche Bank had limited its potential losses by hedging its risk under the swap contract and that Deutsche Bank had not disclosed the negative value of the swap at the trade date of around EUR 80,000. According to the court, Deutsche Bank was obliged to disclose the swap's negative starting value that covered the bank's profit and costs, because it was a crucial indicator as to how the risks and rewards of the parties had been structured into the product. The swap contract, viewed in isolation, would only be beneficial to Deutsche Bank in the event that its prognosis of the movement in interest rates as communicated to Ille was incorrect. The court held that this led to a "substantial conflict of interest" with the bank's advisory duty. This conflict of interest was not resolved by the fact that Deutsche Bank had immediately hedged its own risk under the swap contract following its execution by entering into a series of back-to-back transactions which meant that in reality the movement in interest rate spreads made no difference to Deutsche Bank.

The court set out the principles as to how banks have to market structured products: (i) they need to investigate the risk appetite of their clients investing in structured products. This also applies to clients with professional qualifications ("suitability of investment"); (ii) for complex structured products the risk disclosure must meet high standards of clarity and transparency. The bank must ensure that a client has the same level of knowledge and information to assess the risk as the bank; and (iii) in general, a bank does not have to disclose the fact that it is making a profit. However, a bank has to disclose profits if additional circumstances apply, for example when banks act as investment advisors.

3) The Implications

The decision is likely to be of great interest to the German banking sector, given that lower courts in Germany have considered a number of similar cases since the beginning of the financial crisis and dozens of municipalities and other businesses across Germany invested in loss making interest rate swaps and similar products during the 2000s.

It is currently too early to assess fully whether this decision will establish a precedent for a multitude of similar claims against banks that sold similar products in Germany. In particular, it remains to be clarified to what extent and how a bank needs to disclose an initially negative market value of an interest swap contract. Also, how a bank should

effectively examine a particular client's risk tolerance and manage a client's knowledge and understanding of a financial product, remains to be considered.

Although the Deutsche Bank case is based on German law, it may also influence the disclosure and information practice of banks in other jurisdictions. For common law jurisdictions, the judgment seems to defeat the premise of caveat emptor. Cases over derivatives sales have spread throughout Europe with similar disputes in Italy, France and England and it therefore remains to be seen how courts in other jurisdictions will rule on this issue.

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Kuoni Travel Holding Ltd. closes financing of its acquisition of Gulliver's Travel Associates

Reference: CapLaw-2011-14

On 12 May 2011, Kuoni Holding Travel Ltd. has closed the financing of the acquisition of Gulliver's Travel Associates (GTA). Kuoni has become one of the leading global providers of online destination management services upon consummation of this acquisition. The acquisition was funded by credit facilities in the amount of CHF 600 million, a rights offering in the amount of CHF 257 million and available cash reserves.

Johnson & Johnson and Synthes enter into definitive merger agreement

Reference: CapLaw-2011-15

Johnson & Johnson and Synthes, Inc. entered into a definitive agreement whereby Johnson & Johnson will acquire Synthes for CHF 159 per share, or USD 21.3 billion in total. Upon completion of this transaction, Synthes and the DePuy Companies of Johnson & Johnson together will comprise the largest business within the Medical Devices and Diagnostics segment of Johnson & Johnson.

Takeover of Süd-Chemie AG by Clariant AG

Reference: CapLaw-2011-16

At the Annual General Meeting of Clariant AG the shareholders voted in favour of a capital increase which clears the way for a takeover of more than 95 percent of the shares in Süd-Chemie AG, Munich, Germany.

The total value of the acquisition was CHF 2.5 billion (EUR 2.0 billion). The capital increase with a total market value of approximately CHF 1.1 billion (EUR 880 million) was completed on 18 April 2011 and consisted of a rights issue to current shareholders of Clariant AG, an international offering of the rump shares to new investors, with gross proceeds of approx. CHF 368 million, and the issuance of additional shares to certain former shareholders of Süd-Chemie AG in exchange for Süd-Chemie shares for approx. CHF 750 million. The remainder of the purchase price was financed by a credit facility in the amount of CHF 1.1 billion and available cash.

Swiss Life AG closes placement of a CHF 325 million hybrid bond issuance

Reference: CapLaw-2011-17

Swiss Life AG is optimizing its capital structure through the placement of CHF 325 million subordinated perpetual bonds, guaranteed on a subordinated basis by Swiss Life Holding AG. The bonds were priced with a coupon of 5.25% for the initial 5½ year period until the first call date.

28th International Financial Law Conference in Zurich

Reference: CapLaw-2011-18

A Conference Report

By René Bösch

On 18–20 May 2011, the 28th International Financial Law Conference, presented by the IBA Banking Law Committee and the IBA Securities Law Committee, took place in Zurich. The conference focused on actual topics in the securities markets as well as on recent regulatory initiatives and developments. It was attended by close to 300 delegates and included a great number of high profile speakers from the finance industry and the legal profession. A splendid social programme with dinners at landmark places in Zurich provided an excellent setting for the conference.

The conference was opened by the key-note speech of Romeo Cerutti, General Counsel of Credit Suisse AG, Zurich. He presented his views on recent regulatory initiatives relating to the new regulations on systemically important financial institutions (SIFIs) and in particular on the new Basel III framework. A panel of distinguished specialists then discussed issues arising from the fragmentation of the securities markets. The next session debated changes on the regulatory framework for international finance and their global impact. The first day of the conference then ended with a session on share and bond buy-backs, discussing very lively the legal minefield in which share and bond buy-backs may find themselves.

Friday morning started with a panel session on required and non-required disclosures for listed companies, before a very topical discussion on the securities and banking law aspects in relation to Basel III went under way. The vice chairman of the board of directors of the Swiss regulator FINMA and the chief risk officer of Credit Suisse AG presented in a very lively discussion their (diverging) views on current initiatives to stricter regulate banks and in particular SIFIs and the effects of such tighter regulation on market participants as well as markets generally. Following a session in the afternoon on banking confidentiality the working programme of the conference ended with a very engaged discussion about liability aspects of custodians which revealed surprising new aspects to a great number of participants in the conference.

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St. Gallen Corporate Law Forum (St. Galler Gesellschaftsrechtstag)

Friday, 17 June 2011, 08.55–16.40 h, SIX ConventionPoint, Zurich

www.irp.unisg.ch

St. Gallen Banking Law Forum (St. Galler Bankrechtstag)

Friday, 24 June 2011, 08.55–16.40 h, SIX ConventionPoint, Zurich

www.irp.unisg.ch

In the Controversial Field of Monetary and Financial Policy (Im Spannungsfeld von Geld- und Finanzpolitik)

Tuesday, 28 June 2011, 18.45 h
Steinfelsareal (Zürcher Kantonalbank), Josefstrasse 222, 8005 Zurich

www.haueninfo.ch