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Cross-Border Debt Offerings by Foreign Issuers into Switzerland – An Overview

Reference: CapLaw-2011-22

This position paper addresses the requirements under Swiss law applicable to cross-border offerings of debt securities, including convertible debt securities, by foreign issuers into Switzerland. It also discusses the delimitation of the terms public and non-public offerings in Swiss law.

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1) Scope

This position paper addresses the requirements under Swiss law applicable to cross-border offerings of debt securities, including convertible debt securities,[1] *i.e.,* debt securities issued by issuers incorporated outside of Switzerland, but offered into Switzerland. It also discusses the delimitation of the terms public and non-public offerings in Swiss law.

This position paper does not address any requirements under the listing rules of the SIX Swiss Exchange Ltd. (SIX Swiss Exchange) or any other Swiss exchange or regulated trading facility in Switzerland which would be applicable in case a listing of the instruments in Switzerland was sought. It also does not address the offering of structured products within the meaning of article 5 of the Swiss Collective Investment Schemes Act (CISA).[2] Depending on the specific legal set-up, certain structured debt securities

1 Special rules apply if the debt security itself or the security into which the debt security can be converted qualifies as a unit of a collective investment scheme. Under the CISA, debt securities of foreign issuers may, under certain circumstances, be recharacterized as units of collective investment schemes, *e.g.,* if the purpose of such foreign issuer consists of collective capital investment.

2 With the exception of mentioning a few examples of structured products (capital protected products, capped return products and certificates), the CISA does not define the term structured product. A commonly held view, which is supported by the Swiss Structured Products Association, is that structured products are *financial instruments combining a derivative and a traditional financial instrument (such as a share or bond).* The Swiss Bankers Association's Guidelines on informing investors about structured products, however, clarify that products where the primary focus is on financing purposes or a risk transfer in the narrow sense do not qualify as structured products. The same holds true for forward and options transactions, irrespective of their set-up.

can qualify as structured products rather than as bonds or notes.[3] Where this is the case, a different set of rules applies.

This position paper has been prepared with the sole purpose of expressing what, in the view of the authors, is the current standard for selling restrictions in the context of international offerings of debt securities into Switzerland. It does not constitute legal advice and may not be relied upon or used as a substitute for legal advice taken on a case by case basis.

For purposes of this position paper we have assumed that the issuer is a company incorporated outside of Switzerland that intends to offer debt securities to investors in Switzerland, and that the offering has no connection to Switzerland other than in connection with the offer into Switzerland.[4]

2) Regulatory Framework – Overview

Switzerland's legal regime for inbound debt securities offerings is relatively permissive in international comparison. Switzerland is neither a member of the European Union nor a signatory to the European Economic Area Treaty and, therefore, none of the European directives (*e.g.,* the Prospectus Directive or the Transparency Directive) apply in Switzerland. In contrast to other jurisdictions, the public offering of debt securities into Switzerland is not subject to any requirement of authorisation by, or registration with, any Swiss governmental or other authority or self-regulatory body. The same applies to the prospectus for a debt offering, except in case of a listing on the SIX Swiss Exchange (or any other Swiss exchange).

Notwithstanding the foregoing, public offerings of debt securities in or into Switzerland must comply with (i) the issue prospectus requirements set forth in the Swiss Code of Obligations (CO), and (ii) if the debt securities are to be listed on a Swiss exchange, the applicable listing rules. Accordingly, the determination of which prospectus requirements are applicable to a particular offering of debt securities depends on (i) whether the offering is considered public under the CO, and (ii) whether the debt securities will be listed on a Swiss exchange (such as the SIX Swiss Exchange). Moreover, Swiss law generally makes no distinction between low denomination and high denomination debt securities.

Non-public offerings of debt securities are generally not subject to the obligation to prepare a Swiss issue prospectus provided that the debt securities are not listed on any Swiss exchange or any other regulated market in Switzerland. However, special

3 In practice, the terms *notes* and *bonds* are used interchangeably in Switzerland.

4 If such other connection existed, special rules or guidelines could apply (see for example the guideline described in footnote 5 below).

rules apply for private placements of debt securities of non-Swiss issuers that are denominated in Swiss francs and are governed by Swiss law.[5]

3) Offerings of Debt Securities

a) Bonds and other Forms of Debt Securities

Whenever debt securities are publicly offered or submitted for public subscription or introduced on an exchange in Switzerland, the issuer must prepare a prospectus that complies with paragraph 2 of article 1156 CO.

Article 1156 CO purports to apply to *bonds* only. However, bearing in mind that the provision was enacted prior to the existence of other types of debt securities, it is generally held that article 1156 CO should be interpreted so as to apply to other forms of debt securities except, by reason of the explicit wording of article 5 CISA, for structured products.

b) Private vs. Public Offering

The terms *public offering* and *public subscription* are not defined in the CO, except for the statement in article 652a (2) CO (which relates to equity offerings) pursuant to which any invitation for subscription is public unless addressed to a limited group of persons. As a result, and due to the lack of clear guidance by Swiss courts, the meaning of the term *public offering* for purposes of the CO has been and continues to be the subject of legal debate.

Generally speaking, a public offering is understood to be *an offering made to an indefinite number of investors or by means of a public advertisement* (*e.g.,* newspaper announcement, mass-mailings, web page with unrestricted access). By contrast, if issuers or placement agents solicit individually a limited number of selected investors, including by inviting them to roadshows or call this finite number of handpicked investors individually, the offering is considered to be private as long as there are no public advertisements or similar communications relating to the offering.

In any event, not every public advertisement or announcement of an offering is necessarily a *public offering*. In our view, an offering should not be considered public if the announcement is made subsequently to the closing of the offering or if it does not contain an offer (explicit or implicit) or an invitation to make an offer to investors to

5 The Swiss Bankers Association's *Guidelines Regarding Notes from Foreign Issuers* provide for a prospectus requirement if debt securities of non-Swiss issuers that are denominated in Swiss francs and governed by Swiss law are directly placed with the clients of Swiss banks involved in the issuance *(Syndikatsbanken).*

purchase the debt securities. It is advisable to include certain disclaimers in such announcements so as to demonstrate and document the absence of such intent.

An offering published on the issuer's website may be considered *public,* in particular if the content of the website is connected to Switzerland or the Swiss market or if such a connection could be established. Investors who are resident in Switzerland should, therefore, not have access to the relevant offering materials included on a website, if the issuer wishes to structure an offering as a non-public offering in Switzerland. If such a restriction is not feasible, suitable access restrictions have to be designed on a case-by-case basis.

A *qualitative approach* is generally considered appropriate to distinguish a public offering from a private placement. Such approach is not based on a specific number of offerees, but considers whether investors were selected based on objective criteria as opposed to a general solicitation to the public or whether the investors have a pre-existing specific relationship with the issuer (*e.g.,* existing shareholders, existing employees). Given the need for numeric guidance, practitioners and commentators have developed a quantitative rule of thumb, which focuses on the number of offerees. The threshold between a private placement from a public offering has, based on this rule of thumb, traditionally been set at 20 investors[6], although, following the practice established under the Prospectus Directive, there is a trend among practitioners to consider that the threshold is at 100 investors. Some practitioners recommend as an additional cautionary measure to limit an offering relying on this higher threshold to institutional investors and (possibly) high net worth individuals. Taking an even more permissive approach (which is also reflected in a legislative proposal for an amendment of Swiss stock company law pending in Parliament), *qualified investors* as defined in the CISA[7] should not be taken into account when calculating the relevant number of investors or

6 The threshold of 20 investors mainly has roots in the banking regulations and in the former Swiss regulation on investment funds.

7 Qualified investors within the meaning of the CISA are: (i) regulated financial intermediaries, such as banks, broker-dealers or fund administrators; (ii) regulated insurance companies; (iii) public entities and pension funds with a professional treasury; (iv) corporations organized under private law having a professional treasury; (v) high net-worth individuals, provided they confirm in writing to a regulated financial intermediary or qualifying independent asset manager that they directly or indirectly have at least CHF 2 million in bankable assets; (vi) investors who have concluded a written discretionary asset management contract with a regulated financial intermediary with respect to the assets to be invested; and (vii) independent asset managers and investors who have concluded a written asset management contract with an independent asset manager, provided that the independent asset manager and the asset management meet certain requirements.

when considering the question of whether the offer is public or not.[8] This last approach is appealing as it entails a uniform standard for the offering of securities throughout all product-types.

There is no bright-line test with respect to on-selling of privately placed debt securities by the underwriters or initial investors. However, as a general rule, any subsequent investors do not have to be included in the calculation of the relevant number of investors for the determination of the nature of the offering, provided neither the issuer nor any underwriter was involved in such on-selling nor knew or should have known at the time of the private placement that the securities would (immediately) be sold on. In order to clarify this position, appropriate disclaimers or selling restrictions, such as the one set out on page 9 et seq., should be included in the offering material and appropriate covenants should be included in the underwriting or subscription agreement.

We note that the more recent and more liberal statements presented in this position paper are *untested* in court and *there is no bright-line test for determining whether an offering is public*. Each offering should therefore be evaluated on a case-by-case basis, weighing in all the relevant facts (*e.g.,* marketing, number and type of investors, nature of any on-selling). Nevertheless, once these facts have been taken into consideration, in the absence of any such characteristics of a public offering, the authors of this position paper take the view that if one were to set a numerical threshold in the first place, an offering to up to 100 or even more selected investors should qualify as a private placement. In specific cases, an offering may still be considered non-public even if made to a greater number of investors.

In any event, a debt offering is subject to the issue prospectus requirements of article 1156 CO irrespective of whether it is a public offering, if the debt securities are introduced on a regulated trading facility in Switzerland (such as the SIX Swiss Exchange).

c) Consequences of a Public Offering

i) Disclosure Items in the Prospectus

If a public offering of debt securities is to be made into Switzerland, the issuer must prepare an issue prospectus which complies with articles 1156 and, by way of refer-

8 Notwithstanding the foregoing, it must be noted that the number of 20 investors still plays an important role where Swiss subsidiaries or Swiss branches act as issuer. According to Swiss banking regulation, taking deposits *(Publikumseinlagen)* from more than 20 investors could trigger a licensing obligation. Bonds and other standardized debt instruments, however, do not qualify as deposits within the meaning of the Swiss Banking Act and Banking Ordinance if the investors are informed in a manner equivalent to that provided for in article 1156 CO with respect to public offerings of bonds.

ence, 652a CO. Pursuant to these provisions, the issue prospectus must contain the following disclosure items:

- the contents of the issuer's entry in the commercial register, *e.g.,* name, domicile and purpose of the issuer, name, place of residence[9] and nationality of the members of the issuer's board of directors and the auditors, information on contributions in kind;
- the amount and structure of the issuer's share capital (*i.e.,* the number, par value and type of shares, including rights of holders of preferred stock (if any), rights of holders of bonus certificates (if any)), and a description of provisions in the issuer's articles of incorporation that authorize the board of directors to issue shares;
- the most recent audited *statutory and consolidated financial statements* of the issuer, and, if the issue prospectus is published more than nine months after the balance sheet date, *interim financial statements*;
- the issuer's *dividend history for the five years* preceding the issuance of the debt securities;
- the issuer's *resolution regarding the issuance of the debt securities*; and
- specific details on the *terms of the debt securities* (including maturity, conditions for early redemption, interest payments, security and representation of the holders).

Where a debt security is guaranteed, although not explicitly required by statutory law, it is generally held to be prudent and advisable that the information required with respect to the issuer is also provided for the respective guarantor(s).

In addition to article 1156 CO, a non-Swiss issuer of debt securities is advised to follow the prospectus requirements or other disclosure standards of the jurisdiction of the issuer, when making a public offering into Switzerland. This recommendation follows from the Swiss Federal Act on Private International Law (PILA) which provides that claims arising from the public issue of debt securities by means of a prospectus, circular or similar publication are governed by the law applicable to the issuer or by the law of the state where the offering was made (*i.e.,* Swiss law in case of an offering in Switzerland). This provision offers a potential plaintiff in a prospectus liability suit in Switzerland the right to choose the more favourable law.

9 The authors of this position paper believe that the business address (*i.e.,* address of the seat of the issuer) is sufficient instead of the private residence address.

ii) Consequences of Non-Compliance with Swiss Statutory Prospectus Requirements

Non-compliance with Swiss statutory prospectus requirements in an offering prospectus for a public debt offering into Switzerland is enforced under Swiss law through civil prospectus liability. Such claims can be successful only if, *inter alia,* the plaintiff can establish causation. In other words, the plaintiff must show that the misstatement of information or the failure to provide certain information in the prospectus was an actual and adequate cause of the damage suffered. For example, if a prospectus does not record the dividend history of an issuer for the last five years, investors may only successfully recover damages from the issuer or anyone participating in the offering if they can prove:

– that they would not have bought the debt securities, or would have bought them at a different price, if they had known of the information in question; and

– that the failure to provide the information caused the damage in question.

If the misstatement or the failure to publish certain information does not constitute cause for the damage in question, there is no cause of action for prospectus liability.

iii) Impact of Swiss Prospectus Requirements on International Offerings

If an issuer incorporated outside of Switzerland undertakes an offering that is also directed to, or open to, the Swiss market, such issuer typically will have prepared a comprehensive information document under the laws of its place of incorporation or the laws of its place of listing. We understand that in the member states of the European Union and in the United States of America, the requirements for the contents of a prospectus generally go beyond the statutory Swiss law requirements summarized above.[10]

However, as a matter of practice, certain information required to be disclosed under Swiss statutory law is often missing in international prospectuses. This is frequently the case in respect of:

– the five-year dividend history;

– contributions in kind; and

– the statutory (not consolidated) financial statements.

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10 The situation may be different if, pursuant to local laws no prospectus at all or only a very brief disclosure document is prepared.

If one takes the view that Swiss law requires the disclosure of such information in case of an offering of debt securities into Switzerland by a non-Swiss issuer, Swiss prospectus liability would only arise if (i) the relevant information was incorrect or missing, (ii) the plaintiff can, *inter alia,* show that the failure to provide such information had an impact on his or her investment decision, and (iii) the plaintiff can show that the failure to provide (true and complete) information was the actual and adequate cause of the damage suffered. This will, in our view, typically not be the case – provided the prospectus contains *all information allowing the investor to take an informed investment decision* as required by applicable rules in the European Union, United States or other countries with comparable prospectus disclosure requirements, so that any relevant information should in any event be directly or indirectly included in the prospectus.

d) Non-Public Offerings

A non-public offering of debt securities into Switzerland, which are not listed on any Swiss exchange or any other regulated market in Switzerland, is not subject to any requirements under the CO.[11] However, it is customary to include an appropriate Swiss disclaimer in the marketing materials (see the suggested template wording below).

Credit Suisse AG		*UBS AG*
Baker & McKenzie	*Bär & Karrer AG*	*Homburger AG*
Lenz & Staehelin	*Niederer Kraft & Frey AG*	*Pestalozzi Attorneys at Law Ltd.*
Schellenberg Wittmer	*Vischer AG*	*Walder Wyss Ltd.*

Template Disclaimer for Non-Public Offerings of Debt Securities[12]

Switzerland

This document is not intended to constitute an offer or solicitation to purchase or invest in the [Notes] described herein. The [Notes] may not be publicly offered, sold or advertised, directly or indirectly, in, into or from Switzerland and will not be listed on the SIX Swiss Exchange or on any other exchange or regulated trading facility in Switzerland. Neither this [document] nor any other offering or marketing material relating to the [Notes] constitutes a prospectus as such term is understood pursuant to article 652a or article 1156 of the Swiss Code of Obligations [[or a listing prospectus within the meaning of the listing rules of the SIX Swiss Exchange or any other regulated trad-

11 See above at footnote 5.

12 Other than structured products as such term is understood within the meaning of the CISA.

ing facility in Switzerland][13] *[or a simplified prospectus or a prospectus as such term is defined in the Swiss Collective Investment Scheme Act]*,[14] and neither this [document] nor any other offering or marketing material relating to the [Notes] may be publicly distributed or otherwise made publicly available in Switzerland.

[Neither this [document] nor any other offering or marketing material relating to the offering, nor the [Company] nor the [Notes] have been or will be filed with or approved by any Swiss regulatory authority. The [Notes] are not subject to the supervision by any Swiss regulatory authority, e.g., the Swiss Financial Markets Supervisory Authority FINMA (FINMA), and investors in the [Notes] will not benefit from protection or supervision by such authority.][15]

Lessons Learned from the Financial Crisis (Part 2) – OTC Cash Equity Trades

Reference: CapLaw-2011-23

In the last edition of CapLaw (CapLaw 1/2011), we focused on securities lending transactions which have come under special scrutiny in the financial crisis. In this edition, we will address OTC cash equity trades. As OTC cash equity trades may be exposed to similar risks as securities lending transactions, investors in these financial instruments, to some extent, faced similar issues during the financial crisis. Our below comments relate specifically to the OTC Cash Equity Trades Default Protocol. The protocol has been published by the AFME on 22 September 2010 with the aim to add legal certainty in the event of a signatory becoming insolvent.

By Urs Pulver / Petra Ginter

1) Introduction

At the time of the collapse of Lehman Brothers International (Europe) (LBIE) a number of banks entered into OTC cash settled equity trades with LBIE, which were not entered into on, or under the rules of, a regulated market (RM), multilateral trading facil-

13 Optional. Only relevant where the debt securities are or will be listed abroad and the offering material is called listing prospectus.

14 Optional. The addition *«or the Swiss Collective Investment Scheme Act»* should only be added if the debt securities are such that they come close to structured products. It is advisable to seek legal advice in the specific case.

15 Optional. Only relevant if debt securities are such that they come close to or could potentially constitute structured products. As a different legal regime could apply, *e.g.*, the securities could potentially only be eligible to be offered to qualified investors within the meaning of the CISA, it is advisable to seek legal advice.

ity (MTF) or similar venue. Furthermore, whilst the banks had purportedly put in place terms of business with LBIE, it was not in all cases clear whose terms would prevail. It is fairly common for banks to send each other their standard forms, resulting in a so-called battle of forms. In addition, the OTC cash equity trades were not entered into under any master agreements.

In many cases, this resulted in the trades not being governed by express terms, other than as to size, security and price. The absence of express terms to deal with the LBIE default created considerable legal uncertainty with regard to unsettled OTC trades.

Against this background, it became clear that contractual arrangements between banks trading cash equities bilaterally needed to be improved.

2) OTC Cash Equity Trades Default Protocol

In September 2010, the Association for Financial Markets in Europe (AFME) published a contractually binding protocol (Default Protocol) that permits the termination and valuation of trades in the OTC cash markets upon the insolvency of a party that had signed up to the Default Protocol.

The Default Protocol is governed by English law with exclusive jurisdiction of the English courts. The purpose of the Default Protocol is to provide a standard set of close-out netting provisions which parties can adhere to, and which adhering parties may (but are not obliged to) apply upon the default of another adhering party. The Default Protocol covers OTC cash equity trades that are not otherwise governed by the default rules of a RM, MTF or similar venue, or which are not covered by existing contractual terms between the parties governing the default (Covered Trades). It is designed for principal-to-principal trades and will not cover agency trades between buy-side and sell-side firms.

Upon default, all Covered Trades will be valued by the non defaulting party and close-out netting will be effected between the defaulting and non defaulting party. Performance of the Covered Trades will be replaced by the obligation on the party with the lower claim to pay the net amount. The close-out netting mechanism is derived from the Global Master Repurchase Agreement (GMRA) and the 2009/2010 GMSLA (as described in our article on securities lending in CapLaw 1/2011).

The initial scope of the Default Protocol is for it to apply among larger broker/dealers located in a relatively small number of European jurisdictions, including UK, Germany, France and Switzerland. The adherence mechanism is the same as for the Set-Off Protocol (as defined and described in our article on securities lending in CapLaw 1/2011).

3) Particularities with respect to a Swiss Adhering Party

The Default Protocol specifies that, *inter alia,* the liquidation procedures and protective measures applicable to Swiss banks and securities dealers (under Swiss law) qualify as Act of Insolvency. A default notice shall be deemed to have been served, even if no default notice is given, in the event of the *bankruptcy* of a Swiss bank or securities dealer, and the termination shall take effect as of the time immediately preceding the opening of bankruptcy (Automatic Early Termination; AET). With AET default market values will be determined as at the termination date, being the time of the opening of bankruptcy. These provisions improve the enforceability of the Default Protocol from a Swiss law perspective.

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U.S. Securities and Exchange Commission Issues Final Rules Implementing the Dodd-Frank Whistleblower Provisions

Reference: CapLaw-2011-24

The U.S. Securities and Exchange Commission recently approved the final rules implementing the whistleblower provisions of the Dodd-Frank Act. These rules provide significant financial incentives for whistleblowers to report violations of U.S. federal securities laws directly to the SEC. The new SEC whistleblower rules will apply not only to domestic U.S. public companies but also to foreign private issuers.

By Thomas Werlen / Stefan Sulzer

On 25 May 2011, the U.S. Securities and Exchange Commission (SEC) approved final rules (new Regulation 21F under the Securities Exchange Act of 1934 (Exchange Act)) implementing the whistleblower program mandated by Section 922 of the Dodd-Frank Wall Street Reform and Consumer Act (Dodd-Frank Act). The new rules will become effective on 12 August 2011 (the final rulemaking release, SEC Release No. 34-64545 is available at http://www.sec.gov/rules/final/2011/34-64545.pdf).

While the Sarbanes-Oxley Act (SOX) encouraged *up the ladder* reporting by employees and allowed for self-policing and self-reporting by companies of potential violations, the new SEC whistleblower rules will incentivize external reporting to the regulators. The SEC has established a new Whistleblower Office in the Division of Enforcement and has fully funded its USD 450 million Investor Protection Fund to begin paying whistleblowers.

The new SEC whistleblower rules contain no exclusion for foreign private issuers and are therefore, also applicable to Swiss issuers whose securities are listed in the United States, including ABB Ltd., Credit Suisse, Novartis AG, Syngenta AG and UBS AG.

1) New SEC Whistleblower Rules

Under the new whistleblower rules, the SEC will reward eligible whistleblowers who voluntarily provide original information about violations of federal securities laws that lead to a successful enforcement action where the SEC obtains monetary sanctions exceeding USD 1 million. The whistleblower will be eligible to receive 10 to 30% of the recovered sanctions.

This is an expansion of the SEC's current authority under the Exchange Act, as amended, which caps such compensation at 10% of collected penalties, and restricts whistleblower compensation to the insider trading context.

Whistleblowers Defined. Under the new rules, a whistleblower is an individual who provides information to the SEC that relates to a possible violation of the federal securities laws that has occurred, is ongoing or is about to occur. An eligible whistleblower may be an employee, former employee, vendor, agent, contractor, client, and competitor. Generally, certain people will not be eligible for whistleblower awards, including (i) officers, directors, trustees, or partners of an entity, who are informed of allegations of misconduct; (ii) compliance or audit personnel of a company whose information is obtained because of their positions; (iii) in-house lawyers as well as outside counsel whose information is obtained through representing a client; and (iv) foreign government officials, such as employees of a foreign securities regulator. However, individuals mentioned under (i) and (ii) above may be entitled to an award if they have a *«reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent […] conduct that is likely to cause substantial injury of the financial interest or property of the entity or investors»* (SEC Rule 21F-4(b)(4)(v)(A)); or at least 120 days have passed since they reported the information internally to appropriate internal resources.

Original Information. Under the new rules, *original information* is information that is (i) not already known to the SEC, (ii) derived from the whistleblower's independent knowledge or analysis, (iii) not exclusively derived from an allegation in a judicial or administrative hearing, or similar action; and (iv) provided to the SEC for the first time after 21 July 2010. A whistleblower does not need to have direct, first-hand knowledge of potential violations. Independent knowledge can include information from experience, observation, or even communication with other employees, clients, vendors or non-parties.

Violation of Federal Securities Laws. Only information relating to federal securities laws qualifies. This includes in particular violations of disclosure rules under the Exchange Act and violations under the Foreign Corrupt Practice Act (FCPA). An individual who submits information that relates only to a state law or a foreign (non-U.S.) law violation would not satisfy the SEC whistleblower definition.

Voluntary Submission. The submission of information to the SEC is deemed *voluntary* if the whistleblower provides information before the SEC or any other authority of the federal government such as the Public Company Accounting Oversight Board (PCAOB) directs any formal or informal request, inquiry or demand for the information at the whistleblower.

Successful Enforcement Action. The SEC has made clear that it will not award a whistleblower award for every tip or complaint. Rather, it will reward a whistleblower only if the information leads to a successful SEC enforcement action. The new rules contemplate that only timely information of high quality, reliability, and specificity will merit an award. A whistleblower award should be rare in connection with conduct that is already under investigation. In those situations, only information that has *significantly contributed* to the success of an SEC enforcement action will be considered eligible to merit a whistleblower award.

Incentivizing Internal Reporting. The potentially adverse impact of the new whistleblower rules on companies' internal compliance programs was the greatest source of controversy during the rulemaking process. The SEC declined to adopt a requirement that whistleblowers first have to report through the company's internal reporting systems. Instead, the new rules provide some incentives to help motivate whistleblowers to use their companies' internal compliance and reporting system when appropriate:

(i) A whistleblower may receive a bounty for reporting information internally even if the company – and not the whistleblower – eventually reports the information to the SEC. In such case, the SEC will attribute to the whistleblower all information provided by the company to the SEC and the whistleblower will thus also get credit for any additional information generated by the company in its investigation.

(ii) The SEC will consider a whistleblower as having reported to the SEC on the date he or she reported internally so long as the whistleblower reports the information to the SEC within 120 days thereafter.

(iii) When determining the size of a bounty, the SEC may pay smaller awards to whistleblowers who obstruct or interfere with internal compliance policies and reporting procedures.

Reward and Anonymity Is Not Guaranteed. In case there is an eligible recovery from a final judgment, a whistleblower must file a claim for award, which is reviewed and evaluated by the SEC staff. The time from initiation of investigation to the SEC's recovery of a monetary sanction could run multiple years, and a whistleblower's bounty will be paid only after the SEC actually collects eligible funds. Further, although initial whistleblower reports can be filed anonymously via an attorney, a whistleblower must identify himself or herself to the SEC prior to collecting any reward.

Expanded Protection for Whistleblowers. The SEC rules enhance existing protections for employees who report possible violations of the securities laws either internally or to the SEC or other federal authorities. The new rules prohibit any action to impede a whistleblower's communications with the SEC. For instance, a company could not seek to enforce a confidentiality agreement with an employee to prevent the employee from disclosing to the SEC information relating to a possible securities law violation, except to the extent the information is protected by attorney-client privilege or obtained in the course of a legal representation. The rules also clarify the authority of the SEC to enforce such protections and that the protections apply regardless of whether the whistleblower ultimately satisfies all of the requirements for payment of an award.

2) Impact of New SEC Whistleblower Rules

The SEC estimates that it will receive substantially more tips annually but that only a few of them will reach the USD 1 million threshold (see pp. 209–211 of SEC Release No. 34-64545).

It is currently too early to assess what effect the new SEC whistleblower rules will have on companies' internal compliance programs. In particular, it remains to be seen how the incentives for whistleblowers to report internally rather than going immediately to the SEC balance out the disincentives to internal reporting, such as the fear of retaliation and ostracism.

However, to ensure that a company's internal compliance programs and reporting systems are consistent with the new SEC rules, companies may wish to review their codes of conduct to address any potential inconsistencies with the new rules and to take a fresh look at their internal reporting systems to confirm that the procedures are effective and result in timely reports of possible securities law violations to management and to the audit and compliance committee or another oversight committee. When a company learns of a potential securities law violation, a speedy response will be very important, as the risk of a whistleblower alerting the SEC before the company has been able to conclude its review will be ever present.

Further, companies may want to assess whether their existing anti-retaliation policies and procedures comply with the new rules and are able to clearly document those practices in order to limit exposure to employment-related claims that could add further liability beyond the reported offense. In this regard, officers and other supervisors should be trained with respect to the anti-retaliation provisions of the new rules.

Recently, numerous websites have emerged, designed to entice employees to become whistleblowers and to turn against their companies in the hope of big bounties and it may be a good time to enhance communication and training efforts regarding internal whistleblower and compliance programs to ensure a proper understanding of the importance of the programs and to reinforce a culture of compliance. In addition, as public awareness of the new SEC whistleblower program and its potential awards increases, companies should increase their readiness to respond.

Finally, companies may want to review their D&O insurance policies, particularly the definition of loss and coverage for investigation, to ensure that the new whistleblower rules do not have unintended consequences on the insurance coverage of the company's directors and officers.

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Newsflash: Selective Legal Developments in Switzerland

Reference: CapLaw-2011-25

On 29 June 2011, the Swiss Federal Council amended some of its implementing ordinances. Following international developments, for example, the Federal Council decided on a change on its Collective Investment Schemes Ordinance, thereby introducing a new formalized simplified prospectus for so-called securities funds and other funds for traditional investments. This change will enter into effect as of 15 July 2011. The Federal Council also changed the Swiss Stock Exchange Ordinance by providing for a new possibility for foreign own-account dealers that are not supervised but meet certain requirements to become a member of a stock exchange registered in Switzerland. This change will enter into effect on 1 August 2011.

By Benjamin Leisinger

1) New Rules for Simplified Prospectuses for Certain Collective Investment Schemes in Switzerland

Pursuant to the rules of the Directive 2009/65/EC of the European Parliament and the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), known as UCITS IV, beginning 1 July 2011, the distribution of certain securities will have to be documented by a so-called Key Information Document (KID), a specific form of a standardized simplified prospectus.

This requirement is intended to provide for a better protection and information of the investors. The key investor information shall include appropriate information about the essential characteristics of the collective investment concerned, which is to be provided to investors so that the average investors are reasonably able to understand the nature and the risks of the investment product that is being offered to them and, consequently, to take investment decisions on an informed basis.

On 29 June 2011, the Federal Council changed the Swiss Collective Investment Schemes Ordinance (CISO), thereby introducing a formalized simplified prospectus for securities funds and other funds for traditional investments. Such standardized requirements will be set forth in a new Annex 3 to the CISO. Exceptionally, securities funds and other funds for traditional investments to be authorized by FINMA until 15 July 2012 will still be allowed to prepare and publish an old-style simplified prospectus complying with the existing Annex 2 to the CISO. Real estate funds will be allowed to continue to publish simplified prospectuses complying with Annex 2. These changes will enter into effect as of 15 July 2011 for new securities funds and other funds for traditional investments. Existing securities funds and other funds for traditional investments that had to be documented by a simplified prospectus, as well as securities funds and other funds for traditional investments authorized by FINMA until 15 July 2012 that take advantage of the exceptional possibility to publish an old-style simplified prospectus, will benefit from a transitional period of 3 years. Hence, until 15 July 2014, the Swiss fund management companies or Swiss investment companies with variable capital (SICAV), respectively, of securities funds and other funds for traditional investments, as well as the representatives of foreign collective investments schemes that are comparable to Swiss securities funds and other funds for traditional investments and that are publicly distributed in or from Switzerland, will have to draft a new-style simplified prospectus complying with the new standard and must submit it to FINMA.

The Federal Council noted that further changes concerning the legal framework on collective investment schemes in Switzerland are envisaged, and are already being drafted, namely to the Swiss Collective Investment Schemes Act (CISA). Infact, on 6 July 2011, the Federal Council opened the consultation with respect to the proposed changes to the CISA. Amongst others, the Federal Council plans to introduce new licensing and/or approval requirements. For example, a licensing requirement for the distributors of foreign collecitve investment schemes is proposed, even if they are not publicity distribution, *i.e.,* if they distribute foreign collective investment schemes in or from Switzerland to qualified investors only. The Consultation lasts until 7 October 2001.

2) New Possibility for Unsupervised Foreign Own-Account Dealers to Become a Member of a Stock Exchange Registered in Switzerland

Under the old regime, FINMA could grant authorization to a foreign securities dealer who wished to become a member of a stock exchange registered in Switzerland, provided that, *inter alia*, the foreign securities dealer was subject to appropriate supervision. On 29 June 2011, with entry into effect on 1 August 2011, the Federal Council extended the ***possibility to become a member of a stock exchange*** registered in Switzerland to ***unsupervised foreign own-account dealers.*** Own-account dealers are securities dealers who, in a professional capacity, trade in securities for their own account on a short-term basis. This change became necessary in order to abolish a competitive disadvantage that resulted from a change in the supervisory regulations in the European Union: In the European Union, own-account dealers are no longer subject to supervision but can nevertheless become member of a European stock exchange. But, in order to ascertain that the foreign own-account dealers indeed qualify (and in order not to discriminate Swiss own-account dealers against the foreign ones), the foreign own-account dealers must meet equivalent requirements as the Swiss own-account dealers who want to become a member of a stock exchange registered in Switzerland. Even if they meet these requirements, it should be noted that – also under the new regime, based on article 37 of the Stock Exchange Act – FINMA can still refuse authorization if the countries in which the foreign own-account dealers are domiciled do not afford Swiss own-account dealers genuine market access and do not offer them the same competitive opportunities as they do to the local own-account dealers.

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NIBE Announces Final Results of Tender Offer for Schulthess Group

Reference: CapLaw-2011-26

Swedish based heating company NIBE Industrier AB has announced on 1 July 2011 that subsequent to the additional acceptance period of the tender offer for all publicly held shares in Schulthess Group AG, it held 96.05% in Schulthess.

Axpo Publishes Tender Offer for EGL

Reference: CapLaw-2011-27

On 20 June 2011, Swiss energy company Axpo Holding AG pre-announced the public tender offer for all publicly held shares in the energy trading company EGL Ltd. Prior to the pre-announcement, Axpo and EGL had entered into a transaction agreement. As of 17 June 2011, Axpo held 91.0% in EGL and now aims to obtain full control. The offer prospectus was published on 27 June 2011 and the acceptance period is expected to run from 12 July to 12 August 2011, subject to any extension.

Quo vadis – Financial Center Switzerland? Securities Markets and Market Developments (Quo vadis – Finanzplatz Schweiz? Märkte und Marktentwicklungen im Effektenbereich)

Thursday, 25 August 2011, 08.30 h – 16.30 h, University of Zurich, Zurich

www.eiz.uzh.ch

14th Zurich Conference on Mergers & Acquisitions (14. Zürcher Konferenz zum Thema Mergers & Acquisitions)

Tuesday, 6 September 2011, 09.15 h – 17.10 h, Lake Side Casino Zürichhorn, Zurich

www.eiz.uzh.ch

Capital Market Transactions VII (Kapitalmarkttransaktionen VII)

Wednesday, 23 November 2011, 09.15 h – 17.00 h, Kongresshaus, Zurich

www.eiz.uzh.ch

St. Gallen Symposium on Financial Market Regulation (St. Galler Tagung zur Finanzmarktregulierung)

Friday, 2 December 2011, Convention Point, Zurich

www.es.unisg.ch