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Licensing of the Reviewing Bodies pursuant to the Financial Services Act – An Initial View

Reference: CapLaw-2020-21

The Swiss financial market regulatory framework has undergone fundamental and comprehensive reforms over the past few years. The main purpose of these reforms is to harmonize Swiss regulations with existing and new EU regulations and to ensure access of Swiss financial institutions to the European market by fulfilling equivalence requirements. The most important parts of the reform package in terms of Swiss capital markets are set out in the new Financial Services Act (FinSA) and its implementing ordinance, the Financial Services Ordinance (FinSO), both of which entered into force on 1 January 2020 (subject to the phase-in of certain provisions as well as transition periods).

By Philippe Weber / Christina Del Vecchio

1) Introduction

From 1 January 2020, FinSA (together with FinSO) introduced a new prospectus regime, including specific statutory requirements, for Swiss capital markets applicable to all financial instruments (subject to exemptions and customizations for certain financial instruments) where (i) any person in Switzerland who makes a public offer for the acquisition of securities or (ii) any person who seeks the admission of securities to trading on a trading venue in Switzerland must first publish a prospectus (article 35(1) FinSA). Perhaps most noteworthy, and unlike under the previous regime, any such prospectus must be submitted to a so-called reviewing body (a Reviewing Body) for approval prior to publication (i.e., ex-ante prospectus approval) (article 51(1) FinSA). Notably, for eligible debt securities, prospectus approval may be obtained after the publication of the prospectus (i.e., ex post prospectus approval).

On 28 May 2020, SIX Exchange Regulation AG (SIX Exchange Regulation) and BX Swiss AG (BX Swiss) announced the approval from FINMA to each act as a Reviewing Body under FinSA effective 1 June 2020. Thus, the respective prospectus review offices at SIX Exchange Regulation and BX Swiss are now accepting applications for the review and/or deposit of prospectuses pursuant to FinSA. However, according to FinSO, where a public offer is made or a request is made for admission to trading on a trading venue, the duty to publish a FinSA approved prospectus will only take effect as of 1 December 2020 (i.e., six months after the Reviewing Bodies were licensed by FINMA, article 108(1) FinSO). Until 1 December 2020, insofar as no prospectus in accordance with FinSA is produced, issuers may continue to comply with the previous regime, whereby a so-called offering and listing prospectus can be prepared in compliance with the Swiss Code of Obligations (CO) and/or the listing rules of the relevant exchange (as applicable)(article 109(2) FinSO). However, after the expiration of the six-month transition period, the obligation to publish a FinSA compliant prospectus
will apply to all securities that are publicly offered in Switzerland or seek an admission to trading on a trading venue in Switzerland.

Following their appointment as Reviewing Bodies, both SIX Exchange Regulation and BX Swiss have now published the respective rules, lists, directives as well as the fee schedules of their prospectus offices as contemplated by FinSA and FinSO.

Importantly, according to article 72(5) FinSO, where FINMA grants a license to more than one Reviewing Body, it must ensure appropriate coordination of their practice. To this effect, the prospectus review offices of SIX Exchange Regulation and BX Swiss have coordinated a number of their directives and lists, including the approach to the review for coherence and understandability in prospectuses, the list of recognized jurisdictions and authorities, the list of recognized trading venues, accepted accounting standards and the directive on pro forma financial statements. The rules, lists, directives as well as the fee schedules of SIX Exchange Regulation and BX Swiss are available on their respective websites (see https://www.ser-ag.com/en/topics/reviewing-body.html and https://www.regservices.ch/en/regulations, respectively).

It is worth highlighting that under the new prospectus regime introduced by FinSA and FinSO, the prospectus approval process and admission to trading on a Swiss trading venue generally consists of two parallel processes:

- prospectus approval pursuant to FinSA (i.e., by a Reviewing Body, such as SIX Exchange Regulation or BX Swiss; and subject to exemptions and customizations); and

- application for the admission to trading on the relevant trading venue (i.e., by the exchange admission body, such as SIX Exchange Regulation).

Following the introduction of the new prospectus regime, the Swiss stock exchanges have also amended their listing rules so that these two processes can operate in parallel. However, and perhaps most noteworthy, parties do not necessarily need to submit a prospectus for approval to the respective prospectus office of the trading venue that they may also be seeking admission to trading on. For example, the prospectus office of BX Swiss could approve a FinSA compliant prospectus for an issuer that is separately seeking an admission to trading on the SIX Swiss Exchange (via the application process with SIX Exchange Regulation) and vice versa. We expect that this will likely create some competition in the Swiss market between the two licensed Reviewing Bodies in relation to, among other considerations, speed, efficiency, and accessibility. Nevertheless, FINMA will need to ensure that their practices remain coordinated (see article 72(5) FinSO).

Below is a summary of selected key topics that FinSA and FinSO left to the Reviewing Bodies to further define that we believe are of particular interest (but, importantly, not an exhaustive guide to the prospectus approval process under FinSA and FinSO).
2) **Review of Prospectuses and Supplements under FinSA / FinSO**

**a) Prospectus Review**

According to article 51 FinSA, the Reviewing Body will check that applicable prospectuses are complete, coherent and understandable. While article 59 FinSO specifically provides that the review for "completeness" by the Reviewing Bodies will be limited to formal compliance with the content guidelines annexed to FinSO (which are largely based on the well-established content requirements (i.e., schemes) previously in place under the listing rules of the SIX Exchange Regulation (the SIX Listing Rules)), the new directives and lists published by SIX Exchange Regulation and BX Swiss have provided some additional guidance with regard to their review of prospectuses for "coherence" and "understandability".

Specifically, in connection with their review for "coherence", the prospectus offices of SIX Exchange Regulation and BX Swiss will consider whether: (i) any risks mentioned in the summary are also included in the risk factors section; (ii) the information in the summary corresponds to the information in other sections of the prospectus; (iii) all amounts concerning the use of issue proceeds correspond with the amount of the expected proceeds from the offering; and (iv) the financial figures included in the prospectus match those in the financial statements appended to the prospectus.

In addition, the prospectus offices of SIX Exchange Regulation and BX Swiss will check prospectuses for their "understandability", considering whether: (i) the prospectus includes a clear and detailed table of contents; (ii) the prospectus is free from unnecessary repetitions; (iii) related information is grouped together; (iv) the prospectus uses a font size that is easy to read; (v) the prospectus is structured in a way that enables investors to understand the contents; (vi) the components of the mathematical formulas are defined in the prospectus; and (vii) the language in the prospectus is not deliberately misleading.

**b) Supplements not subject to approval**

Generally, according to article 56(1) FinSA, a duty to publish a prospectus supplement is triggered by any new facts or circumstances that arise between the time of approval of the prospectus and the completion of the public offer or opening of trading on a trading venue that could have a significant influence on the assessment of the securities. As with prospectuses, in principle, supplements will also need to be reviewed and approved by the applicable Reviewing Body prior to publication as well as published in the same form as the approved prospectus (article 66(2) FinSO). In addition, as a general matter, after the publication of a supplement investors must be given the opportunity to withdraw their subscriptions or acquisitions (article 56(5) FinSA).
However, to facilitate the timely publication of supplements relating to certain events, FinSA provides that the Reviewing Body shall maintain a list of facts that, by their nature, are not subject to review or approval by the Reviewing Body prior to publication (article 56(4) FinSA). To this end, both SIX Exchange Regulation and BX Swiss have issued a list of facts that may be addressed in a supplement that would not be subject to the review or approval by the Reviewing Body prior to publication (but, in any case, must be filed with the applicable Reviewing Body upon publication).

In summary, the approach to supplements can be broadly categorized as follows:

- **Pricing Supplements**: Customary pricing supplements do not need to be reviewed or approved by a Reviewing Body prior to publication. Once the pricing details are ascertained, the issuer needs to file the supplement with the appropriate Reviewing Body upon publication. Pricing supplements do not trigger any additional obligations with regard to the offering’s timeline.

- **Supplements containing ad-hoc information**: Generally, notifications to the market relating to the occurrence of new facts which, according to the rules of the respective Swiss or foreign trading venue, are made public and are possibly price-sensitive may be filed as a supplement not subject to review or approval by the applicable Reviewing Body. An analogous standard is applied for issuers whose securities are not (yet) admitted to trading. Excluded from this are announcements relating to published financial statements. Nevertheless, issuers are required to file the supplement with the appropriate Reviewing Body upon publication. Unlike with pricing supplements, though, such supplements do trigger additional obligations with regard to the offering’s timeline.

- **All other new facts and circumstances**: All other new facts and circumstances that could have a significant influence on the assessment of the securities as well as any announcements that could be classified as an ad hoc announcement that relate to published financial statements must be reviewed and approved by the applicable Reviewing Body prior to publication. In addition, such supplements do trigger additional obligations with regard to the offering’s timeline.

Each of these are discussed in a bit more detail below.

**i. Pricing Supplements**

Events contemplated by and disclosed in the prospectus or the final terms (e.g., approvals under company law or by the authorities, the stipulation of the price or volume of the securities offered or possible alternatives to a capital increase) do not trigger a duty to publish a supplement (article 63(2) FinSO) and, thus, do not require the review or approval of a Reviewing Body prior to publication or affect an offering’s timeline (as with prospectus supplements described in more below). Indeed,
article 40(4) FinSA specifically states that if the final issue price and the issue volume cannot be stated in the prospectus, the prospectus must then indicate the maximum issue price and the criteria and conditions used to determine the issue volume. However, issuers need to file such information (i.e., the supplement) with the appropriate Reviewing Body upon publication. As such, both SIX Exchange Regulation and BX Swiss have indicated that supplements that include the final issue price and issue volume do not need to be approved by their respective prospectus offices prior to publication.

**ii. Prospectus Supplements**

However, for facts and circumstances not contemplated by or disclosed in the prospectus that are capable of materially influencing average market participants investment decisions, a supplement to the prospectus must be immediately prepared and reported to the appropriate Reviewing Body (article 63(1) FinSO).

To facilitate the timely publication of supplements relating to certain events, FinSA provides that the Reviewing Body shall maintain a list of facts that, by their nature, are not subject to prior approval by the Reviewing Body (article 56(4) FinSA). According to the rules of the respective prospectus offices of SIX Exchange Regulation and BX Swiss (subject to qualifications discussed below), notifications to the market relating to the occurrence of new facts which, according to the rules of the respective Swiss or foreign trading venue, are made public and are possibly price-sensitive may be filed as a supplement not subject to review or approval by the applicable prospectus office. Both SIX Exchange Regulation and BX Swiss also provide an analogous standard for issuers whose securities are not (yet) admitted to trading.

However, SIX Exchange Regulation and BX Swiss have specifically excluded supplements relating to new facts that entail or result in changes to published annual, semiannual or quarterly financial statements of the issuers concerned (despite such facts being also ad hoc relevant and possibly price sensitive). In such cases and in the case of all other supplements relating to new facts and circumstances that could have a significant influence on the assessment of the securities, the applicable Reviewing Body will then follow the review timelines stipulated in article 56(3) FinSA and article 65(2) FinSO with regard to approval and revisions of supplements.

In each of the above described scenarios (i.e., other than upon publication of customary pricing supplements), following the publication of the prospectus supplement, (i) the offer period cannot end sooner than two (2) days after publication of the supplement (article 56(5) FinSA) or (ii) instead of extending the offer period, the issuer may, under the terms of the offer, grant investors the option to withdraw their subscriptions or acquisitions within two (2) days after the final completion of the public offer (article 63(6) FinSO).
c) Accounting Standards

According to article 51(2) FinSO, the Reviewing Body is also required to maintain and publish a list of accounting standards generally recognized by its prospectus office. In connection therewith, SIX Exchange Regulation and BX Swiss have each published consistent lists of recognized accounting standards that include (subject to certain conditions) Swiss GAAP FER, IFRS, US GAAP and EU-IFRS. Certain additional international accounting standards are permitted for debt securities, including, inter alia, Korean IFRS (K-IFRS), Hong Kong IFRS, International Public Sector Accounting Standards (IPSAS) along with several others.

3) Approved Foreign Prospectuses Recognized in Switzerland

As a basic principle, the same rules apply to the public offering and listing of securities by domestic and foreign issuers in Switzerland. In addition, even though Switzerland is not part of the EU and cannot benefit from EU passporting rules, pursuant to article 54 FinSA and article 70 FinSO, certain prospectuses produced under foreign legislation may be approved by the Reviewing Body in Switzerland if they are drafted in accordance with international standards established by international organizations of securities regulators and the disclosure obligations are equivalent to the requirements under FinSA (in essence the information in the prospectus must comply in substance with the content of the applicable annexes pursuant to FinSO).

According to article 54(3) FinSA, the Reviewing Body shall publish a list of countries whose prospectus approvals are recognized in Switzerland. The Reviewing Body may also stipulate by which authority the approval needs to be issued. Notably, the prospectuses (and any accompanying supplement to such prospectuses) need to be in an official language of Switzerland or English (article 70(3) FinSO).

As of 1 June 2020, the lists of SIX Exchange Regulation and BX Swiss include most major European countries, the United States and Australia. Importantly, no later than the beginning of the public offer or admission of the securities in question to trading, the prospectus must be (i) registered and filed with a Reviewing Body, (ii) published and (iii) made available on request free of charge in paper form (article 70(4) FinSO).

4) Procedure of the Reviewing Body and Suspension of Review Deadlines

The Reviewing Body follows the administrative procedures set out in Swiss administrative law (specifically, the Federal Act on Administrative Procedure of 20 December 1968 (the APA)). The APA provides for certain rights, including the right to inspect files, the right to be heard and judicial review. In addition, the calendar of the Reviewing Body may also follow the legal holidays stipulated in the APA, which differ from securities exchange trading days.
However, in order to meet the demands of the capital markets, both SIX Exchange
Regulation and BX Swiss have decided partially to forgo the suspension of deadlines
according to the legal holidays stipulated in the APA. According to the currently avail-
able directives, during the review procedure of SIX Exchange Regulation (as of 1 June
2020), the deadlines for its prospectus office are suspended during the following days:
(i) Good Friday and Easter Monday; (ii) August 1 (Swiss national day); (iii) from 24 De-
cember up to an including 26 December; and (iv) from 31 December up to and includ-
ing 2 January. According to the directive of BX Swiss (as of 1 June 2020), the dead-
lines for its prospectus office are suspended during the following days: (i) Good Friday
and Easter Monday; (ii) Whit Monday; (iii) from 25 December up to an including 26 De-
cember; and (iv) from 1 January up to and including 2 January.

In light of the requirement under FinSO that Reviewing Bodies coordinate themselves
in order to facilitate uniform market practice (article 72(5) FinSO), we expect that
these dates will ultimately be aligned and will largely track the Swiss securities trading
calendar.

5) Recognized Foreign Trading Venues
According to article 48(3) FinSO, the Reviewing Body shall maintain and publish a list
of foreign trading venues recognized by it or of the recognized trading segments of
such foreign trading venues. The purpose of such recognition relates most significantly
to exemptions from the duty to publish a prospectus in case of certain admissions to
trading in Switzerland (see article 38(1)(c) FinSA) and certain relaxation requirements
from the duty to publish a prospectus and supplement (see article 47(2)(c) FinSA). As
of 1 June 2020, the lists of SIX Exchange Regulation and BX Swiss include selected
trading venues across Europe, the United States, Australia, Hong Kong and China.

6) Pro-Forma Financial Information
As contemplated by FinSO, SIX Exchange Regulation and BX Swiss have also pro-
vided guidelines (in the form of directives) on the disclosure requirements around pro-
forma financial information. The directives of SIX Exchange Regulations and BX Swiss
largely follow the previous practice under the SIX Listing Rules (which prior to the re-
forms introduced by FinSA/FinSO had also published an analogous directive address-
ing additional financial disclosure in connection with issuers that had a complex fi-
nancial history). In light of this, we are of the view that there should not be too many
surprises for market participants in this regard.

In brief, in the event the issuer has made or is planning to make significant changes to
its structure, depending on the scope of the structural change (as calculated based on
the formulas provided in the respective directives), SIX Exchange Regulation and BX
Swiss may require additional financial statements to be published in the prospectus in
order to provide investors with a transparent understanding of the issuer’s financial sit-
tuation. Structural changes can include corporate reorganizations, spin-offs, mergers or
acquisitions. Additional financial statements may include, subject to exemptions, combined financial statements, carve-out financial statements and/or pro forma financial statements.

7) Fee Schedule

In addition to the topics discussed above, SIX Exchange Regulation and BX Swiss have also published their respective fee schedules and policies in accordance with the scale of fees for rulings and services under article 79 FinSO and annex 8 thereto. Notably, both SIX Exchange Regulation and BX Swiss will charge additional fees of up to 50% of the ordinary fee for rulings and services provided urgently or outside normal working hours upon request (article 79(6) FinSO). However, at least according to the rules of BX Swiss, there is no entitlement for the prospectus office to review a prospectus within a shortened period. Furthermore, each of SIX Exchange Regulation and BX Swiss charge additional fees in the case of physical filings. In light of this, it is advisable for parties who will likely be using the services of the respective prospectus offices to establish a user account for their company or firm in advance, as there may certain administrative steps involved.

8) Conclusion

As noted above, Switzerland’s financial market regulatory framework has undergone fundamental and comprehensive reforms over the past few years. While we believe that the new prospectus regime introduced by FinSA and FinSO will positively impact the Swiss capital markets in the long-run, it remains to be seen how many of the new novelties, including the prospectus approval process by the Reviewing Body under FinSA, will work in practice.

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Structured products under FinSA

Reference: CapLaw-2020-22

The entry in force of FinSA and the FinSO has introduced several changes to the regulation of structured products in Switzerland. Some changes appear directly in the specific rules on structured products, but most of them derive from their inclusion in the FinSA’s general framework. This article presents the new regulation of structured products as of 2020 and discusses a select handful of specific issues.

By Jeremy Bacharach

1) General overview

The regulation of structured products has undergone a significant makeover as of January 2020 with the entry into force of the Financial Services Act (FinSA) and the Financial Services Ordinance (FinSO). Until 2019, structured products were subject to a rather “lightweight” regulation under former article 5 of the Collective Investment Schemes Act (CISA) and former articles 3(7) and 4 of the Collective Investment Schemes Ordinance (CISO). They never truly fit within these legal texts, as they do not qualify as collective investment schemes per se — something the law explicitly recognized (see former article 5(2)(c) CISA).

As of 2020, the specific rules on structured products have been transferred to articles 70 FinSA and 96 FinSO — a more appropriate venue. Accordingly, the relevant provisions in the CISA and CISO have now been repealed. This is more than a mere relocation of the former legislation, however, as the FinSA and the FinSO have introduced several changes to the regulation of structured products. Some changes are immediately apparent, since they appear directly in the specific rules. Others are less evident — but nonetheless important — because they derive from the inclusion of structured products in the FinSA’s general framework.

It should also be noted that no change has been made to article 94(3)(a) of the Financial Market Infrastructure Act (FMIA), pursuant to which structured products are excluded from the rules regarding derivatives trading (i.e., clearing, reporting, risk mitigation, etc.).

The table below summarizes the new regulation of structured products as of 2020 under the FinSA and the FinSO. A handful of more specific issues are commented thereafter.

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1 The author sincerely thanks Prof. Luc Thévenoz for his thoughtful remarks and his advice as well as Prof. Rashid Bahar for his insights on some key points of this article. An earlier version of this article was first published on the website of the University of Geneva Centre for Banking and Financial law under https://cdbf.ch/1094/.
Structured products under FinSA

Jeremy Bacharach

CISA (until Dec. 2019) FinSA (as of Jan. 2020)

A. Notion

<table>
<thead>
<tr>
<th>CISA (until Dec. 2019)</th>
<th>FinSA (as of Jan. 2020)</th>
</tr>
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<tbody>
<tr>
<td>5(1) CISA</td>
<td>3(4) FinSA</td>
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</table>

B. Documentation

<table>
<thead>
<tr>
<th>Simplified prospectus</th>
<th>Scope</th>
<th>Contribution to non-qualified investors in or from Switzerland 3(30) CISA, except as provided for by 46bis CISO</th>
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</table>
| Content | 4(2)(c) CISA, 4(2)(d) CISO, self-regulation.

Key Information Document

<table>
<thead>
<tr>
<th>Scope</th>
<th>Document</th>
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<tbody>
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<td>exempts</td>
<td>Offer to retail clients 3(4) FinSA and 5(1) FinSA, unless acquisition within portfolio management agreement 3(2) FinSA</td>
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| Content | Annex 3 FinSO |

Prospectus

<table>
<thead>
<tr>
<th>Scope</th>
<th>Document</th>
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<tbody>
<tr>
<td>exempts</td>
<td>- Products qualify as securities 3(4) FinSA and 5(1) FinSA, unless acquisition within portfolio management agreement 3(2) FinSA</td>
</tr>
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<td></td>
<td>(use also 51 FinSA and Annex 7 item 2 FinSO)</td>
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| Content | Annex 3 FinSO |

C. Involvement of a regulated entity

<table>
<thead>
<tr>
<th>Scope</th>
<th>Distribution to non-qualified investors in or from Switzerland 5(1) CISA</th>
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<tr>
<td>Offer</td>
<td>in or from Switzerland to retail clients with whom there is no permanent portfolio management or investment advice relationship 70(1) FinSA</td>
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<table>
<thead>
<tr>
<th>Regulated entities</th>
<th>Banks, insurance companies, security dealers, foreign institutions subject to equivalent supervision 5(1) CISA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banks, insurance companies, security dealers, foreign institutions subject to equivalent supervision 70(1) FinSA</td>
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</tbody>
</table>

| Appropriate security/collateral | 4(1bis) CISO 96(3) FinSO |

D. Activities only available to regulated entities

<table>
<thead>
<tr>
<th>Scope</th>
<th>Creation and public offers of derivatives 2(d) SESTA</th>
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<tr>
<td>Activities</td>
<td>Creating derivatives in the form of securities and offering these to the public on the primary market on a commercial basis 12(b) FinIA</td>
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</table>

<table>
<thead>
<tr>
<th>Authorization required</th>
<th>Securities dealer 2(d) SESTA</th>
</tr>
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<tbody>
<tr>
<td>Bank or securities firm 12 FinIA</td>
<td></td>
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</table>

E. Issuing by special purpose entities

<table>
<thead>
<tr>
<th>Scope</th>
<th>5(1bis) CISA, 4(1bis) and 1(ter) CISO</th>
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<tr>
<td>Issuing by special purpose entities</td>
<td>3(7) FinSA, 9(1) and 1(3) FinSO</td>
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F. Listing

<table>
<thead>
<tr>
<th>Scope</th>
<th>4(8a) CISO, self-regulation</th>
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<tr>
<td>Listing</td>
<td>3(1) FinSA, FMSA, self-regulation</td>
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G. Trading and market conduct

<table>
<thead>
<tr>
<th>Scope</th>
<th>Structured products excluded from the rules on the trading of derivatives 9(3)(a) FMSA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trading and market conduct</td>
<td>9(4) FinSA, 11(1) FinSO, 14(4) CISA</td>
</tr>
</tbody>
</table>

2) Specific issues

a) Qualification as financial instrument

Structured products now qualify as financial instruments pursuant to article 3(a)(4) FinSA. As a result, the rules applicable to financial instruments, their offering, and, as the case may be, the provision of financial services are also applicable to structured products. Besides the FinSA’s general framework, articles 70 FinSA and 96 FinSO provide more specific rules on structured products. In any case, the old system, which whereby structured products were regulated specifically and on an "ad-hoc" basis, is no more.

b) Lack of definition

As was already the case under the CISA, the FinSA does not rigorously define structured products. According to article 3(a)(4) FinSA, the notion of "financial instruments" includes "structured products, i.e. capital-protected products, capped return products and certificates." This list of examples is similar to the one that article 5 CISA used to provide. As a result, the same types of instruments are covered by this provision, such as trackers, certificates, reverse convertibles, warrants, so-called “exchange-traded products,” and others.

In case of doubt as to whether a particular product qualifies as a structured product under FinSA, it is possible to do either of the following:
– Refer to the Swiss Structured Products Association’s Swiss Derivative Map and verify whether the product falls into one of its categories (see also FinSO Annex 3, items 1.2.2 and 3.0);

– Refer to the definition provided by the European Securities and Markets Authority, which, in our opinion, generally matches the practice in Switzerland: “structured retail products’ [….] are compound financial instruments that have the characteristic of combining a base instrument (such as a note, fund or deposit) with an embedded derivative(s) that provides economic exposure to reference assets, indices or portfolios. In this form, they provide investors, at predetermined times, with pay-offs that are linked to the performance of reference assets, indices or other economic values.” It should be noted, however, that Swiss law does not classify structured funds and structured deposits as structured products under article 3(a)(4) FinSA but as units in collective investment schemes (article 3(a)(3) FinSA) and variable return deposits (article 3(a)(6) FinSA), respectively.

c) Duty to publish a prospectus

A notable consequence of the classification of structured products as financial instruments under article 3(a) FinSA is the duty to publish a prospectus if, cumulatively,

– the product qualifies as a security under article 3(b) FinSA, that is, instruments that are standardized and issued for the purpose of being traded en masse on the financial market.

– the product is either publicly offered or admitted to trading on a trading venue (article 35(1) FinSA).

If these conditions are met, then the prospectus should be drafted in accordance with FinSO Annex 3 (“Minimum content of the prospectus: Scheme for derivatives”). The FinSO also contains a specific alleviation in favor of structured products: pursuant to item 2 of FinSO Annex 7, prospectuses for structured products may be published before they are submitted to the reviewing body (provided that the requirements of article 51(2) FinSA are met).

d) Offers to private clients

Under the CISA, distributors of structured products to non-qualified investors were required to provide a "simplified prospectus" (former article 5(1)(b) CISA). Its contents were defined by the Swiss Bankers Association and the Swiss Structured Products

Association’s "Guidelines on informing investors about structured products,” which were approved by FINMA and last updated in 2014.

The FinSA replaces the notion of "distribution to non-qualified investors” with the notion of "offer to private clients" as the trigger to a certain number of requirements. Offers are defined by article 3(g) FinSA as "any invitation to acquire a financial instrument that contains sufficient information on the terms of the offer and the financial instrument itself” (see also article 3(5) FinSO). In turn, article 4(2) FinSA defines private clients as clients who do not qualify as professional clients under article 4(3) FinSA.

Offers of structured products to retail investors have to meet the following requirements:

- First, and as a consequence of the inclusion of structured products in the FinSA’s general framework, the issuer must produce a Key Information Document (article 58 FinSA; FinSO Annex 9). This is not required if the products are acquired for clients within the scope of a portfolio management agreement (article 58(2) FinSA; article 83 FinSO).

- The products must be issued, guaranteed or secured by a regulated institution (article 70(1) FinSA; article 96(3) FinSO). This is not required if the offering is made by the clients’ portfolio managers or investment advisors (as defined in article 96(1) FinSO).

- If the issuer is a special-purpose entity (as defined in article 96(2) FinSO), the offering must take place through a regulated institution and collateral as must be guaranteed by a regulated institution (article 70(2) FinSA).

Additionally, offers or sales of structured products may also qualify as the provision of a financial service (see below).

In practice, the alleviations for offers made through portfolio managers will have two main implications.

First, it will be considerably easier for non-regulated issuers to market their product through regulated institutions such as banks, securities firms, or portfolio managers. In other words, non-regulated issuers are encouraged to interact with regulated institutions, which will in turn market the products in question to their clients and not with the end clients themselves.

Second, portfolio managers will be able to offer their own structured products to their clients, or to arrange for the issuance of ad hoc structured products for their clients by third-party issuers, in a relatively unregulated way. The reasoning is, obviously, that
the duties imposed upon portfolio managers by the FinSA (see articles 6 ff. FinSA) are sufficient to safeguard the clients’ interests in this context.

e) Marketing and selling

First, the marketing of structured products is subject to the rules on advertising for financial instruments pursuant to articles 68 FinSA and 95 FinSO. In particular, it should be clearly indicated as such (article 68(1) FinSA) and must mention the relevant documentation (article 68(2) FinSA).

The marketing and selling of structured products to potential buyers directly may also qualify as a financial service under article 3(c)(1) FinSA ("acquisition or disposal of financial instruments"). Indeed, article 3(2) FinSO provides that "[t]he acquisition or disposal of financial instruments within the meaning of [3(c)(1) FinSA] is deemed to be any activity addressed directly at certain clients that is specifically aimed at the acquisition or disposal of a financial instrument." The Federal Council’s commentary of the FinSO seems to indicate that this broad definition encompasses any and all activities that may lead a client to acquire a particular financial instrument. We raise doubts as to whether article 3(2) FinSO – a "level 2" act – is a legally valid implementation of 3(c)(1) FinSA – a "level 1" act – with respect to the substantial alteration of the latter’s initial meaning in the ordinance. In any case, the consequences of such a broad implementation of article 3(c)(1) FinSA are not clear yet.

Should the marketing and selling of structured products be deemed a financial service under article 3(c)(1) FinSA and 3(2) FinSO, actors marketing structured products – even in the absence of an offering under article 3(g) FinSA – would have to comply with the FinSA Code of Conduct (article 7 ff. FinSA) and, as the case may be, be registered in a register of advisors (article 28 ff. FinSA). Subsequent practice will show whether this broad conception of financial services will be upheld or relaxed.

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3 Federal Department of Finance, Financial Services Ordinance (FinSO), Financial Institutions Ordinance (FinIo) and Supervisory Organisation Ordinance (SOO): Explanations (published in French, German and Italian), 6 November 2019, p. 19.
Duty to Report under Article 74 FinIA – Planning Tool for FINMA or (Maybe) More?

Reference: CapLaw-2020-23

FinIA has consolidated the authorisation regime for all financial institutions (except for banks which remain to be regulated under the Banking Act) and has extended this regime to independent asset managers and trustees. Even though the new law provides for a smooth transitional period enabling financial institutions to cope with the new regulation, asset managers and trustees now falling under the new regime are or have been required to file a report with the Swiss regulator FINMA. This article outlines the duty to report and its consequences.

1) Introduction

The new Financial Institutions Act (FinIA) requires independent asset managers (IAMs) and trustees to obtain authorisation from the Swiss Financial Market Supervisory Authority (FINMA). In connection with the new authorisation requirement, parliament has introduced a duty to report under the transitional provisions.

Since FinIA entered into force, FINMA as well as various service providers active in the compliance sector held informational events in order to familiarise, in particular the IAMs and trustees, with the transitional periods, including the duty to report and the general licensing requirements. Quite a number of representatives of financial institutions have participated in these events and have – most likely – been informed on the following:

Under article 74(2) FinIA, financial institutions not required to obtain authorisation from FINMA under former law were obliged to report to FINMA within six months after entry into force of the FinIA. Furthermore, under article 74(3) FinIA, IAMs and trustees commencing their activities within a year after entry into force of the FinIA must report to FINMA immediately.

The legal concept of the report, in particular the legal consequences of failure to report, raises questions.

2) Aims and Objectives

It is questionable whether the report under article 74(2) and (3) FinIA serves to protect investors and proper functioning of the financial market, in line with the main thrust of the FinIA (article 1(2) FinIA) and of financial market regulation in general.
Investor protection cannot be the aim, as the report does not contain any investor-specific information and is not published in any form.

As the report form asks for planning information related to obtaining a FinIA authorisation, in our opinion the primary aim appears to be enabling FINMA to carry out sensible resource planning for the event of an inundation of applications for authorisation (in the case of the comparable provision, article 155 of the former Collective Investment Schemes Act (former CISA), the Federal Council (FC) has mentioned the purpose of taking stock of the situation, Dispatch to the Collective Investment Schemes Act of 23 September 2005, Federal Gazette 2005 pp. 6395 et seqq., p. 6489; similarly Swiss Banking Act (Banking Act), Final Provisions to the Amendment of 17 December 2004, para. 1, cf. BSK BankG-Maurenbrecher/Kramer, SchlB 2004 BankG N 1).

Of course the report may indirectly also serve a broader purpose such as protection of the FinIA system of supervision or the maintenance of public confidence in FinIA supervision. The FinIA provides for rather lengthy transitional periods with respect to the filing of the FINMA approval applications. Financial institutions that were active before FinIA entered into force (1 January 2020) must comply with the authorisation requirements imposed by FinIA and file an application with FINMA within three years of that date (i.e. until 31 December 2022). Financial institutions newly entering the Swiss market must comply with the authorisation requirements imposed by FinIA upon commencement of business, except for the requirement of having an affiliation with a Supervisory Organisation (SO). After FINMA’s approval of an SO, they must affiliate with the SO and file an application with FINMA within a year after such approval. In both cases, the financial institutions may carry out their business, provided they are affiliated with a self-regulatory organisation (SRO) for AML purposes. Given these rather extensive transitional periods, the report may provide FINMA with information required to ensure surveillance of the financial institutions’ SRO affiliation. However, taking into account that IAMs and trustees have been obliged to affiliate with an SRO for AML purposes already under former law, such a FINMA surveillance seems unlikely and contrary to the principle of self-regulation established and anchored with respect to AML surveillance.

In summary, protection of the FinIA system of supervision might be deemed supported with the duty to report but in no way constitute the ultimate purpose of this report. This broader purpose seems clearly subordinate to the purpose of resource planning, especially under consideration of similar report duties imposed in the context of previous legislative amendments and transitional provisions associated thereto.

In view of the above, in our opinion, the report under article 74(2) and (3) FinIA does not fundamentally help to protect proper functioning of the financial market. The reason for the provision, therefore, is predominantly FINMA’s need to plan the use of
its resources, especially during the expected peak season by the turn of the year 2022/2023.

3) Deadline to Report
In assessing the deadline, one must distinguish the report to be submitted in accordance with article 74(2) FinIA by financial institutions already in business before FinIA entered into force on 1 January 2020 from the report to be submitted by institutions commencing business after that date in accordance with article 74(3) FinIA. Whereas IAMs and trustees already in business before 1 January 2020 had to submit the report by 30 June 2020, IAMs and trustees commencing business after 1 January 2020 must do so immediately ("unverzüglich") upon commencement of their activities, i.e. sometime in 2020.

The legal meaning of the vague but commonly used German term "unverzüglich" (English: immediately) requires some careful consideration. In the FinIA debate in the National Council (NC), FC Maurer defined "unverzüglich" as "ten days or so" (Official Bulletin 2017 NC p. 1321). This estimate is debatable considering the interpretation of other financial market law immediacy requirements (see for example article 29(2) of the Financial Market Supervision Act (FINMASA), article 13(6) Banking Act and article 96(4) CISA). It seems important to make it clear that "unverzüglich" (English: immediately) in German does not mean "sobfort" (English: at once), but "ohne Verzug" (English: without delay) (see BSK FINMAG-Truffer, article 29 N 44). Even though the term "without delay" provides for some leeway, prudent IAMs and trustees will submit a report at the time activities are commenced.

4) Duty to Report and Addressee
a) Background
As indicated, article 74 FinIA differentiates between the financial institutions required to report in para. 2 and the financial institutions required to report in para. 3. Whereas para. 2 covers all financial institutions under the FinIA, para. 3 expressly only covers the IAMs and trustees in accordance with article 17 FinIA. The former is directed towards continuing activities and the latter towards commencing activities.

b) Financial Institutions Required to Report under Article 74(2) FinIA
The broad definition of the financial institutions required to report in article 74(2) FinIA covers not only IAMs and trustees but also and in particular the following financial institutions that so far have not required authorisation from FINMA:

- Managers of collective assets in accordance with article 24(1) (b) FinIA, i.e. pension fund managers;
– Trade assayers in accordance with article 42bis of the Precious Metal Control Act (PMCA);

– Branch offices of foreign financial institutions under article 52 et seqq. FinIA; and

– Representations of foreign financial institutions under article 58 et seqq. FinIA.

For the branch offices and representations, which by definition under article 2 FinIA – at any rate if they are Swiss entities – are not deemed to be financial institutions, article 93(4) of the Financial Institutions Ordinance (FinIO) reiterates the duty to report in article 74(2) FinIA.

It is open to question whether the duty to report covers financial institutions ceasing their activities within the transitional period. This question is primarily relevant for financial institutions active before FinIA entered into force. It seems clear that a report of financial institutions having ceased their activities before the lapse of the deadline to report, i.e. 30 June 2020, is, to say the least, hardly of any value and in our view clearly not required. The situation is different where a financial institution ceases its activities within the period between the deadline to report and the deadline to file an application with FINMA (i.e. 30 June 2020 - 31 December 2022). Article 74(2) FinIA does not link the report to a subsequent filing of an application with FINMA, neither explicitly nor implicitly. Furthermore, it seems to be realistic that financial institutions, even if planning to cease their activities, due to various reasons decide to remain operative. This leads to the conclusion that the duty to report applies irrespective of a financial institution ceasing its activities between 30 June 2020 and 31 December 2022. It is worthwhile noting that FINMA seems to be of the same opinion, as the FINMA report form requires written information until 31 December 2022 in case of a waiver to file an application (oddly enough in writing and not by means of its survey and application platform (EHP)).

c) Financial Institution Required to Report under Article 74 (3) FinIA

As indicated, FinIA provides for a transitional period not only for financial institutions already in business before the FinIA entered into force but also for IAMs and trustees commencing activities within a year after FinIA entered into force. The wording is clear insofar that IAMs and trustees are the only financial institutions able to rely on this transitional period. The provisions of the ordinance do not provide for any extension corresponding to article 93(4) FinIO. For example, branch offices and representations of foreign financial institutions that are newly established or commence their activities in 2020 must go through the ordinary authorisation process before they can act for the foreign institution in Switzerland.
d) **Addressee of the Report**
FINMA is the addressee of the report, for reports under article 74(2), those under article 74(3) FinIA as well as for those under article 93(4) FinIO. Responsibility within FINMA is that of Asset Management Division.

5) **Report Form**
FINMA provides a form that can be completed and submitted online on its EHP. Before submitting the report, the person required to report must register on the EHP and request a user account. Only when FINMA has provided the user details is it possible to complete the report form and send the report.

If the electronic transmission of the report is not possible for technical reasons, or due to lack of time (in the case the expiry of the deadline is imminent), under the general principles of administrative law, FINMA must also accept a report sent by mail. There is no legal obligation, neither in a federal act nor ordinance, to use a form in this case. Although the supervisory authority may favour the use of a form for practical reasons, the authority’s insistence on submitting a form seems excessively formalistic and would be unlikely to be supported by the courts.

Once a report form has been submitted electronically, the EHP generates an automatic confirmation message which is sent to the email address previously indicated by the reporting institute.

6) **Legal Consequences**
The legal consequences of a failure to report remain vague and unclear. In particular, it is questionable whether a failure to report precludes the financial institution concerned from reliance on the transitional provisions and whether the absence of a report ultimately constitutes an obstacle to authorisation. The text of article 74(2) and (3) FinIA and article 93(4) FinIO does not contain any adverbs to link each first sentence (relating to the duty to report) to each second sentence (which refers to the application for authorisation). Article 74(3) FinIA differentiates between the authorisation requirements from the report as obligations *sui generis*, by using the conjunction "and" instead of an expression indicating inclusion (for example "such as" or "in particular"). Based on a grammatical interpretation, hence, there is no link between the duty to report and the authorisation requirements. Likewise, there are no indications in the wording that a report is a precondition for invoking the transitional provisions. FINMA also seems to take the view that the duty to report is separate, given the FINMA report form requires indication of an intention to apply for authorisation.

By contrast, the Federal Department of Finance (FDF) in its explanatory report on the FinSO and FinIO generically assumes that the transitional period is linked to the
"observance" of the transitional provisions (FDF, Explanatory report on the Financial Services Ordinance, the Financial Institutions Ordinance and the Supervision Organisation Ordinance of 6 November 2019, p. 114). The Dispatch to the FinSA and FinIA of 4 November 2015, Federal Gazette 2015 pp. 8901 et seqq., p. 9043 by usage of the adverb "sodann" (English: then) links potential reliance on the transitional provisions to the submission of a report within the relevant deadline. A historical interpretation – which carries considerable weight in the case of recent provisions – links the report with the other requirements, with the result that a failure to report would carry the significant repercussions of not being eligible to rely on the transitional provisions.

The aims and objectives of the report must lie outside the key principles of financial markets law – protecting investors and ensuring proper functioning of the financial market (article 4 FINMASA; cf. section 2) above). In our view, the report under article 74(2) and (3) FinIA as well as under article 93(4) FinIO allows FINMA to plan sensibly for a possible inundation of applications towards the end of 2022. This objective, however, does not under any circumstances justify any linkage between fulfilling the duty to report and being able to rely on the transitional provisions or being eligible for a decision on authorisation. Instead, for teleological reasons, a failure to report must be regarded as a simple breach of a provision of financial market law equivalent to an administrative regulation ("Ordnungsvorschrift").

Systematic interpretation demands the uniform application of the law within a subfield of the law. Consequently, the legal consequences should also be based on the other pre-existing transitional provisions of financial market legislation (for example article 155(1) of the former CISA, the Banking Act Final Provisions to the Amendment of 17 December 2004, paragraph 1 as well as on article 90(6) of the Insurance Supervision Act (ISA)). Strikingly, all these provisions, which serve as models, help FINMA to take stock of the situation or identify institutions requiring authorisation in future for the first time. None of the provisions are expressly set out as regulations on validity. In the case of article 155(1) of the former CISA, the duty to report was linked to the application for approval, but few additional conclusions can be drawn from this. In the case of the two other provisions mentioned, it is noticeable that the substantive transitional provisions are in each case set out in separate paragraphs, which indicates a certain separation of content and a qualification of the duty to report as a purely administrative regulation.

In summary, the legal consequences remain uncertain given there is leeway for different interpretations.

In our opinion, the wording and teleological considerations lead to the conclusion that the transitional provisions have no constitutive effect and should be regarded as merely administrative regulations. Although a historical interpretation is of importance with
respect to recent rules, it generally takes a generic approach to compliance with transitional periods, in particular requiring the application for authorisation to be submitted within the relevant deadline and SRO membership. In our opinion, a failure to report primarily brings strategic disadvantages in the authorisation process (before even submitting the application for authorisation, the applicant has already violated financial market law, which could at least have some practical influence on FINMA’s attitude). Taking this view, FINMA would hardly be equipped with any enforcement measures, at most the restoration of legality (article 31 FINMASA) by forcing the respective financial institution to submit a report at this later stage. Applicants could steal FINMA’s thunder by handing in such report on their own initiative in advance of being forced by FINMA by means of supervisory measures.

However, and by contrast, there is a hidden risk that the supervisory authority and the courts will weigh their interpretation differently and in the absence of a report take the view that the transitional regime does not apply. In such scenario an application for authorisation would have to be submitted immediately and no FinIA-relevant activity could be carried out until authorisation is granted. With the consequence of criminal sanctions according to article 44 FINMASA in case of non-compliance. Even though the authors are of the opinion that this scenario is rather unlikely, also here, handing in a belated report – of course before FINMA has initiated any enforcement measures – could be helpful and should be considered by financial institutions. We assume that FINMA allows for belated registrations and reports on its EHP and thus will generate automatic confirmation messages for belated reports as well. Such confirmation message could support financial institution’s bona fide reliance on the transitional period.

7) Conclusion

For financial institutions seeking authorisation for the first time, reporting is now a common way for supervisory authorities to connect with new “clients” and gain an overview of how many and who they are. This “inventory” gives an indication of the amount of office work that will need to be done to deal with the applications for authorisation submitted.

Even though the authors are of the view that a failure to report will not have any negative consequences on financial institutions’ ability to rely on the transitional periods nor obtaining authorisation, cautious financial institutions required to file until 30 June 2020 have filed a report within this deadline. IAMs and trustees commencing activities in 2020 must file the report without delay, but prudent financial institutions will do so right upon commencing their activities.

In case of failure to report, financial institutions are well advised to make up for such report.
However, irrespective of all the legal classifications, be it purpose or merely the consequences of a duty to report, FINMA’s evaluation of the reports received by end of June will indicate whether the informational events have induced a general appetite to report and the interest shown at these events was also reflected in the number of reports received by FINMA.

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A new proxy adviser regulation in Switzerland?
Reference: CapLaw-2020-24

The Swiss Parliament has adopted a motion requiring the Swiss government to propose a new regulation addressing the conflicts of proxy advisers. The primary focus seems to be on ISS and to a lesser extent on Glass Lewis for their potential dual role in advising institutional investors on voting recommendations and listed companies on corporate governance and compensation. In the absence of a physical presence of these proxy advisers in Switzerland, it remains unclear how the required legislation could be effectively enacted.

By Thomas U. Reutter / Annette Weber

1) Proposal for new legislation in Switzerland

Thomas Minder, member of the Council of States submitted a parliamentary motion on proxy advisers on 23 September 2019. In this motion, the Swiss government was asked to propose legislation, for example by amending the Financial Market Infrastructure Act, to address the issue of conflicts of interests of proxy advisers. The legislation required by the motion should be designed to both disclose and avoid conflicts of interests of proxy advisers. It should also consider international developments on this topic. The motion was adopted by the Council of States on 3 June 2020 after being adopted by the National Council. Therefore, the Swiss government is tasked to provide a proposal how to regulate proxy advisers to mitigate conflicts of interests.

In the reasoning for the motion, Mr. Minder identified conflicts of interests of proxy advisers analyzing Swiss listed companies and offering advisory services to the very same companies on corporate governance and compensation. On a more polemic note, the motion also alleges that some proxy advisers recommend no votes for compensation systems of companies in order to be retained as advisers on a re-design of such systems by these companies. ISS, the big elephant in the room offering both proxy advice to investors as well as corporate governance advice to listed companies, was not specifically mentioned but seems to have been the primary target of the motion.
The debates in the National Council and in the Council of States were not conducive to learning insights on the motion, but the proposal for regulation was not perceived well by all stakeholders. For example, Swissholdings, the association of multinational companies, claimed that a more comprehensive view on proxy advisers is warranted and added that conflicts of interests are only a part of a more general problem: the quality of proxy advice.

2) International legislation efforts

In the recent years, the U.S. as well as the EU made efforts to further regulate proxy advisers (see CapLaw-2015-16). In August 2019, the U.S. Securities and Exchange Commission (SEC) issued a new guidance on the role of proxy advisers with the intention to enhance their accountability. The SEC made clear in its guidance that the anti-fraud rules according to Rule 14a-9 of the Securities Exchange Act of 1934 are applicable to proxy advisers as well. The guidance includes recommendations on disclosure of additional information regarding conflicts of interests, the sources of information and methodology used by proxy advisers. In November 2019, the SEC proposed additional rules on the proxy voting process. In particular, the proposal contains rules according to which registrants (i.e., companies listed on a U.S. stock exchange) have the right to be heard, and rules on conflict of interests.

At the end of October 2019, ISS filed a complaint against the SEC regarding the guidance on proxy advisers issued by the SEC in August 2019 claiming that the SEC exceeded its jurisdiction and violated the U.S. federal Administrative Procedures Act, i.e., challenging the process how the guidance was issued. In addition, ISS claims that proxy advice may not be viewed as proxy solicitation but is a specialized form of investment advice. Earlier this year, the SEC filed an unopposed motion to hold the case in abeyance which leads to a stay in the litigation until the earlier of 1 January 2021 or adoption of the final rules on proxy advisers. During this stay, the SEC will not enforce the guidelines. While it remains unclear what the outcome will be, it is clear that the SEC would like the proxy advisers to take more responsibility.

In connection with the EU Shareholder Rights Directive (Directive (EU) 2017/828 amending Directive 2007/36/EC), the EU added rules for proxy advisers by requiring member states to address the transparency of proxy advisers (article 3j of the said Directive):

- **Code of Conduct**: Proxy advisers are required to publish a code of conduct which they apply and to report the application of the code. Absent the adoption of such a code of conduct or in case of a deviation from the code of conduct when applying it, a proxy adviser needs to provide an explanation.
- **Information to be disclosed**: The implementing rules of the Shareholder Rights Directive adopted by a member state shall require proxy advisers to publicly disclose certain information, such as, the main features of a proxy adviser’s methodology, the main information sources used and the procedures put in place to ensure the quality of research, advice and voting recommendation.

- **Conflicts of interests**: A core piece of the EU regulation on proxy advisers revolves around the disclosure of conflicts of interests. Member states must ensure that proxy advisers identify and disclose actual or potential conflicts to their clients. This includes business relationships that may influence the proxy adviser’s voting recommendations. Member states are not required to enact any substantive rules on conflicts of interest such as organizational measures like information barriers. Only disclosure requirements must be imposed and disclosure itself is limited to the client, i.e. the institutional investors. Conflicts do not need to be disclosed to the investee company or to the public at large.

In summary, the Shareholder Rights Directive operates with disclosure rules only and does not impose any conduct requirements, and even the disclosure requirements are not particularly stringent.

### 3) Will COVID-19 impact proxy advice?

Is the strong focus on best corporate governance typical for companies outside of a crisis? Or put differently in German – is it a Schönwetter-Phänomen? In an economic crisis, such as the one caused by the coronavirus pandemic, investors appear to focus less on best practices for corporate governance. Rather, their focus is on how their investee companies can weather the storm. In other words: Survival, resilience and performance of companies are more important than the term of office of a chairperson, whether or not the CEO is also on the board and – *horrible dictu* – how diverse the board composition formally looks like.

Not surprisingly therefore, the 2020 shareholder meeting season will be remembered as peaceful and benign in the sense that activism, proxy fights and votes against board proposals were at record lows. Even motions for an increase or extension of authorized capital potentially resulting in substantial dilution for existing shareholders received higher approval rates than in normal circumstances. In a best case, this crisis may be an eye opener for investors and proxy advisers that formulaic "one size fits all" caps on equity capital increases unnecessarily cripple a company’s resilience in a fast approaching economic crisis. Similarly, if the rather formalistic approach of proxy advisers on corporate governance aspects caves in favor of a more substantive one, the crisis would leave a positive mark at least in this respect.
However, "substance over form" requires judgment. Judgment in turn is more expensive than a strictly followed formal process and bears the risk of failure. The process and profit oriented business model of large proxy advisers hardly leaves any room for a more substantive approach and there is little reason for optimism that proxy advisers will follow a new approach for future proxy advice based on lessons learned from the current crisis. Hence, it is probably fair to say that COVID-19 has not eliminated the desire to scrutinize the need for proxy adviser regulation.

4) Can Switzerland regulate proxy advisers?

For Ethos, the leading Swiss proxy adviser, the answer is yes, given that it is incorporated in Switzerland. ISS and Glass Lewis, the more relevant players not only internationally, but also for all major Swiss listed companies, are beyond the direct reach of the Swiss legislator. These advisers are incorporated outside of Switzerland and usually have no physical presence in this country. Moreover, their clients are institutional investors which are mostly also not incorporated in Switzerland. The only connection to Switzerland is the investment of the proxy advisers’ clients in shares in Swiss listed companies.

The EU has subjected third-country proxy advisers to the rules of the Shareholder Rights Directive to the extent they "carry out their activities through an establishment located in the Union, regardless of the form of that establishment" (article 3j para. 4; Recital 27). Hence, the EU only regulates proxy advisers who have a physical presence in the Union. However, as proxy advisers typically do not even have a branch or similar establishment in Switzerland, the EU approach would likely not work in Switzerland. Switzerland would have to rely on the effects doctrine (Auswirkungsprinzip) established in competition law to regulate the impact of proxy advice activity abroad on Swiss incorporated or Swiss listed companies or on the Swiss financial market.

Based on this reasoning, the Swiss legislator may arguably address proxy advisers indirectly, e.g. by imposing rules affecting other market participants, such as Swiss listed companies or Swiss investors. In our view, the attachment point for any Swiss legislation should be the listed company and the proxy advisers’ impact on listed companies in this country.

5) What to expect from the proposed legislation

The Minder proposal will likely end up as a Rohrkrepierer if it tries to address only conflicts of interests. Legislating an international issue without international legislation is tricky enough, but only addressing a corporate law issue of non-Swiss incorporated entities seems desperate.
Hence, any proposed legislation should broaden its scope and primarily focus on the impact on companies incorporated and listed in Switzerland. To avoid an allegation of extraterritorial reach, the legislation could also be narrowed to proxy advice for Swiss investors in relation to Swiss listed companies. Although this approach does not guarantee that all Swiss listed companies are captured, it is likely that such a rule will affect indirectly a vast majority of Swiss listed companies. Indeed, it may be expected that proxy advisers, probably in response to client demand, will not treat their non-Swiss clients less favorable than their Swiss clients on whom a new legislation may confer additional rights.

In terms of additional substance beyond a mere replication of the standards set in the EU, the Swiss regulator could require that (i) Swiss listed companies on which proxy advisers advise Swiss investors have a right to be heard before the proxy advisers issue a recommendation to their clients, (ii) a statement of the Swiss listed company must be included in the recommendation of the proxy advisers and (iii) proxy advisers have to make their recommendation public either a few days prior to the shareholder meeting or shortly thereafter.

We believe that the introduction of a right of a listed company to be heard and to have its comments and assessment included in any advice of the proxy advisers would significantly increase the quality of advice without creating any substantial incremental costs for proxy advisers.

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**LIBOR Transition for Derivatives – State of Play**

Reference: CapLaw-2020-25

On the basis of statements made by regulators so far, the market expects that panel banks will no longer be compelled to make submissions for the determination of the London Interbank Offered Rates (LIBOR) as of the end of 2021 and that LIBOR will cease to be published in its current form as a result. This gives rise to the questions what alternative interest rate benchmarks may be used instead of LIBOR rates in the derivatives market and how to proceed with regard to transactions referencing LIBOR rates that have a maturity beyond the end of LIBOR.

By Olivier Favre
1) End of LIBOR

The fate of the LIBOR benchmarks was sealed when Andrew Bailey, the chairman of the FCA at the time, stated in a speech on 27 July 2017 that "it would no longer be necessary for the FCA to persuade, or compel, banks to submit to LIBOR" by the end of 2021. Regulators have since then maintained the position that LIBOR should cease to exist at the end of 2021 and a transition to alternative risk-free rates should be completed by such date. Nevertheless, LIBOR benchmarks are still widely used for products traded today, in particular in the interest rate derivatives and loan markets and for floating rate notes.

LIBOR is currently administered by ICE Benchmark Administration Limited (IBA) and available in five currencies (USD, GBP, CHF, JPY and EUR) and seven maturities (overnight, one week, one month, two months, three months, six months, and twelve months), resulting in 35 values published on each London business day. The number of contributing LIBOR panel banks varies depending on the currencies: 16 panel banks are contributing as regards the USD- and GBP-LIBOR, 15 panel banks are contributing to the EUR-LIBOR, 12 panel banks contribute to the JPY-LIBOR and 11 panel banks contribute to the CHF-LIBOR.

On 1 April 2019, the IBA announced that it completed a transition to a new waterfall methodology, where the determinations by panel banks must be made, if possible, on the basis of real transactions. Despite these efforts, a large part of the determinations are still based on markets that are not active and LIBOR is to a large extent still dependent on expert judgment. In the view of the leading regulators, this is a fundamental flaw in the model, which is not sustainable and has no prospect of changing.

It is hard to predict what the end of LIBOR will look like. It is quite possible that there will be a phasing-out with individual panel banks withdrawing from the submission process at different times around the end of 2021. This raises the question at what point exactly LIBOR loses its representative effect and whether there should be a switch to alternative benchmarks even before the actual cessation of the publication of LIBOR by the IBA and, if so, how this should be reflected in the contracts.

In any event, the discontinuation of LIBOR rates will lead to a fragmentation in two dimensions: On the one hand, each currency will have its own solution for an alternative benchmark. On the other hand, the derivatives, loans and floating rate notes markets will probably not be fully aligned as regards the solutions for the adjustments to be applied with respect to the use of alternative risk-free rates (RFRs), e.g. with respect to the use of overnight rates instead of forward-looking term rates and the move from rates taking into account the credit risk of the interbank market to risk-free rates.
2) **Risk-free Rates (RFRs)**

a) **Available RFRs**

To meet the requirements that have been established by the Financial Stability Board (FSB), an alternative benchmark that may be used to replace LIBOR must not be based on a discretionary determination by an administrator or contributors to the benchmark, but it must be determined on the basis of a transaction-based methodology. Also, the rate must not be based on the interbank lending market, but it must be based on secured or unsecured transactions entered into in a wider market.

The national working groups in the relevant markets have identified the following RFRs that may be used as alternative to the IBOR rates: (i) in respect of CHF, instead of CHF-LIBOR: the Swiss Average Rate Overnight (SARON); (ii) in respect of USD, instead of USD-LIBOR: the Secured Overnight Financing Rate (SOFR); (iii) in respect of GBP, instead of GBP-LIBOR: the Sterling Overnight Index Average (SONIA); (iv) in respect of AUD, instead of BBSW: the Australia Overnight Cash Rate (AONIA); (v) in respect of JPY, instead of JPY-LIBOR, TIBOR and Euroyen-TIBOR: the Tokyo Overnight Average Rate (TONA); (vi) in respect of CAD, instead of CDOR: the Canadian Overnight Repo Rate Average (CORRA); (vii) in respect of HKD, instead of HIBOR: the HKD Overnight Index Average (HONIA); and (viii) in respect of EUR, instead of EUR-LIBOR and EURIBOR: the Euro Short Term Rate (€STR).

For some of these RFRs, the market anticipates that existing benchmarks will continue to be published in a modified form. This is planned for Australia, Japan and Canada. In the EU, the EURIBOR will continue to exist, while the EUR-LIBOR and the Euro Overnight Index Average (EONIA) will cease.

The LIBOR rates are fixed at the beginning of the interest period and may then be applied to determine interest payments that become due and payable at the end of the interest period. However, the RFRs are – as opposed to LIBOR – overnight rates. As a result, if they shall be used in respect of a calculation period exceeding one day, the daily rates must be adjusted for the relevant term.

In respect of some RFRs, forward-looking term rates, which will be determined on the basis of derivatives transactions regarding such RFRs as underlyings, may be published in addition to the RFRs (e.g. for USD and GBP). The national working group expects that this will not be the case for Switzerland in the absence of a sufficiently liquid SARON futures market.

b) **Compounding of RFRs**

The standard term adjustment for the RFRs will be a compounding over the relevant calculation period. However, the compounded rates will only be known as of the end of
the relevant calculation period, unless the relevant values will be taken from the previous calculation period.

In a base scenario, the calculation period runs for the same time as the interest period and the compounded RFR would only be available on the last day of such calculation period. This base scenario may not be suitable for cases, where the compounded RFR should be already determined as of a day prior to the last day of the interest period (e.g. for operational reasons, in order to make the relevant payments).

If the compounded RFR must be available prior to the last day of the interest period, the calculation could be made by reference to a calculation period that runs differently than the interest period. For instance, it would be possible to start the calculation period at the same time as the interest period, but to end the calculation period a few days prior to the end of the interest period (this method is referred to as "lockout"). Alternatively, it would be possible to start the calculation period a few days prior to the start of the interest period and end it also a few days prior to the end of the interest period (this method is referred to as "lookback" or, in the terminology used by ISDA, "backward-shift"). With these methods, the compounded RFR would be known already prior to the end of the interest period.

3) Fallbacks for legacy transactions

a) Legacy transactions

As regards transactions referencing a LIBOR rate instead of an RFR and entered into with a term beyond the effective date of the LIBOR cessation (a legacy transaction), the question arises how such transaction can be transitioned during its respective term to an RFR. This may occur by agreeing to fallback clauses (either by including such clauses into the transaction documentation when it is entered into or by amending the transaction to that effect).

b) Derivatives documentation

OTC derivatives transactions are, as a matter of standard practice, documented under master agreements entered into for the trading relationship. The master agreements most frequently used in the market are those published by the International Swaps and Derivatives Association, Inc. (ISDA), which are available in a version of 2002 and a version of 1992 (the 2002 ISDA Master Agreement and the 1992 ISDA Master Agreement). ISDA Master Agreements are usually expressed, upon election of the parties, to be governed by English law or by the laws of the State of New York.

In addition to ISDA Master Agreements, the derivatives market uses also other types of master agreements for local markets. In Switzerland, we have the Swiss Master Agreement published by the Swiss Bankers Association, which is governed by Swiss law and
includes a choice of jurisdiction for Swiss courts. The Swiss Master Agreement was first published in 2003. It was published as an updated version in 2013.

c) Fallback clauses

A fallback clause must address three matters: firstly, it must include the triggers for the transition to the fallback rate. Secondly, the clause must specify the alternative RFRs that will apply upon a trigger event becoming effective. Thirdly, the fallback clause must specify the adjustments that shall apply with respect to the move to the relevant fallbacks, including a term adjustment to address the differences in the term structure of the two rates (i.e. in respect of fallbacks to LIBOR, the move from a forward-looking term rate to an overnight rate) and a spread adjustment taking into account any differences with respect to credit risk (i.e. in respect of fallbacks to LIBOR, the move from a rate addressing interbank credit exposure to a rate based on secured transactions or transactions traded in a wider market).

ISDA intends to implement the relevant fallback clauses in a supplement to the 2006 ISDA Definitions, which are the relevant ISDA definitions applicable to interest rate benchmarks, and in a "Protocol" (ISDA Fallbacks Protocol) for inclusion of the fallbacks into transactions already in place at the time of the publication of the supplement to the 2006 ISDA Definitions.

d) Trigger events

In the fallback language to be prepared by ISDA, the triggers are expected to include the following events:

i) a public statement or publication by or on behalf of the relevant administrator of the relevant IBOR announcing that it has ceased or will cease to provide the relevant IBOR permanently or indefinitely, provided that there is no successor that will continue to provide the relevant IBOR; and

ii) a public statement or publication by the regulatory supervisor for the administrator of the IBOR, the central bank for the currency of the relevant IBOR, an insolvency official with jurisdiction over the administrator of the IBOR, a resolution authority with jurisdiction over the administrator of the IBOR or a court or an entity with similar insolvency or resolution authority over the administrator of the IBOR, which states that the administrator of the IBOR has ceased or will cease to provide the IBOR permanently or indefinitely, provided that there is no successor that will continue to provide the relevant IBOR; and

iii) a relevant LIBOR rate ceasing to be representative, as a result of panel banks ceasing to make submissions, prior to the date a trigger pursuant to i) or ii) above becomes effective (pre-cessation trigger).
For i) and ii), the effective date of such events may be at a later point in time than the occurrence of the relevant event. For instance, if the administrator of a relevant IBOR announces much in advance that it will cease to publish the relevant IBOR at a certain date in the future, the event would have occurred as of such announcement, but the fallbacks will only apply on the future date when the publication of the IBOR will cease.

As regards iii), the occurrence of such a pre-cessation trigger event will need to be defined in an objective way that allows a uniform application, e.g. on the basis of a decision by a regulator that the LIBOR has lost its representativeness.

e) Definition of RFRs

As regards the identification of alternative RFRs, the 2006 ISDA Definitions and the ISDA Fallbacks Protocol will include provisions mapping the relevant IBORs to an alternative RFR. Moreover, these provisions will also include secondary fallbacks for the event of a cessation of a primary fallback.

f) Term adjustment

As regards the term adjustment, ISDA consulted with the derivatives market participants as regards the approach to be taken to address the differences in the tenors between IBORs and the overnight RFRs. The result of these consultations showed a preference of the derivatives market for a "compounded setting in arrears" rate to be determined in respect of each IBOR tenor and a "lookback/backward-shift" of the calculation period by two banking days for the determination of the term adjusted overnight RFR. It is the intention that the 2006 ISDA Definitions and the ISDA Fallbacks Protocol will include such term adjustments for the RFRs. Therefore, as of the first interest period after the relevant trigger event becoming effective, the calculation would be made on the basis of a calculation period determined with such "lookback/backward-shift" method.

g) Spread adjustment

To address the differences in the credit and liquidity risk and further factors, such as fluctuations in supply and demand between the relevant IBORs and the RFRs, a spread is added to the relevant value (spread adjustment).

ISDA also sought the views of the derivatives market participants as regards the methodology to be applied for such spread adjustment. The outcome was a preference for the calculation of a historical median over a five-year lookback period as opposed to a calculation on the basis of a mean, which would be calculated over a longer look-back period, subject to the trimming of outliers.
On the basis of the consultations, it is the preference of the market to set the spread adjustment at the time the fallbacks will be applied without providing for a gradual phase-in over a transition period. It is the intention that the 2006 ISDA Definitions and the ISDA Fallbacks Protocol will include such spread adjustment to be set for each LIBOR tenor. Such adjustment will be determined as of the date the relevant trigger event for the fallback will be effective.

h) Publication of adjusted RFRs

It is ISDA’s intention that Bloomberg shall publish on behalf of ISDA the term- and spread-adjusted RFRs in the relevant tenors. For each such tenor, Bloomberg shall publish three values: the term-adjusted RFR, the relevant spread and an "all-in" rate as the aggregate of the term-adjusted RFR and the spread.

i) Implementation for ISDA documentation

- Fallbacks as part of supplement to 2006 Definitions:

The fallback clauses will be included in a supplement to the 2006 ISDA Definitions. As a result, as of the go-live date of such supplement, any derivatives transactions documented in a confirmation referring to the 2006 ISDA Definitions will include such fallbacks specified in the supplement to the 2006 ISDA Definitions.

- ISDA Fallbacks Protocol:

As regards the inclusion of fallbacks into transactions already in place at the time the supplement to the 2006 ISDA Definitions goes live and with a term beyond the LIBOR cessation, the parties may adhere to the ISDA Fallbacks Protocol.

As regards the scope of such ISDA Fallbacks Protocol, ISDA currently intends to cover not only transactions entered into under ISDA Master Agreements or by reference to the 2006 ISDA Definitions, but to apply a broader scope, covering also some transactions entered into under non-ISDA documentations (including those entered into under Swiss Master Agreements), provided that they include any cashflows that are determined by reference to a relevant IBOR. ISDA intends to include an annex to the ISDA Fallbacks Protocol with the relevant non-ISDA Documentation to be covered by the protocol.

Also, it is ISDA’s intention that the ISDA Fallbacks Protocol will amend collateral documentations by incorporating the relevant fallback clauses also for the purposes of the calculation of interest payments.
- **Bilateral agreement:**

  As an alternative to adhering to the ISDA Fallbacks Protocol, the parties may enter into a bilateral agreement for the purposes of including the relevant fallback clauses into such pre-existing transactions.

**j) Implementation for Swiss documentation**

- **ISDA Fallbacks Protocol:**

  The ISDA Fallbacks Protocol may also apply in respect of transactions entered into under a Swiss Master Agreement published by the Swiss Bankers Association, to the extent that such Swiss Master Agreements will be included by ISDA in the list of protocol covered non-ISDA documentation.

  However, the ISDA Fallbacks Protocol will only incorporate fallbacks into pre-existing transactions. For transactions entered into after the go-live of the protocol, the parties will have to include a reference to fallbacks into the relevant transaction documentation (e.g. by way of incorporating the 2006 ISDA Definitions or by entering into a Swiss IBOR Appendix).

- **Swiss IBOR Appendix:**

  The Swiss Bankers Association intends to publish a Swiss IBOR Appendix that may be entered into as a bilateral agreement by parties to (i) a Swiss Master Agreement for OTC Derivative Instruments published by the Swiss Bankers Association (including (a) the 2003 version, (b) the 2013 version for use in connection with certain ISDA Definitions and (c) the 2013 non-ISDA version not for use in connection with any ISDA Definitions), (ii) a Swiss Master Agreement for Repo Transactions published by the Swiss Bankers Association (bilateral 1999 version, multilateral 1999 version) and (iii) a Swiss Master Agreement for Securities Lending and Borrowing prepared by the Swiss Bankers Association (2011 version). The Swiss IBOR Appendix will include into such Swiss law governed master agreements the same fallbacks as those specified in the ISDA Fallbacks Protocol published by ISDA. Therefore, for the Swiss law governed agreements mentioned above, entering into the Swiss IBOR Appendix as a bilateral agreement will be an alternative to adhering to the ISDA Fallbacks Protocol by both parties.

  As opposed to the ISDA Fallbacks Protocol, the Swiss IBOR Appendix will not only incorporate fallbacks into pre-existing transactions, but also achieve this result for transactions entered into after the date of signing of the Swiss IBOR Appendix.

  In addition to including such fallbacks, it is intended that the Swiss IBOR Appendix will include clauses specifying how RFRs are compounded, where the parties do not agree differently in the relevant transactions.
Moreover, the Swiss IBOR Appendix shall include the relevant fallbacks for the transition from EONIA to €STR as the relevant fallback rate when EONIA cessation is scheduled to occur at the end of 2021.

4) Litigation risk in the absence of fallbacks

Parties to OTC derivatives transactions are exposed to a litigation risk when LIBOR ceases to be published in the event they failed to incorporate fallbacks into legacy transactions (as set out under 3 above) and there are no statutory provision under the governing law of the contract providing for the application of fallback clauses by operation of law.

A party that could enter into a new transaction on better terms compared to the pre-existing transaction may hold off its consent to the amendment and argue that the obligations have become impossible to fulfil and have therefore been frustrated.

This argument could be disputed by the other party with the argument that the LIBOR cessation is a change in circumstances that should be classified as requiring the application of fallback clauses. Under a Swiss law governed agreement, an adjustment of the terms of the contract by a court could be requested under the doctrine of the "clausula rebus sic stantibus", which applies under general principles of Swiss contract law, or on the basis that the contract was incomplete in the absence of fallbacks and should be supplemented accordingly. However, a Swiss court may not adjust or supplement the terms of the contract if a transaction was entered into at a time when the market was already on notice about the potential LIBOR cessation at the end of 2021. It would be up to the court to determine at what point in time exactly the parties would be deemed to be "on notice" of the LIBOR cessation.

To achieve a predictable outcome of the transition of legacy transactions, the parties will therefore have to adhere to the ISDA Fallbacks Protocol or agree to the inclusion of fallback clauses into the documentation in advance of the LIBOR cessation.

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ADC Therapeutics SA’s Successful IPO

Reference: CapLaw-2020-26

On 15 May 2020, ADC Therapeutics SA listed its shares on the New York Stock Exchange (ticker symbol ADCT). ADCT is a late clinical-stage oncology-focused biotechnology company pioneering the development and commercialization of antibody drug conjugates. Through its IPO, at USD 19 per share, ADCT raises gross proceeds of USD 267 million including greenshoe. At market close on the first day of trading, ADCT had a market capitalization of USD 2.1 bn. ADCT is the first Swiss company to go public in 2020.

Rights Offering of Cassiopea SpA

Reference: CapLaw-2020-27

On June 3, 2020, SIX Swiss Exchange listed Cassiopea S.p.A. launched a rights offering of 750,000 registered shares. Cassiopea expects to receive net proceeds from the offering of approximately EUR 22.3 million, which will be used to finance the Company’s operations up to the planned approval of Clascoterone cream 1% in H2 2020 and the preparation of Clascoterone cream 1%’s subsequent launch in the U.S. and for general corporate purposes. The newly issued shares started trading on the SIX Swiss Exchange for the first time on June 18, 2020. Italian-based Cassiopea is a specialty pharmaceutical company developing and preparing to commercialize prescription drugs with novel mechanisms of action (MOA) to address long-standing and essential dermatological conditions.

Placements of SoftwareONE shares

Reference: CapLaw-2020-28

On 15 May 2020, the selling shareholders KKR, Raiffeisen Informatik, the heirs of Patrick Winter and B. Curti Holding AG conducted a sale of 17.5 million shares in SoftwareONE Holding AG, a leading provider of end-to-end software and cloud technology solutions headquartered in Switzerland and listed on the SIX Swiss Exchange. The sale was effected pursuant to a block trade by way of an accelerated book build and raised gross proceeds of CHF 350 million.

On 18 June 2020, the selling shareholders KKR, Raiffeisen Informatik and the heirs of Patrick Winter conducted a further sale of 17 million shares in SoftwareONE Holding
AG, a leading provider of end-to-end software and cloud technology solutions headquartered in Switzerland and listed on the SIX Swiss Exchange. The sale was effected pursuant to a block trade by way of an accelerated book build and raised gross proceeds of CHF 382.5 million.

Implenia AG Completes the Spin-off of Ina Invest Holding AG
Reference: CapLaw-2020-29

On 12 June 2020, Implenia AG completed the spin-off of Ina Invest Holding AG and the shares of Ina Invest Holding were, after a concurrent capital increase, listed on the SIX Swiss Exchange. Ina Invest AG is a Swiss real estate company whose entire portfolio shall be developed and realized according to the highest sustainability criteria.

The spin-off has been effected through a tax-neutral dividend in kind distribution of the Ina Invest Holding shares to Implenia’s shareholders that was previously approved by Implenia’s shareholders. It was preceded by the separation of a part of Implenia’s development portfolio to Ina Invest (a subsidiary held in part by Ina Invest Holding and Implenia) through a series of transactions, including a tax neutral spin-off of real estate in various cantons. Ina Invest Holding will hold approximately 57% of Ina Invest, with Implenia the rest. In parallel, Ina Invest Holding has completed a rights offering. It raised gross proceeds of approximately CHF 116 million.

Credit Suisse (Schweiz) AG Receives Approval for the First-Ever Prospectus Complying with the New Swiss Prospectus Regime
Reference: CapLaw-2020-30

On 18 June 2020, SIX Exchange Regulation, in its capacity as a new review body under the Financial Services Act (FinSA), licensed since 1 June 2020 (as is the second Swiss review body, RegServices of BX Swiss), approved the first fully FinSA-compliant base prospectus of Credit Suisse (Schweiz) AG. Credit Suisse’s Swiss Covered Bond issuance programme provides for the issuance of Swiss-law governed covered bonds with public offerings and admissions to trading on a trading venue in Switzerland in compliance with the new Swiss prospectus regime.
SIG Combibloc Group Completes its EUR 1.85 Billion Refinancing
Reference: CapLaw-2020-31

On 22 June 2020, SIG Combibloc PurchaseCo S.à r.l., a subsidiary of SIG Combibloc Group, has issued EUR 450 million Senior Unsecured 1.875% Notes due 2023, as well as and EUR 550 million Senior Unsecured Notes 2.125% due 2025. Certain subsidiaries of SIG Combibloc Group have also entered into new sustainability-linked EUR 850 million loan facilities. The net proceeds from these transaction are used to refinance the existing group financing.

Saint-Gobain Sells Stake in Sika
Reference: CapLaw-2020-32

In May 2020, Saint-Gobain’s subsidiary Schenker-Winkler Holding AG sold its 10.75% stake in Sika for CHF 2.56 billion. The shares were placed via a private placement to qualified institutional investors by way of an accelerated book-building process.

Placement of Helvetia Group AG Shares
Reference: CapLaw-2020-33

On 17 June 2020, Helvetia Group AG, a leading international insurance group, successfully placed 3.3 million new shares at a price of CHF 91.00 per share in a private placement by way of an accelerated bookbuilding process, resulting in gross proceeds of approximately CHF 300 million. The net proceeds from the share placement will be used to partly finance the acquisition of a 70 per cent. majority interest in the Spanish insurer Caser (Caja de Seguros Reunidos, Compañía de Seguros y Reaseguros S.A.) for around EUR 780 million. The acquisition of Caser is expected to further strengthen Helvetia’s European business as a second pillar, significantly expand Helvetia’s attractive non-life business and increase its distribution capabilities in Spain.
RSBG SE successfully places shares of Stadler Rail AG

Reference: CapLaw-2020-34

On 26 May 2020, RSBG SE, the industrial investment company of RAG-Stiftung, successfully placed 5.5 million shares of Stadler Rail by way of an accelerated bookbuilding process, representing approximately 5.5 per cent. of the total number of Stadler Rail shares outstanding. The shares were placed at CHF 38.10 per share, resulting in gross proceeds of approximately CHF 210 million. Following the placement, RSBG SE continues to hold approximately 4.5 per cent. of the shares in Stadler Rail.

Placement of Idorsia Ltd. Shares

Reference: CapLaw-2020-35

On 20 May 2020, Idorsia Ltd, a Swiss biopharmaceutical company, successfully completed a private placement with institutional investors of 11 million new registered shares, corresponding to 8.4% of its currently issued share capital, by way of an accelerated bookbuilding process. The shares were placed at CHF 30.00 per share, resulting in gross proceeds of CHF 330 million. The net proceeds will be used by Idorsia to prepare to launch its first commercial products and to continue to fund the development of its other pipeline candidates.

IPO of V-ZUG Holding AG

Reference: CapLaw-2020-36

On 25 June 2020, V-ZUG Holding AG (ticker symbol: VZUG) listed its shares on the SIX Swiss Exchange. The opening price was CHF 72.00 per share, resulting in a market capitalization of CHF 463 million. The newly established V-ZUG Holding AG was spun off from Metall Zug AG, which can look back on a company history of more than 100 years. Its 6,428,571 registered shares were traded on the Swiss stock exchange for the first time today. The previous shareholders of Metall Zug AG were allotted one registered share of V-ZUG Holding AG for each type A registered share of Metall Zug AG and ten registered shares of V-ZUG Holding AG for each type B registered share of Metall Zug AG.
GesKR Event on the New Corporate Law (GesKR-Tagung zum neuen Aktienrecht)

Wednesday, 21 October 2020, Metropol Zurich


Capital Market – Law and Transactions XVI (Kapitalmarkt – Recht und Transaktionen XVI)

Wednesday, 11 November 2020, Metropol Zurich


In light of the new data protection laws, CapLaw has released a privacy statement. The privacy statement, as updated from time to time, is available on our website (see http://www.caplaw.ch/privacy-statement/). For any questions you may have in connection with our data processing, please feel free to contact us at privacy@caplaw.ch.