LEXOLOGY®
Getting The Deal Through

Debt Capital Markets

in Switzerland

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MARKET SNAPSHOT

Market climate

What types of debt securities offerings are typical, and how active is the market?

The Swiss domestic bond market is primarily a retail market with standard denominations of 5,000 Swiss francs.

The main exchange for debt securities is SIX Swiss Exchange AG (SIX) (www.six-group.com/exchanges/issuers/bonds_en.html). As at 31 January 2020, a total of 3,507 bonds were listed or admitted to trading on SIX, of which 1,819 bonds were denominated in Swiss francs and 1,180 were issued by Swiss issuers.

The SIX bond segment comprises a wide range of instruments, convertibles and exchangeables, asset-backed securities (ABS) and loan participation notes. Bonds are also traded on two affiliates of SIX: SIX Corporate Bonds AG (international bonds denominated in euros, sterling or US dollars with an issue volume of at least 250 million) and SIX Repo AG (OTC Spot Market for bonds and short-term debentures of the Swiss Confederation). Furthermore, there is an active market for unlisted bonds and privately placed debt securities.

Regulatory framework

Describe the general regime for debt securities offerings.

For a better understanding of Swiss capital markets, it is worth highlighting that Switzerland is neither a member of the European Union (EU) nor the European Economic Area (EEA). Consequently, the EU prospectus rules and other EU or EEA capital markets rules and regulations are not applicable in Switzerland. Since Swiss capital markets participants largely depend on free and unrestricted access to the European (capital) markets, Switzerland regularly adapts its legislation to maintain regulatory alignment with EU rules. Consequently, in recent years Switzerland has implemented a comprehensive reform package.

The most important part of the reform package for debt securities offerings is included in the Financial Services Act (FinSA) and the Financial Services Ordinance (FinSO) that entered into force on 1 January 2020. Key points for the offering of debt securities are:

- new prospectus rules for public offerings and admission to trading, which are expected to enter into force six months after the first Review Body is licensed by the Swiss Financial Market Supervisory Authority (FINMA), but not earlier than 1 October 2020;
- the requirement to prepare and make available to a Basic Information Document (BID) for certain debt instruments 'with derivative character', which will enter into force on 1 January 2022; and
- the codification of private placement exemptions and other exemptions from the duty to publish a prospectus.

New prospectus rules for public offerings and admission to trading

FinSA and FinSO include comprehensive new prospectus rules. Pursuant to the new prospectus rules, any public offer or admission to trading on a trading venue of securities in Switzerland requires the prior publication of a prospectus approved by a review body (ex ante prospectus approval). For a discussion of minimum prospectus disclosure requirements see question 4. For certain types of debt securities, prospectus approval may be obtained after the publication of the prospectus (ex post prospectus approval; see question 3).

Trading venues for purposes of the new prospectus rules are stock exchanges and multilateral trading facilities in Switzerland. As a result of admission to trading on a trading venue, debt securities are subject to the Swiss insider trading and market abuse rules.

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Review bodies are private entities that must be licensed by FINMA. Review bodies will be the sole competent authorities to approve prospectuses under the new prospectus rules (for a discussion of the scope of the review, see questions 8 and 9) and will also be vested with other administrative powers. It is expected that FINMA will grant licences as review bodies in the first quarter of 2020 to SIX Exchange Regulation AG, a separate and independent entity of SIX, and to a subsidiary of BX Swiss AG (which is a much smaller exchange that currently does not have any listed bonds).

In addition to the new regime introduced by FinSA and FinSO, issuers seeking an admission and listing of the relevant debt instruments on an exchange will also need to comply with the requirements of the applicable exchange. SIX is the largest securities exchange in Switzerland, followed by BX Swiss AG.

Prior to the entering into force of the new prospectus rules, issuers may continue to comply with the previous regime, whereby an offering and listing prospectus is prepared in compliance with the relevant provisions of article 1156, paragraph 1 of the Swiss Code of Obligations (CO) and the listing rules of the relevant exchange (which previously included certain prospectus content requirements that have now been formally incorporated into FinSO).

Basic Information Document

In addition, under FinSA where debt securities with derivative character are offered to retail clients, a Business Information Document (BID) must be made available, subject to certain exemptions. The obligation to prepare and make available a BID to retail investors will enter into force on 1 January 2022. During the transition period, existing rules to prepare a simplified prospectus for structured products will continue to apply.

Exemptions from the duty to publish a prospectus

FinSA includes express exemptions from the duty to publish a prospectus in the context of public offerings and admission to trading. The available exemptions in the context of public offerings include, among others:

- offerings limited to investors classified as professional clients as defined in the FinSA;
- offerings addressed to fewer than 500 retail investors;
- offerings to investors who acquire securities for a consideration in excess of 100,000 Swiss francs;
- offerings with a minimum denomination per unit of 100,000 Swiss francs; and
- offerings that do not exceed a total value of 8 million Swiss francs over a period of 12 months.

Furthermore, there are certain product-related exemptions from the duty to publish a prospectus depending on the type of securities or the context in which such securities are being publicly offered and certain exemptions that apply in the context of the admission to trading on a trading venue in Switzerland.

FinSA further provides that in circumstances where a prospectus is not required, offerors or issuers must nevertheless treat investors equally when sharing essential information regarding the offering.

Private placements

If the offering of debt securities does not qualify as a public offering in the sense of FinSA, no prospectus will be required.

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

In addition to the new prospectus approval regime introduced by FinSA and FinSO, issuers seeking a listing on a Swiss

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stock exchange will need to comply with the listing rules of the relevant stock exchange.

Prospectus approval by a review body

FinSA generally introduces an ex ante prospectus approval process to Swiss capital markets (ie, prospectus approval is required prior to a public offering or admission to trading).

However, in order to preserve time-to-market advantages under existing rules, prospectus approval for certain types of debt securities can be obtained after publication of the prospectus (ex post prospectus approval). The ex post prospectus approval procedure is available for bonds, including convertible and exchangeable bonds, warrant bonds, mandatory convertible notes, contingent convertible notes (CoCos) and write-down bonds, as well as structured products with a duration of 30 or more days. Subject to certain other conditions, issuers availing of this exemption must ensure that the most important information about the issuer and the securities that is relevant for investors' decisions is available or can be made available no later than the day on which the public offering commences or admission to trading is applied for, as confirmed by a Swiss bank or broker dealer in writing. The most important information generally comprises the information stipulated in the applicable annex to FinSO. Furthermore, where an issuer is availing of this exemption, it must prominently place this fact on the cover page of the prospectus, noting that the prospectus has not yet been reviewed or approved by the review body. At any time during the 60 calendar day period after the commencement of the public offering or application for admission to trading (with shorter periods applying to debt securities with a term of 180 days or less), the prospectus must be submitted to a review body for approval.

Listing of debt securities on SIX

In addition to prospectus approval by a review body, an issuer must initiate a separate process for the listing of the debt securities. The listing rules of SIX and other regulations set out the listing requirements for the issuer (eg, capital resources, annual financial statements, applicable law and place of jurisdiction) and the debt securities (eg, minimum capitalisation of the issue and paying agents). Typically, the listing process starts with an application for provisional admission to trading on SIX, followed by the listing application no later than two months after provisional admission to trading. Additional rules apply with respect to the approval of new issuers.

Prospectus requirements

In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

Generally, any public offer of securities or admission of securities to trading on a trading venue in Switzerland must first publish a prospectus, and the prospectus must be submitted to the review body prior to publication, subject to the exemption from the ex ante prospectus approval requirement for certain debt securities (see question 3) and exemptions from the requirement to publish a prospectus based on the type of offer, type of securities or exemptions for admission to trading (in each case, as provided for under FinSA (see also question 2)).

The annexes to FinSO include detailed structural and content requirements for debt securities prospectuses, including a tabular summary box, information on the issuer, information on the securities and the responsibility statement.

Documentation

Describe the drafting process for the offering document.

While the offering document is ultimately the responsibility of the issuer, typically the investment banks involved in the offering provide input, primarily with respect to disclosure related to the debt instruments to be offered while the issuer

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primarily focuses on issuer-related disclosure.

The drafting process of the offering document is primarily guided by the content requirements set forth in FinSO and the applicable SIX rules and regulations (see questions 2 and 3).

Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The key agreement for issuance of Swiss law-governed debt securities is typically the bond purchase agreement between the issuer and the lead manager or managers as well as the terms and conditions of the debt securities to be offered. In addition, once the relevant prospectus has been approved by the review body, the prospectus must be published prior to the start of the public offering or before the admission to trading. The publication can be in electronic format (eg, on the issuer's or review body's website), but in any case must be available in print form free of charge upon request.

Does offering documentation require approval before publication? In what forms should it be available?

According to FinSA, subject to certain exemptions in relation to the duty to publish a prospectus or the timing of the prospectus review and approval and subject to the transition period for the entry into force of the new prospectus rules under FinSA, all prospectuses will need to be reviewed and approved by the review body with respect to completeness, coherence and comprehensibility before the public offering or admission to trading on a trading venue. See questions 2 and 3 for further information.

Authorisation

Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

Under the new prospectus rules, first-time issuers will be required to submit the prospectus to the review body at least 20 calendar days prior to commencement of the planned offering (or application for admission to trading), while repeat issuers will only be required to do so at least 10 calendar days ahead of time. However, if the review body does not provide a response within the specified period, this will not mean that the prospectus is deemed approved.

If the review body determines that a prospectus does not comply with the new prospectus rules it notifies the issuer and requests the issuer to modify the prospectus accordingly. Once the issuer submits the modified prospectus, the review body decides within another 10 calendar days whether the modified prospectus can be approved.

On what grounds may the regulators refuse to approve a public offering of securities?

The review body may refuse to approve the prospectus if the statutory requirements for the prospectus are not met. Given that the review process is more of a formal nature (eg, whether the prospectus is complete, coherent and comprehensible) rather than of substantive nature (ie, whether the information is actually correct), we expect that requests for modifications from the review body will be of a primarily formal nature.

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In addition, in the case of listed securities, the exchange admission body (eg, SIX) may not approve the listing application if it does not fulfil the formal listing requirements. See question 3.

How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

FinSA includes express exemptions from the duty to publish an approved prospectus in connection with public offerings, as described in greater detail in question 2.

For private offerings of debt securities (ie, private placements), there is no duty to prepare or publish a prospectus. Swiss issuers must be aware that in order to ensure that the private placement does not qualify as a 'deposit taking' under Swiss banking regulations (and thereby triggering licensing requirements), the private placement documentation must contain certain basic information about the issuer, the terms of the securities, financial statements, security and, if any, any bondholder representative (article 5(3) letter b Banking Ordinance).

In any case, FinSA requires that in circumstances where a prospectus is not required, offerors or issuers must nevertheless treat investors equally when sharing essential information regarding the offering.

Offering process

Describe the public offering process for debt securities. How does the private offering process differ?

Listed and public offerings

Pursuant to FinSA, issuers who carry out a public offering of debt securities are required to undergo an approval process (ie, by the review body) and an admission to trading process (ie, by the exchange admission body).

Following the entry into force of the prospectus approval duty pursuant to FinSA (which will not take place prior to 1 October 2020), the issuer will be required to submit a complete prospectus to the review body for review (focusing on completeness, coherence and comprehensibility). The review body has 10 (in the case of new issuers, 20) calendar days to carry out the review.

Importantly, if, between the date of approval and the closing of the offering or the start of trading new facts arise that could significantly impact the price of the securities in question, a supplement must be published, which must also be reviewed and approved by the review body. The review body will have seven calendar days to carry out such review and approval. If the new facts in question arise during the offer period, the offer period must remain open for at least two days after the publication of the supplement. This may require an extension of the offer period. Investors must have the right to withdraw their subscription for securities up until the end of the offer period.

Public offerings and listings of straight bonds, convertible and exchangeable bonds, warrant bonds, mandatory convertible notes, CoCos, write-down bonds such as exempt securities and structured products with a duration of 30 or more days may be exempt from ex ante prospectus approval. Subject to the tenor of the debt instruments, issuers who avail of this exemption must submit the prospectus to the applicable review body for review no later than 60 calendar days after commencement of the public offer or admission to trading. The issuer will also need to submit the confirmation statement referenced in question 2 to the review body with the prospectus to be reviewed.

In addition to the approval process, new issuers also need to be admitted to trading by the exchange admission body (most commonly SIX). The new issuer's 'recognised representative' (which may be a bank, law firm, auditing or advisory firm) must submit a written listing application (including evidence of approval of the prospectus in accordance with FinSA, or, in the case of a listing without a prospectus, an explanation of the relevant exemption from preparation of a

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prospectus that is being claimed). The issuer must also submit an issuer declaration stating that it is in agreement with the listing and that it has read and acknowledges the SIX listing rules. SIX will, in principle, make a decision regarding the admission to provisional trading no earlier than three trading days after receipt of all the required documents.

Private placements

A non-public offering of debt securities in or into Switzerland that are not admitted to trading on any trading venue is exempt from the duty to publish an approved prospectus. The process for carrying out a private placement is therefore not regulated in the same way as public offerings. The drafting of the offering documentation (if any) for private placements is determined by Swiss market standard in a manner designed to minimise potential civil liability issues. For Swiss issuers the private placement documentation must contain certain basic information so that the private placement does not qualify as a deposit taking and trigger banking licence requirements (article 5(3) letter b Banking Ordinance; see also question 10).

Closing documents

What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

Closing documents typically include the prospectus, bond purchase agreement, agency agreement, terms and conditions of the debt securities, legal opinions, comfort letters, corporate authorisations, closing certificates and the securities register or the global certificate.

Listing fees

What are the typical fees for listing debt securities on the principal exchanges?

The typical charges for listing bonds on SIX are the following:

General		
Basic charge	Processing of a listing application	2,000 Swiss francs
Variable charge	Listing of new bonds or the increase of an existing listed bond	10 Swiss francs per million Swiss francs nominal value
Stand-alone prospectuses		
Additional charge	Examination of the listing prospectus (stand-alone prospectus)	5,000 Swiss francs
SIX-registered issuance programmes		
Basic charge	Initial examination and registration of a SIX-registered issuance programme	6,000 Swiss francs
Additional charge	Examination of the listing prospectus (Final Terms) in connection with a SIX-registered issuance programme	2,000 Swiss francs
Basic charge	Examination and registration of the annual update of a SIX-registered issuance programme	3,000 Swiss francs (each year of an ongoing registration)

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Registration of new issuers		
Additional charge	Registration of a new issuer	10,000 Swiss francs

KEY CONSIDERATIONS

Special debt instruments

How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

Of the 3,507 bonds listed or admitted to trading on SIX as at 31 January 2020, 33 were convertible bonds, 32 were CoCos and 21 were ABSs. Furthermore, there is a very active structured products market.

What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

In addition to the general minimum disclosure requirements for debt securities (see question 2) that include provisions regarding convertible or option and exchangeable bonds, the FinSO includes specific minimum prospectus disclosure requirements for asset-backed securities derivatives and collective investment schemes. For a discussion of the recognition of certain foreign prospectuses, see question 18.

Depending on the type of special debt security, additional rules apply. For example:

- the offering of (Swiss and) foreign collective investment in (or from) Switzerland is subject to specific regulatory requirements, and may require FINMA approval;
- structured products (ie, certain debt securities with embedded derivative components) are also subject to additional regulatory requirements; and
- for certain types of special debt securities, there is an obligation to make available a BID (as discussed in more detail in question 2). During the two-year phase-in period, structured products will remain subject to the duty to publish a simplified prospectus for distribution to non-qualified investors under current law, unless a BID is prepared on a voluntary basis.

There are no specific rules regarding accounting standards for special debt securities in FinSA; however, debt securities to be listed and traded on SIX pursuant to the Standard for Bonds must adhere to one of the approved accounting standards. For a discussion of the qualification of securities as debt or equity for Swiss tax purposes, see question 16.

Classification

What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

FinSA and FinSO distinguish between equity securities and debt securities. Equity securities are defined as shares pursuant to the CO and other transferable securities equivalent to shares, including participation certificates pursuant to the CO and profit-participation certificates pursuant to the CO as well as certain convertible instruments. All other types of securities are considered debt securities. FinSA also includes a definition of investment fund interests and structured products, which are subject to additional regulatory requirements not covered in this chapter.

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Under FinSA and FinSO, the distinction between debt and equity securities is, among other things, relevant to determine the applicable minimum disclosure requirements and available exemptions from the prospectus requirements.

For Swiss tax law purposes, the qualification of a financial instrument as debt or equity for a Swiss company is based on legal form. Consequently, shares and participation certificates pursuant to the CO are qualified as equity, all other instruments generally qualify as debt.

Transfer of private debt securities

Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

Other than the general selling restrictions to ensure compliance with the prospectus requirements pursuant to FinSA, there are no specific transfer restrictions or other limitations imposed on privately offered debt securities pursuant to FinSA.

In addition, FinSA and FinSO impose certain rules of conduct on financial services providers that must be complied with at the point of sale, which are broadly in line with MiFID rules.

Cross-border issues

Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

As a basic principle, the same rules apply to the listing of debt securities by domestic and foreign issuers. Pursuant to FinSA and FinSO, certain prospectuses produced under foreign legislation may be approved by the review body in Switzerland if they are drafted in accordance with international standards established by international organisations of securities regulators and the disclosure obligations are equivalent to the requirements under FinSA.

The review body can also provide that prospectuses approved in certain jurisdictions are considered automatically approved in Switzerland. In such cases, the review body shall publish a list of countries whose prospectus approval is automatically recognised in Switzerland (it is currently expected that the list will include, among others, EU member states and the United States). Nevertheless, the prospectus must be published no later than the beginning of the public offer or admission of the securities in question to trading and be filed with the respective review body.

Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

No.

Underwriting

What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Investment banks as initial purchasers in debt securities offerings will typically underwrite the securities on a fixed-

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price basis once they are satisfied that there is sufficient investor demand at the end of the book-building process. Typically, the managers will purchase the offered debt securities on a several basis based on each manager's commitments as set out in the purchase agreement. Purchase agreements for debt securities in Switzerland are quite standardised and relatively short. A typical purchase agreement will include provisions regarding fees and commissions, offering restrictions, representations and warranties of the issuer (in respect of itself and the offering documentation) and broad indemnity provisions in favour of the managers. The purchase agreement also typically contains a clause allowing the underwriter to terminate the agreement in the case of force majeure, which may take the form of a suspension of trading, a moratorium on commercial banking activities, material adverse change to the financial condition of the issuer, material adverse change in international financial conditions, calamity, crisis and others.

How are underwriters regulated? Is approval required with respect to underwriting arrangements?

The regulation of underwriters in Switzerland is governed by a variety of rather fragmented rules and regulations. Of most relevance are various provisions set forth in the Financial Institutions Act (FinIA), the Financial Institutions Ordinance, the Banking Act and the Financial Market Supervision Act. In particular, underwriters who commercially underwrite securities issued by third parties (on a firm basis or against commission) and offer them to the public on the primary market (article 44 (1) letter c FinIA) require a licence as a securities house (article 41 FinIA). The underwriting agreements per se do not require any additional approvals.

Transaction execution

What are the key transaction execution issues in a public debt offering? How is the transaction settled?

Debt securities are usually issued in bearer form or as uncertificated securities. The issuance of physical global certificates is still customary for debt securities (typically as global certificates). However, debt securities may also be issued as uncertificated securities and certain banks increasingly accept such forms when they act as underwriter. For equity securities, uncertificated securities have become market standard. Listed securities typically then qualify as book-entry securities governed by the Federal Act on Intermediated Securities (FISA).

Normally, trades in debt securities executed via SIX are generally cleared by SIX x-clear Ltd and settled at SIX SIS Ltd (for Swiss franc bonds) or SIX SIS Ltd, Euroclear or Clearstream (for non-Swiss franc bonds). SIS acts as a central depository and effects the settlement of stock exchange and off-market transactions in Switzerland for Swiss bonds. SIX uses an integrated settlement solution (ie, a facility based on the cooperation of recognised central securities depositories).

Holding forms

How are public debt securities typically held and traded after an offering?

Debt securities can be issued in bearer form and certificated in a permanent global note, which is then deposited with SIX SIS Ltd or another depository recognised by SIX. Under FISA, once the securities are registered in the main register of the depository and entered into the accounts of one or more participants of the depository, the securities will constitute book-entry securities. With respect to bonds that are initially certificated in a permanent global note, book-entry securities are hence created in a two-step process, namely:

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- a permanent global note is issued and deposited with SIX SIS Ltd or another depository (such as Euroclear or Clearstream). Should the bond issue be represented by non-certificated securities, this first step is substituted by registering the bond issue in a register of non-certificated securities held by the issuer or its agent and an additional registration in the main register held by SIX SIS Ltd or another depository; and
- the bonds deposited or registered are credited to securities accounts. As a result of the creation of book-entry securities, the rights in the underlying (certificated or non-certificated) securities are suspended and any sale of book-entry securities may only be carried out through electronic bookings following a corresponding instruction.

Alternatively, debt securities can also be issued directly in uncertificated form, which avoids the necessity of first creating and depositing a global note with SIX SIS Ltd or another depository.

Outstanding debt securities

Describe how issuers manage their outstanding debt securities.

Generally, liability management in Switzerland is in line with international practice. Issuers are allowed to buy back their outstanding debt securities, and the buy-back of debt securities does not fall within the scope of the public tender rules applicable to buy-backs of equity securities. Given recent market conditions, with low interest rates, many debt security issuers considered repurchasing outstanding bonds and replacing them with bonds at lower yield. Sometimes issuers are also able to repurchase their bonds at a discount. In addition, many banks have made tender and exchange offers in order to issue bonds or notes that comply with their regulatory capital requirements (ie, Tier 2 CoCos or write-off bonds).

Market abuse considerations apply and caution should be exercised to ensure that the purchasing of debt instruments does not constitute the preferential treatment of specific security holders.

REGULATION AND LIABILITY

Reporting obligations

Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

Generally, no reporting requirements apply for unlisted debt securities (other than as stipulated in the terms and conditions).

For listed debt securities, there exist a number of regular reporting obligations for the maintenance of listing. The reportable facts include general information on the issuer as well as information regarding the securities. Standardised forms and entry screens are available to issuers to enable them to fulfil their regular reporting obligations.

In addition, issuers must comply with the ad hoc disclosure rules of SIX. This applies to all issuers whose securities are listed on SIX and whose registered offices are in Switzerland, as well as to issuers whose registered offices are not in Switzerland, but whose securities are listed on SIX and not in their home country.

Liability regime

Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

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Under FinSA, the liability regime applies equally to debt or equity securities. Specifically, pursuant to article 69 FinSA, whoever makes statements in prospectuses, key information documents or similar communications that are inaccurate, misleading or in violation of statutory requirements, without having acted with the required care, is liable to the acquirer of a financial instrument for the damage caused thereby. In addition, for information contained in the summary of a prospectus, liability is limited to matters where such information is misleading, incorrect or inconsistent when read together with the other parts of the prospectus. For incorrect or misleading information about the prospects (ie, forward-looking statements) regarding the issuer, liability is limited to cases where such information was provided against better knowledge or without an appropriate disclaimer about the uncertainty regarding future developments. It should also be noted that FinSO requires prospectuses to include information about the companies or persons that are assuming responsibility for the content of the prospectus as well as a declaration by these companies or persons that the information is correct to the best of their knowledge and that no material facts or circumstances have been omitted (eg, in the case of debt instruments (other than derivatives and structured products), see FinSO, Annex 2, paragraph 4).

FinSA also introduces administrative criminal liability leading to a monetary fine in case of, inter alia, the intentional provision of false information or withholding of material facts in connection with a prospectus or BID or if a prospectus or a BID is not published as required under the new prospectus rules.

Finally, further provisions may apply in cases of inappropriate or illegal market behaviour. In particular, the rules on insider dealing and market manipulation set out in the Financial Market Infrastructure Act may be relevant.

Remedies

What types of remedies are available to the investors in debt securities?

While prospectus liability may lead to a civil liability and related litigation proceedings, insider dealing and market manipulation are considered violations of administrative law (see question 28). Further, they could also qualify as criminal offences (which may result in criminal proceedings against the persons involved in such behaviour). Finally, SIX also has disciplinary powers in cases of improper activities in relation to securities listed on SIX and may decide to implement various sanctions (see question 28).

Enforcement

What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

Sanctioning powers of FINMA

FINMA's enforcement actions are primarily taken against companies that are under its supervision or carrying on business without the necessary licence or authorisation. However, where a serious supervisory breach is suspected, FINMA may initiate administrative proceedings against individuals, for example, executive officers, shareholders or employees of supervised companies. Market behaviour rules (in particular rules on insider dealing and market abuse) apply to all market participants, and FINMA's supervisory and enforcement rights are in such cases not limited to supervised companies. Cases of criminal behaviour, insider dealing and market manipulation are enforced by the Swiss federal prosecutor.

In administrative proceedings for the purpose of financial market enforcement against supervised companies, FINMA may apply measures it deems most appropriate and proportionate to enforce compliance with the law. The available sanctions include reprimands (declaratory ruling), specific orders to restore compliance with the law, prohibition of individuals from practising their profession or carrying on business, as applicable, and the revocation of licences. The revocation of a licence may result in liquidation or bankruptcy proceedings. FINMA may also confiscate any illegal

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gains or losses avoided or order publication of a final and binding ruling. Sanctions are more restricted in administrative proceedings against other persons.

The offering of debt securities or similar instruments by Swiss entities to more than 20 offerees may qualify as a deposit-taking activity under the Swiss banking laws unless the investors at the time of the offering are provided with certain specific information about the issuer, the debt instrument, the financials of the issuer and security, as well as the representative (if any) (article 5 (3) let. b of the Banking Ordinance), in a form as contemplated by article 64 (3) FinSA (eg, certain newspapers, in written form, in electronic format on the website of the issuer or the relevant exchange). Non-compliance with such obligations may qualify as banking activity for which the issuer would require a banking licence. Non-compliance with that rule can lead to severe sanctions by FINMA.

Sanctioning powers of SIX

In the event of non-compliance with the SIX regulations and directives and their implementing provisions, the competent departments of SIX Exchange Regulation (in less significant cases) or the SIX Sanctions Commission (in more severe cases) may impose sanctions against the issuer, guarantor or authorised representatives in question.

In particular, sanctions may be imposed in the following areas:

- ad hoc publicity;
- financial reporting;
- regular reporting obligations;
- corporate governance; and
- management transactions.

The following sanctions may be imposed on issuers or guarantors:

- reprimand;
- fine of up to 1 million Swiss francs (for negligence) or 10 million Swiss francs (for wrongful intent);
- suspension of trading;
- delisting or reallocation to a different regulatory standard;
- exclusion from further listings; and
- withdrawal of recognition.

Tax liability

What are the main tax issues for issuers and bondholders?

For Swiss issuers, the main tax issue is the Swiss withholding tax at the current rate of 35 per cent on interest payments under domestic bond issues. Temporary exemptions (for bonds issued prior to 1 January 2022) are available only in the case of CoCos issued by systemic relevant banks (commonly called ‘too big to fail’ banks) as well as in the case of certain write-off bonds qualifying for regulatory capital. An additional temporary exemption applies to certain bail-in bonds. Nevertheless, the Swiss withholding tax represents a competitive disadvantage for the Swiss bond market. For an update on potential legislative developments around the future of the Swiss withholding tax, see question 30.

Furthermore, bonds, like any other taxable securities, are subject to a 0.15 per cent Swiss transfer stamp duty for domestic bonds and 0.3 per cent for foreign bonds if a transfer of title occurs for consideration and a Swiss securities dealer is involved as a party or as an intermediary to the transaction.

For direct tax purposes of Swiss resident individual bondholders, most of the return of bonds is subject to Swiss income tax. Upon sale and redemption of structured products, the theoretical bond component is subject to pro rata

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Swiss income taxation. Until now, accrued interest is tax-free income upon sale of a bond.

UPDATE AND TRENDS

Key developments of the past year

Please provide any updates and trends in your jurisdiction's debt capital market.

30 Please provide any updates and trends in your jurisdiction's debt capital market (trends, product types, special issues, etc).

Currently, a Swiss issuer of bonds must deduct a withholding tax of 35 per cent from interest (and certain other) payments made to investors inside and outside of Switzerland (debtor-based regime). See also question 29.

Because it may be difficult for investors outside Switzerland to reclaim Swiss withholding tax, the current system makes it impracticable for Swiss issuers to directly access investors outside Switzerland. This has had a material adverse effect on Swiss capital markets for decades. To address this issue, in December 2014, the Swiss Federal Council published draft legislation to, among other things, replace the current debtor-based regime with a paying agent-based regime for Swiss withholding tax, where a withholding would be required only for Swiss resident investors. Swiss resident investors, however, would be entitled to a full refund of such Swiss withholding tax if, inter alia, the income subject to such Swiss withholding tax is properly declared in the income tax return of the Swiss resident investor.

The Federal Council withdrew the draft legislation in June 2015 and mandated the Swiss Federal Finance Department to appoint a group of experts to prepare a proposal for reform of the Swiss withholding tax system. On 23 October 2017, the Swiss Federal Economic Affairs and Taxation Committee of the Swiss Federal Council filed a parliamentary initiative reintroducing the request to replace the current debtor-based regime applicable to interest payments with a paying agent-based system for Swiss withholding tax. The initiative requests the implementation of a paying agent-based system that subjects all interest payments made to individuals resident in Switzerland to Swiss withholding tax and provides an exemption from Swiss withholding tax for interest payments to all other persons (including Swiss corporations).

The consultation draft of the Swiss Federal Council is expected in spring 2020 and will thereafter be submitted for parliamentary consultation. The exact scope of the Swiss federal withholding tax reform and the date of its implementation are not yet known.

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