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The Offering of Foreign Securities in Switzerland

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Inhalt

I. Introduction

This article describes and explains the requirements under Swiss law applicable to an offering of securities of a foreign issuer in Switzerland with an emphasis on the foreign issuer's and underwriting banks' perspective. In such context, typically, a Swiss lawyer is contacted by foreign counsel shortly before the launch of an offering and asked to advise on what sounds like a simple question:

> „We act for issuer ‚A' (or the underwriting banks) in connection with the listing of A's securities on a foreign stock exchange. The securities will be placed in an international offering. In this context, the securities shall also be offered to selected (institutional) investors in Switzerland. Could you please advise on registration requirements and provide appropriate selling restriction language for inclusion in the offering prospectus?"

Implicit in this question is the assumption, often based on the rules in the foreign lawyer's own jurisdiction, that securities may only be offered in Switzerland upon compliance with Swiss *prospectus approval or registration requirements* or, if such shall be avoided, based on *qualified investor or similar exemptions*[1]. However, the general rules under Swiss law are different and can be summarised as follows:

- Special rules apply for the offering of units of a *foreign collective investment scheme* and (to a limited extent) *structured products* pursuant to the Swiss Federal Act on Collective Investment Scheme („CISA").
- Outside the scope of application of the CISA, there is *no requirement for a prospectus to be filed with, or approved by, a Swiss supervisory body* in connection with the offering of securities in Switzerland by a foreign issuer, provided that the securities will not be listed on a Swiss

[1] E.g., this assumption may be based on the EU Prospectus Directive which, however, is not applicable in the present case because Switzerland is not a member of the European Union or of the European Economic Area.

stock exchange[2]. This applies whether the securities are offered to the public or a category of investors such as institutional investors.

- In case of a *public offering* of newly issued shares or bonds in Switzerland, articles 652a and 1156 of the Swiss Code of Obligations („CO") provide for certain *minimum content requirements* regarding the issue prospectus and for the obligation to make the issue prospectus available to investors. Absent any prospectus approval or registration requirements under the CO, compliance with the CO content requirements is not supervised by, nor can the prospectus be voluntarily filed for pre-clearance with, a Swiss regulator. A breach of the CO prospectus requirements may, however, result in *prospectus liability*, i.e. an investor may try to sue for damages before the courts if he did not receive a prospectus containing all information required by the CO.

- The CO does not prescribe the use of a particular language, i.e. in the context of an international offering no separate Swiss prospectus or summary in a Swiss national language is required. In addition, with one possible exception[3] the CO prospectus content requirements are not particularly demanding. Accordingly, instead of offering the securities in Switzerland exclusively on a non-public basis and without a CO-compliant prospectus, the alternative is to ensure that the international (English language) prospectus contains the minimum information required by Swiss law. Importantly in this context, different to the EU Prospectus Directive and the CISA, the CO (as currently in force) does not expressly provide for a qualified investor exemption. As will be discussed in Section IV.3. below, this is causing considerable legal uncertainty with respect to the definition of a public offer and the circumstances under which compliance with the CO content requirements can be avoided when foreign securities are offered in Switzerland.

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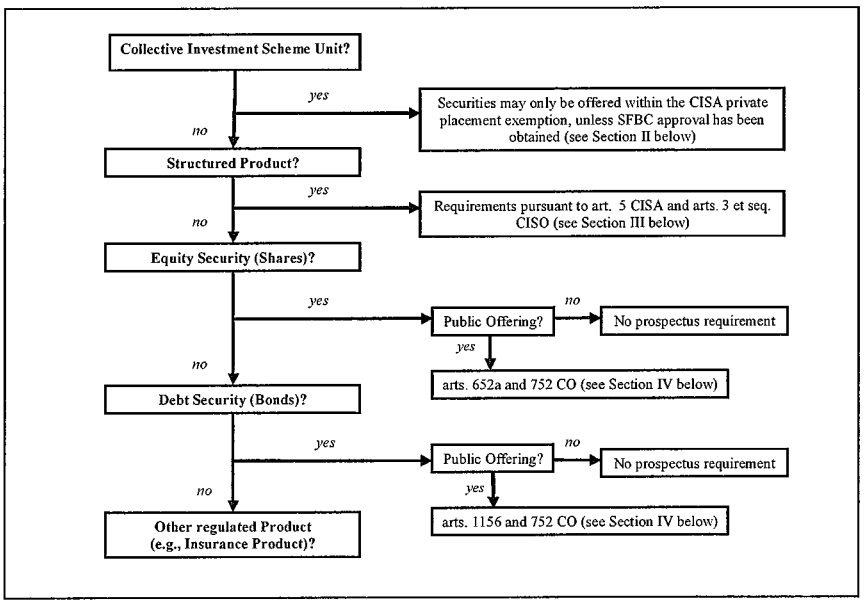
2 The additional rules and requirements which apply in case of a listing of the securities on a Swiss stock exchange, namely the SWX Swiss Exchange or the BX Berne eXchange, are not further discussed in this article. For further details see the Listing Rules of the SWX Swiss Exchange and the BX Berne eXchange. In addition, for an overview of certain key procedural issues see BRÄNDLE/IMBACH.

3 The exception relates to the requirement under article 652a CO to include stand-alone financial statements. See Section IV.4.b) below.

Consequently, in case of an offering of foreign securities in Switzerland, from a Swiss law point of view the following key questions should be raised with respect to the offered securities and the planned offering:



Based on this review scheme, the questions and legal implications arising in connection therewith will be discussed in more detail in Sections II.-V. below. The main conclusions and findings are summarised in Section VI.[4]

II. Collective Investment Schemes

1. Overview

Since 1 January 2007, collective investment schemes are governed by the CISA which replaced the Investment Fund Act („IFA"). The CISA lays down, for the first time, a nearly comprehensive prudential regulation of all

[4] For a list of abbreviations and the bibliography see Annexes 2 and 3 below. In addition, Annex 1 contains a summary chart.

assets brought together for purposes of capital investment, based on the principle „same business, same risks, same rules". This comprehensive regulatory approach also means that, in contrast to the previous regime, the law no longer only regulates „open-end" structures, i.e. structures under which the investor has a right vis-à-vis the structure to the redemption and repayment of his shares, but also covers „closed-end" vehicles where this redemption right does not exist or exists only at the end of the vehicle's term. Finally, the CISA also covers structured products – though to a lesser extent[5].

The CISA has been implemented by extensive regulation, specifically the Swiss Federal Council's Ordinance of November 22, 2006 („CISO") and the Swiss Federal Banking Commission's („SFBC") Ordinance of December 21, 2006 („CISO-SFBC"). In the present context, the SFBC Circular 03/1 of 28 May 2003 (as amended on 29 August 2007) regarding Public Advertising within the Meaning of the Collective Investment Scheme Legislation („SFBC Circular 03/01") is also relevant.

The CISA provides for registration and licensing requirements which not only apply to Swiss collective investment schemes but also to foreign collective investment schemes (irrespective of their legal form) if they are the subject of *public advertising (i.e. publicly offered) in or from* Switzerland[6].

In the context of an international offering as referred to in the introduction above, compliance with time consuming CISA registration and licensing requirements is normally not an option. Accordingly, in such circumstances, foreign issuers typically need to get comfortable (quickly), either that they do not qualify as foreign collective investment scheme or, if this is not possible, that the offering in Switzerland does not qualify as public offering within the meaning of the CISA.

2. Definition of „Foreign Collective Investment Scheme"

Article 7 CISA defines collective investment schemes as assets (*Vermögen*), which are raised from investors for the purpose of collective investment (*gemeinschaftliche Anlage*) and which are managed for the account of such

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5 For a general overview of the CISA see ABEGGLEN; HASENBÖHLER, N 1-79.

6 See articles 2(4) and 119 CISA.

investors (*Fremdverwaltung*), whereby the investment requirements of the investors are met on an equal basis (*Befriedigung der Anlagebedürfnisse in gleichmässiger Weise*)[7]. As stated above, collective investment schemes may be open or closed-ended.

With respect to *foreign* collective investment schemes article 119 CISA specifies as follows:

> „[1] The following are considered foreign open-ended collective investment schemes:
>
> a. Assets that were accumulated on the basis of a fund contract or another agreement with similar effect for the purpose of collective investment and are managed by a fund management company with its registered office and main administrative office abroad;
>
> b. Companies and schemes with their registered office and main administrative office located abroad whose purpose is collective capital investment and whose investors have a legal right with regard to the company itself, or with regard to a closely associated company, to the redemption of their units at the net asset value.
>
> [2] Closed-end collective investment schemes are deemed to be companies and schemes with their registered office and main administrative office located abroad whose purpose is collective capital investment and whose investors have no legal right with regard to the company itself, or with regard to a closely connected company, to the redemption of their units at the net asset value."

Consequently, the definition of foreign collective investment scheme is broad and, for example, potentially covers foreign investment companies in whatever legal form[8] and (under certain circumstances) special purpose vehicles issuing debt or equity instruments[9]. Furthermore, if core

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7 See HASENBÖHLER, N 85-115.

8 Article 2(3) CISA exempts investment companies in form of stock corporations from the CISA if their shares are listed on a *Swiss* stock exchange or if only „qualified investors" are admitted as shareholders, the shares are in registered form and licensed auditors annually confirm to the SFBC the compliance with these conditions. Importantly, the listing on a foreign stock exchange is not sufficient to fall within the first mentioned exemption.

9 In case the issuer is a special purpose vehicle, special attention should be given because SPVs could likely qualify as foreign collective investment schemes or issuers of structured products and because the distinction of the two categories involves delicate questions. See SFBC-FAQ, Questions 12-13.

management functions are performed in Switzerland, the scheme and its manager may be considered by the SFBC to be effectively based in Switzerland and will be subject to Swiss regulation, irrespective of such scheme's or manager's foreign registered domicile.

Hence, if we go back to the introductory question above, even shares or notes of a foreign domiciled issuer which at first sight may *not* look like a collective investment scheme require a careful analysis of the issuer's status and the instrument offered if the latter are to be offered in or from Switzerland.

3. Approval Requirements for Public Distribution of Foreign Collective Investment Scheme in or from Switzerland

If foreign collective investment schemes are offered *publicly in or from Switzerland*, binding documents such as their sales prospectus, articles of association or fund contracts require the prior approval of the SFBC[10]. According to article 120(2) CISA, approval will be granted if the following conditions are met:

a. the collective investment scheme is subject to public supervision intended to protect investors in the country of domicile of the fund management company or the investment scheme company;

b. the organisation, investor rights and investment policy of the fund management company or the investment scheme company are equivalent to the provisions of the CISA;

c. the designation „collective investment scheme" does not provide grounds for confusion or deception; and

d. representative and a paying agent are appointed for the distribution of units in Switzerland.

In the context of an international offering, going through the lengthy approval process is normally not an option, either because the described conditions cannot be met or due to time constraints or costs. However, the situation may be different where foreign regulated investment schemes shall

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[10] Article 120(1) CISA.

be publicly distributed in Switzerland on an ongoing basis. The SFBC has issued detailed guidelines for respective applications distinguishing between EU (UCITS III) compatible and non-EU compatible foreign collective investment schemes[11].

Without CISA approval, units of a foreign investment scheme may only be offered in or from Switzerland if made in reliance on the CISA private placement exemption, i.e. in a manner which does not qualify as public advertising within the meaning of the CISA.

4. Private Placement Exemption

a) Public Advertising/Offering

Article 3 (first sentence) CISA generally defines the term public advertising[12] as any *advertising that is directed towards the public.* On the whole, the terms „advertising" and „public" have been defined rather broadly by the SFBC[13]. However, article 3 (second and third sentence) CISA provide for the following important safe harbours:

i. the publication of prices, net asset values and tax data in the media by regulated financial intermediaries[14] does not qualify as public

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11 These SFBC guidelines (version of 1 April 2008) can be found on the SFBC website. See <www.ebk.admin.ch/d/wegleit/pdf/Wegleitung_UCITS_III_d.pdf> (regarding UCITS III compatible) and <www.ebk.admin.ch/d/wegleit/pdf/Wegleitung_Non-UCITS_d.pdf> (regarding non-UCITS III compatible foreign collective investment schemes). Regarding the SFBC guidelines on the application for admission as Swiss representative of foreign collective investment schemes (version 13 June 2007) see <www.ebk.admin.ch/d/wegleit/pdf/dvtaf.pdf>.

12 According to Swiss doctrine the definition of public advertising as set out in article 3 CISA applies in the same way to the terms „public offer" (e.g., as used in article 5 CISA for structured products) and „public distribution" (e.g., as used for foreign collective schemes in article 120 CISA) when used in the CISA. See BÖSCH, N 7; HASENBÖHLER, N 117; MEYER, 58.

13 See SFBC Circular 03/01, in particular notes 6-8 on the term „advertising", notes 9-19 on the term „public", and notes 24-34 on the use of the internet.

14 The restriction to „regulated financial intermediaries" is only stated in article 3 (second sentence) CISA whereas no such reservation is made in article 3(2) CISO (implementing ordinance) for the publication of prices, net asset values and tax data

advertising, provided that the announcement includes no contact details; and

ii. advertising is not deemed to be public if (i) it is directed exclusively towards „qualified investors"[15], *and* (ii) only the customary advertising methods for this market are used for such purpose[16].

Under the IFA the distribution of foreign collective investment schemes required no approval from the SFBC if the offer was limited to no more than 20 investors (whether qualified or not) per annum[17]. The CISA no longer (expressly) provides for such quantitative safe harbour nor does the revised SFBC Circular 03/01. On the contrary, based on the qualified investor exemption in article 3 (third sentence) CISA *e contrario*, the SFBC has expressed the view that any advertising which is *not* exclusively addressed towards qualified investors is to be deemed public[18]. Hence, even an offer to one non-qualified investor (or to a handful of non-qualified investors on a private basis such as through the use of individual investor letters) could be deemed public.

In my view, the restrictive interpretation by the SFBC is not covered by article 3 CISA: First, it contrasts with the composition of article 3 CISA. The

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in the media by foreign collective investment schemes. Unfortunately, the SFBC Circular 03/01 does not resolve this discrepancy, except for clarifying in note 8 that irrespective of whether or not contact details are provided the publication of such data by *electronic information systems* (e.g., Bloomberg, Reuters) does not qualify as public advertising provided that it is only addressed to qualified investors. See also BÖSCH, N 16 et seq.; LENOIR/PUDER, 983.

15 For further details see Section II.4.b) below.

16 Note 10 of SFBC Circular 03/01mentions by way of examples road-shows and in person contact (*persönliche Kontaktaufnahme*). Hence, including an express qualified investor selling restriction into a widespread advertisement (e.g., news-paper ad) is likely not to be deemed sufficient by the SFBC. However, it is worth to note that different to article 3(1) CISO (implementing ordinance), article 3 CISA (statute) does *not* make the qualified investor exemption dependent upon the „use of customary advertising methods for this market". It is, thus, questionable whether there is sufficient legal (statutory) ground for such (additional) condition and, in any event, the condition „customary advertising method" should not be interpreted too restrictively; see BÖSCH, N 25.

17 See note 9 of SFBC Circular 03/1 on Public Advertising within the Meaning of the IFA of 28 May 2003 (no longer in force).

18 See SFBC Circular 03/01, note 9.

first sentence of article 3 CISA states the general principle, i.e. public advertising is *any advertising that is directed towards the public.* The second sentence mentions the above described safe harbour for publication of prices, net asset values and tax data. Only the third sentence states that advertising is not deemed to be public if exclusively addressed to qualified investors. Consequently, the third sentence of article 3 CISA must be read as a safe harbour under the more general rule in the first sentence which refers to *„the public"* and not to *„any person other than a qualified investor"*. Secondly, the restrictive interpretation does not sufficiently take into account the general meaning of the term „the public" (*Publikum*)[19]. Consequently, in line with former practice and in the interest of a consistent interpretation of the term „public offer" under the CISA and article 652a CO[20], the better view is that advertising (and, likewise, an offer) should not automatically be deemed public if addressed to non-qualified investors.

Consequently, and more generally, an offer should therefore not be deemed „public" as long as it is addressed to a limited group of persons (*eng umschriebener Personenkreis*), whereby the limit can be of qualitative *or* quantitative nature[21]:

- The *qualitative criterion* has to be construed based on the *ratio legis* which is to protect public investors. In this sense, a lesser need for investor protection may follow from the type of investor (e.g., sophisticated investor vs. small investor), the relationship between the investor and the offeror (e.g., an offeror acting under a discretionary asset management mandate), the relationship between the investor and the product (e.g., investor already invested in the same product) or a combination of the foregoing[22].
- While the *ratio legis* puts a limit on how much weight can be given to the *quantitative criterion*, the term „public" clearly supports the view that an offer which is only addressed to a small number of persons

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19 See BÖSCH, N 22 et seq. and 31 et seq.

20 See Section IV.3. below.

21 See BÖSCH, N 26 et seq.

22 See LENOIR/PUDER, 984-986. Although the new qualified investor exemption under article 3 CISA addresses this aspect to a large extent, it does not cover it in an exhaustive manner; see BÖSCH, N 28-30, with further examples.

(other than by means of public media) cannot be deemed to be public. The maximum number depends upon the particular circumstances of the individual case though the lack of legal certainty makes it difficult to rely on this exception unless the offer is to a very mall number of investors[23]. In terms of legal certainty it would, therefore, be helpful if the SFBC could reconsider its position on the treatment of advertising addressed to non-qualified investors and reinsert a quantitative safe harbour in its Circular 03/01.

b) Qualified Investors

The term qualified investor is defined in article 10(3) CISA and (in further detail as regards high-net-worth individuals) in article 6 CISO. The list comprises regulated financial intermediaries such as banks, securities dealers and fund management companies, regulated insurance companies, public entities and retirement benefits institutions with professional treasury operations, companies with professional treasury operations, high-net-worth individuals and investors who have concluded a written management agreement with a financial intermediary[24].

c) Selling Restriction

Due to the above described limitations, offering documents for foreign collective investment schemes which shall be offered in Switzerland based on the private placement exemption should contain a selling restriction legend. A sample of such selling restriction might read:

> „The issuer qualifies as a foreign collective investment scheme pursuant to article 119 para. 2 of the Swiss Federal Act on Collective Investment Schemes („CISA"). The Units will not be approved for

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[23] See BÖSCH, N 32, who takes the view that an offer to no more than 20 investors should continue to be considered non-public without prejudice to such higher number as may be justified due to particular circumstances in an individual case.

[24] High-net-worth individuals must (directly or indirectly) hold financial investments (bankable assets) of at least CHF 2'000'000. For further requirements and details regarding the exemption regarding high-net-worth individuals and investors having concluded an asset management mandate see article 6 CISO and SFBC Circular 03/01 notes 13-19.

> public distribution in or from Switzerland and they may only be offered and sold to „qualified investors" as defined in, and in accordance with the private placement exemptions under, the CISA. The issuer is not subject to the supervision of the Swiss Federal Banking Commission. Therefore, holders of the Units will not benefit from the specific investor protection under CISA and the supervision by the Swiss Federal Banking Commission."[25]

5. (No) Application of articles 652a and 1156 CO?

As will be discussed below, articles 652a and 1156 of the Swiss Code of Obligations set out certain minimum content requirements for public offering prospectuses regarding shares and debt securities. Unlike the CISA, the CO does currently not expressly provide for a „qualified investor" exemption. Accordingly, where shares of foreign collective investment schemes (in corporate form) are offered in Switzerland in reliance on the CISA qualified investor exemption, it is uncertain whether the offer document must comply with the content requirements set out in the CO[26].

III. Structured Products

1. Overview

Foreign securities which do not fall within the definition of collective investment scheme may still qualify as structured products which are also regulated – though less extensively – by the CISA[27]. With respect to structured products which are to be offered in or from Switzerland, the CISA provides for the following two routes:

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25 The sample has been included for illustration purposes only and is no substitute for a transaction specific selling restriction which has to take into account the particular circumstances of such case. In addition, see footnote 16 above regarding the potential insufficiency of selling restrictions in media advertisements.

26 See Sections III.5. and IV.3. below as well as footnote 40.

27 The SFBC has published a list of frequently asked questions with practical guidance on a number of issues regarding structured products. See SFBC-FAQ.

i. public offering in Switzerland, which will not trigger a prospectus *approval* but will make it necessary to comply with certain *CISA distribution and documentary requirements* (see III.3. below), or

ii. offering in reliance on the CISA private placement exemption (see III.4. below).

2. Definition of „Structured Products"

In contrast to „collective investment schemes", the CISA does not provide for an abstract definition of the term „structure product". Article 5(1) CISA merely lists a few examples such as „capital-protected products, capped return products and certificates".

Guidance on the meaning of the term structured product can be found in the Guidelines of the Swiss Bankers Association of July 2007 on Informing Investors about Structured Products (the „SBA-Guidelines") which have been formally approved by the SFBC. According to these guidelines, structured products are investment instruments whose redemption value is dependent upon the price development of one or several underlyings; they may have a fixed or indefinite duration and the price may depend on one individual or several parts, irrespective of their weighting. Furthermore, the purchase of structured products is made on the basis of an individual purchase contract law relationship and, different to a collective investment scheme, no collective asset portfolio serves the investor as the basis of liability for compliance with the contractually agreed terms and conditions of the product (no right of segregation). Instead, the issuer and the guarantor (if applicable) are liable. Based thereon, the SBA Guidelines conclude that neither products which have the primary purpose of financing or risk transfer in the narrow sense such as Collateralised Debt Obligations, Credit Linked Notes, Asset Backed Securities, Convertible Bonds, plain vanilla Bonds, etc., nor options and futures contracts such as Futures, Warrants, Traded Options, etc. do qualify as structured products[28].

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[28] See SBA-Guidelines, 4-5; see also MEYER PATRICK, 4 et seq. Furthermore, the Swiss Structured Products Association (SSPA) has issued a helpful chart setting out the different categories of structured products offered in Switzerland; see <www.svsp-verband.ch>.

In practice, the distinction can be difficult to apply. However, it is of great importance because of the below described regulatory requirements which apply to structured products under the CISA but not to (ordinary) debt and equity instruments[29].

3. Regulatory Requirements

According to article 5 CISA and article 4 CISO, structured products may only be offered publicly in or from Switzerland if:

a. they are issued, guaranteed *or* distributed by
   - a Swiss licensed bank, insurance company or securities dealer, *or*
   - a foreign institution which is subject to equivalent standards of supervision and (unless the structured product is listed on a Swiss exchange) has a branch in Switzerland[30], *and*

b. a simplified prospectus is available for them. However, the simplified prospectus is not subject to any approval of filing requirement.

Article 5(2) CISA sets out the minimum requirements for the simplified prospectus. According thereto, the prospectus must:

- describe, in accordance with a standard format, the key characteristics of the structured product (key data), its profit and loss prospects, together with the significant risks for investors;
- be easily understood by the average investor; and

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29 On the other hand, structured products may contain features of collective investment schemes, e.g. in case of dynamically managed baskets, which can make their distinction from the tighter regulated collective investment schemes difficult. Similar issues arise in case of „structured products" which have collective investment scheme units as underlying asset. See SFBC-FAQ, Question 14.

30 For purposes of compliance with the condition stated in paragraph (a) it is sufficient if one qualifying institution is involved as issuer, guarantor or distributor. Accordingly, if, e.g., the structured product is guaranteed by a Swiss licensed bank, foreign institutions may (cross border) offer the structured product in Switzerland even if they are not subject to equivalent standards of supervision or have no branch in Switzerland. For further details, including the broad meaning of the term „branch", see SFBC-FAQ, Questions 1-5.

- make reference to the fact that the structured product is neither a collective investment scheme, nor does it require the authorisation of the SFBC. In addition, investors must be cautioned in the prospectus if the structured product is only distributed (but not issued or guaranteed) by a qualifying financial intermediary.

More detailed rules on the structure and contents of the simplified prospectus can be found in the SBA-Guidelines. The simplified prospectus must be offered to interested investors free of charge at the issuance or purchase date (as the case may be). No simplified prospectus is required (i) if the structured product is listed on a Swiss stock exchange which ensures the CISA transparency requirements or (ii) if the structured product is publicly distributed from (but not in) Switzerland and applicable foreign regulations ensure the transparency requirements of article 5(2) CISA[31].

4. Private Placement Exemption

From article 5(1) CISA *e contrario* follows that the regulatory requirements described under III.3. above do not apply in case of a non-public offer of structured products. With respect to the meaning of „public offer" and „qualified investors" reference can be made to the detailed comments in Section II.4. above which apply in the same manner for structured products.

Accordingly, in the event that structured products shall be offered in Switzerland in reliance on the private placement exemption (instead of making available a simplified prospectus) the offering document should contain a selling restriction which might read:

> „The [securities] qualify as structured product pursuant to article 5 of the Swiss Federal Act on Collective Investment Schemes ('CISA'). The [securities] will not be approved for public distribution in or from Switzerland and they may only be offered and sold to 'qualified investors' as defined in, and in accordance with the private placement

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31 In addition, according to SFBC-FAQ, Question 8, no separate simplified prospectus is needed if the structured product has been admitted for trading on an EU regulated market and there exists a EU Prospectus Directive compliant prospectus with the three parts information regarding the issuer, information regarding the security and summary, provided that the summary (or an annex) contains certain additional Swiss specific information.

> exemptions under, the CISA. The [securities] are neither a collective investment scheme nor do they require the authorization of the Swiss Federal Banking Commission. Therefore, holders of the [securities] will not benefit from the specific investor protection under CISA and the supervision by the Swiss Federal Banking Commission."[32]

5. (No) Application of article 1156 CO?

As will be described in more detail in Section IV.3. below, *bonds* (*Anleihensobligation*) may only be *publicly offered* in Switzerland for subscription on the basis of an issue prospectus which complies with the minimum content requirements under article 1156 CO. While the prospectus required for (non Swiss listed) bonds is not subject to any Swiss approval or registration requirements, failure to comply with article 1156 CO may result in *prospectus liability*[33].

„Bonds" pursuant to article 1156 CO are commonly defined as a large loan which has been divided into partial amounts, all of which being governed by the same terms and conditions as regards interest, issue price, duration, subscription period and payment date[34]. For purposes of the prospectus requirements of article 1156 CO, the term goes beyond „straight" bonds and, for example, covers convertible bonds, bonds with warrants attached and potentially other derivatives[35]. On the face, it also covers (at least certain types of) structured products[36].

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32 The sample has been included for illustration purposes only and is no substitute for a transaction specific selling restriction which has to take into account the particular circumstances of such case. In addition, as mentioned above, different cautionary legends are required for a simplified prospectus. Moreover, see footnote 16 above regarding the potential insufficiency of selling restrictions in media advertisements.

33 Furthermore, the issuance of a bond without prospectus may qualify as a banking activity and result in criminal liability if done without a proper banking license. See article 3a paras. (2) and (3)(b) of the Swiss Federal Banking Ordinance.

34 See DÄNIKER, 21-25.

35 See WATTER, Art. 1156 CO, N 2 et seq. With respect to derivatives, see the detailed analysis in CONTRATTO, Derivatives, 269 et seq.

36 See the Report (*Botschaft*) of the Swiss Federal Council of 23 September 2005 relating to the draft Statute on Collective Investments, Swiss Official Gazette (BBl) 2005 6415.

In order to avoid a potential overlap between article 1156 CO (which deals with prospectus requirements for bonds) and article 5 CISA (which deals with prospectus requirements for structured products) a special provision has been included in article 5(4) CISA[37] according to which „the requirements of article 1156 CO for a prospectus shall not apply in this case". The meaning of the words „in this case" referred to in article 5(4) CISA is not entirely clear, but if put in context it is likely to refer to the case covered by the immediately preceding article 5(3) CISA. Article 5(3) CISA states that a *simplified prospectus* must be made available to interested investors free of charge at the issuance or purchase date (as the case may be). Consequently, for structured products, article 1156 CO can be disregarded if a CISA compliant simplified prospectus is made available.

However, if structured products are offered *without* a CISA compliant simplified prospectus, i.e. in reliance on the private placement exemption available under the CISA, article 1156 CO may still apply *but only if* the term „public offer" is not construed in the same manner under the CISA and the CO. As will be argued in Section IV.3. below, the term should be construed in the same manner to avoid such and other undesired inconsistencies.

IV. Shares and Bonds

1. Overview

Outside the scope of the CISA there is *no* requirement for a prospectus to be filed with, or approved by, a supervisory body in connection with the offering of equity or debt securities by a foreign issuer, provided such securities will not be listed on a Swiss stock exchange. This applies whether the securities are offered to the public or a category of investors such as professional or institutional investors.

It is important, however, to distinguish the question of pre-approval from the question of whether a foreign issuer of equity or debt securities is obliged to prepare and make available (without Swiss regulatory approval) a Swiss law

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[37] See HASENBÖHLER, N 806.

compliant offering prospectus (*Emissionsprospekt*) in order to avoid potential prospectus liability under Swiss substantive law[38].

2. Consequences of Public Offering of Shares and Bonds in Switzerland

Article 156 of the Swiss Federal Statute on Private International Law (the „PIL Statute") provides that claims based on the public issue[39] of equity and debt securities of companies (which term is generally construed broadly)[40] by means of prospectuses, offering memoranda and similar notices may be asserted either under the law governing the issuer or under the laws of the jurisdiction in which the issue took place. Hence, Swiss substantive law on *offering prospectuses and prospectus liability*[41] may apply where the offering of foreign securities constitutes a *public offer* in Switzerland within the meaning of the PIL Statute[42]. As will be discussed in detail in Section IV.3.

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38 For a general overview of Swiss prospectus liability rules see ROBERTO/WEGMANN and NOTH/GROB.

39 Given this reference to public „issue" (*Ausgabe*), it is unclear whether article 156 PIL Statute can also be invoked in a secondary offering (i.e. the offering of existing equity or debt securities); see WATTER, Art. 156 PIL Statute, N 12, who argues in favour of such broader interpretation.

40 See, e.g., to WATTER, Art. 156 PIL Statute, N 7 and 27, according to whom article 156 PIL Statute (which allows investors to choose among different laws) also applies in case of the public issue of foreign collective investment schemes, in particular if the scheme has a corporate structure.

41 From this must be distinguished claims that are not linked to the public issue of securities, e.g., claims based on a purchase contract, tort or terms and conditions of a bond. In this respect other conflict of law rules apply which may also lead to the application of Swiss substantive law. See VISCHER, N 6.

42 In addition, given that the below described minimum perspectus requirements in the CO are of mandatory nature *(ius cogens)*, according to certain authors, under the doctrine of *lois d'application immédiate* (art. 18 PIL Statute), they apply directly whenever Swiss courts have jurisdiction; see VISCHER, N 10, and SCHNYDER/BOPP, 399. In terms of jurisdiction, article 151(1) and (2) PIL Statute declares competent the courts at the domicile of the issuer and of persons which corporate-wise can be held liable. In addition, article 151(3) PIL Statute allows for claims based on liability arising from the public issue of equity and debt securities to be brought before the courts of the place of issue notwithstanding any choice of law to the contrary. *Place of issue* includes the Swiss domicile of a bank if it has made available the prospectus or accepted subscription forms (in or from

below, unfortunately the meaning of the term „public offer" within the scope of the PIL Statute (and, relating thereto, the CO) is not entirely clear.

If Swiss substantive law applies, the most relevant provisions are articles 652a and 1156 CO which set out the minimum prospectus requirements in respect of shares of share corporations and bonds (*Anleihensobligationen*)[43], respectively, and article 752 CO which (together with article 1156 (3) CO) provides the main basis for Swiss prospectus liability. These provisions read as follows:

> „Article 652a CO
>
> [1] If new shares are publicly offered for subscription, the company shall publish an issue prospectus indicating:
>
> 1. the content of the present entry in the Commercial Register except the indications concerning the persons authorized to represent the company;
> 2. the current amount and composition of the share capital, mentioning the number, nominal value and type of shares, as well as preferential rights of individual classes;
> 3. provisions in the articles of incorporation concerning an authorized increase of capital or an increase of capital subject to a condition;
> 4. number of profit sharing certificates and the content of rights connected therewith;
> 5. the latest annual financial statement and the consolidated statement with the auditors' report and if the closing of the balance sheet dates back more than six months, interim financial statements;
> 6. dividends paid during the last five years, or since incorporation;
> 7. the resolution on the issue of new shares.

Switzerland). Article 151(3) PIL Statute, however, cannot be invoked in cases covered by the Lugano Convention which prevails over the PIL Statute; see VISCHER, N 10.

43 Regarding the broad meaning of the term „bond" see Section III.5. above. Swiss law governed notes having a denomination (*Stückelung*) in excess of CHF 10'000 which are issued by a foreign issuer and directly placed by a syndicate of Swiss banks or securities dealers without being listed, are subject to further rules and regulations as set out in the Guidelines of the Swiss Bankers Association of 2001 regarding Notes of Foreign Issuers. These rules are not further discussed herein.

[2] Any invitation for subscription is public unless addressed to a limited group of persons.

[3] (...)."

„Article 752 CO

If, upon founding of a company, or upon issue of shares, bonds, or other securities, statements have been made or disseminated which are incorrect, misleading or not complying with the legal requirements in issue prospectuses or similar instruments, anyone having intentionally or negligently contributed thereto is liable to the acquirers of the security for any damage caused thereby."

„Article 1156 CO

[1] Bonds may only be publicly offered for subscription or listed on a stock exchange on the basis of a prospectus.

[2] The provisions regarding the prospectus in connection with the issuance of new shares apply mutatis mutandis; in addition, the prospectus shall include details regarding the bonds, including the terms and conditions regarding interest and repayment, security granted in respect of the bonds and, if applicable, the representation of bondholders.

[3] If bonds have been issued in breach of the foregoing provisions or if the prospectus contains wrong information or information which does not comply with the legal requirements, those persons who have negligently or willfully participated become jointly and severally liable for the damage."

While articles 652a and 752 CO refert to Swiss share corporations only, the view has been taken in Swiss doctrine that these provisions apply *mutatis mutandis* to foreign stock corporations and possibly after types of foreign companies[44].

From the above follows that if (new[45]) shares or bonds of a foreign issuer are *publicly offered* (as construed under the PIL Statute and the CO) for

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[44] See KONDOROSY, 152 et seq. ad 160 et seq.; SCHNYDER/BOPP, 400; ZOBL/ARPAGAUS, 253; HOPT, 413.

[45] According to the letter article 652a(1) CO solely applies to the offer of *newly issued* shares, which is also the prevailing (though not uncontested) view in Swiss doctrine, it being understood that this includes the offer of new shares via

subscription in Switzerland, based on the PIL Statute investors may request that an offering prospectus is made available which complies with article 652a CO (in case of shares) or article 1156 CO (in case of bonds). Furthermore, if Swiss substantive law applies, investors may assert prospectus liability claims pursuant to article 752 CO (or article 1156 para. 3 CO)[46].

3. Definition of „Public Offering" under the PIL Statute and the CO

Unlike the CISA, neither article 156 PIL Statute nor articles 652a and 1156 CO expressly provide for a qualified investor exemption. Instead, article 652a(2) CO simply states that any invitation for subscription is public „unless addressed to a limited group of persons". According to Swiss doctrine the term „public" as used in article 156 PIL Statute in principle has to be construed in the same manner[47]. In other words, Swiss substantive law may apply by virtue of article 156 PIL Statute if the offer is not addressed to a limited group of persons as referred to in article 652a(2) CO.

The meaning of public offer pursuant to article 652a CO and article 156 PIL Statute has been extensively debated in Swiss doctrine but there remains a considerable degree of uncertainty for the following reasons: On the one hand, in contrast to the CISA, the SFBC has no supervisory authority in respect of the PIL Statute and the CO. Consequently, the SFBC Circular 01/03 regarding public advertising is not (directly) applicable and, in the absence of any prospectus approval or filing requirement, no authoritative interpretation can be obtained from the SFBC. On the other hand, Swiss courts which would be competent to decide the matter have so far not rendered any clear precedent.

The views expressed in Swiss doctrine can be summarised as follows:

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underwriting bank (*Festübernahmeverfahren*). See ZOBL/KRAMER, § 19 N 1109, in particular footnote 2004 with further references.

46 From a foreign issuer's and underwriting bank's perspective it is important to note the following: Article 752 CO covers not only the offering prospectus but also *similar communications* which includes a broad range of written material (e.g. prospectus summaries, private placement memoranda and listing notices) and, according to some authors, even oral information (e.g. commercials on television) and electronic information on a website. See ROBERTO/WEGMANN, 162.

- According to one view, the offer must be made to a certain *minimum number* of investors in order to become a „public" offer. In this context is often mentioned the „20 investor" rule of thumb according to which an offer shall only be deemed public if made to more than 20 investors[48].
- The foregoing view, however, is disputed on the grounds that a limitation in terms of number is not sufficient and that, rather, an offer must be deemed public if the scope of addressees is *qualitatively unlimited (qualitative Unbestimmtheit des Adressatenkreises)*[49]. In this context, the manner how investors are contacted and whether addressees are individually determined or known in advance is also considered relevant. Based on such view, for instance, an offer which is limited to a clearly distinct and limited group of persons linked by a common criteria such as the shareholders of a non-listed company or employees of the issuer may not be deemed public. So far, however, Swiss doctrine has not recognized the „qualified investor" criterion as such limiting factor.
- Some authors also refer to the common *ratio legis* in cases where the term „public offer" is used in Swiss capital markets legislation, i.e. the need for *(increased) investor protection* where securities are offered publicly as opposed to a private and individual solicitation. In this sense, the typical „public" investor has a greater need for protection and information than a sophisticated or professionally advised investor. Certain authors have in this context also postulated a uniform

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47 See WATTER, Article 156 IPRG, N 22. See also VISCHER, N 20.

48 See NOBEL, 11 N 213 et seq. This view is supported by article 4 of the Swiss Stock Exchange Ordinance which defines securities as such which are placed with more than 20 customers, and article 3a(2) of the Swiss Banking Ordinance which states that those who accept on a continuing basis more than 20 deposits from the public are considered to be acting on a professional basis within the meaning of the banking law. Generally, the number 20 appears in several Swiss financial laws and regulations; for an overview see KUSTER.

49 See FORSTMOSER/MEIER-HAYOZ/NOBEL § 52 N 88-92; ISLER/ZINDEL, N 2-3b; ZOBL/KRAMER, N 1066.

interpretation of the terms „public offer" respectively „public advertising in all Swiss capital market law regulations[50].

In my view, all of the above views have some merit and should be brought together. Consequently, primarily based on a systematic and teleological interpretation of the law taking into account the common *ratio legis* (investor protection), I take the view that the term „public offer" as used in article 652a and 1156 CO and article 156 PIL Statute should be construed *consistently and in the same manner* as the term public advertising under the more recent article 3 CISA, meaning that:

- an offering of shares or bonds should *not* to be deemed public within the meaning of article 652a and 1156 CO and article 156 PIL Statute if it is exclusively directed towards qualified investors as defined under the CISA. Indeed, if one accepts the above described qualitative approach and the need for investor protection as being the underlying *ratio legis*, one can hardly think of anything more pertinent than a *„qualitative"* restriction to *„qualified"* investors[51];
- likewise, and this is even more evident with respect to shares than it may be for collective investment schemes or structured products, an

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50 See ZOBL/KRAMER, N 21-22 with further references; CONTRATTO, Derivatives, 244 et seq.; KUSTER, 17. As regards the CISA, see BÖSCH, N 6.

51 By Report (*Botschaft*) of 21 December 2007 (BBl 2007 1589 et seq.) the Swiss Federal Council has presented to Swiss parliament a bill for a revision of the CO. Therein, the government proposes, amongst other things, to include a new paragraph 4 in article 652a CO according to which no offering prospectus is required if the shares are exclusively offered for subscription to qualified investors pursuant to article 10(3) CISA. The bill has not yet been debated in parliament and the entry into force may take several years. However, while the situation will be clear if and once this paragraph 4 has become the law, in my view, the absence of such provision in the current version of article 652a CO does not mean that the qualified investor exemption is currently not available. Rather, for the reasons stated above, the proposal of the Federal Council to amend article 652a CO should be viewed as a mere ratification of already existing law. It is also indicative, that the Report of the Federal Council contains no explanation or justification for the proposed new article 652a (4) CO which supports the argument that this is not considered to be a material change.

offer should *not automatically* be deemed public if addressed to non-qualified investors[52]; and

- while the *ratio legis* sets a limit on how much weight can be given to the quantitative criterion, the term „public" calls for some recognition of the quantitative element. However, unless the SFBC will revisit its position and (again) include a minimum number in SFBC Circular 03/01, no express quantitative safe harbour for exempted offerings to *non-qualified investors* is available, which makes it difficult to rely on this exception unless the offer is to a very small number of non-qualified investors[53].

Conclusion: An offer should not be deemed „public" within the meaning of articles 652a and 1156 CO or article 156 PIL Statute as long as it is addressed to a *qualitatively or quantitatively limited group of persons*, whereby the principles of how these terms are to be interpreted within the context of article 3 CISA as discussed in Section II.4. above apply in the same manner here. By applying the term „public offer" in a consistent manner can also be avoided that the offering of foreign collective investment scheme units or structured products without a prospectus in reliance on the CISA private placement exemption suddenly becomes the subject of prospectus requirements under the CO which cannot have been the intention of the legislator[54]. If shares or bonds are publicly offered in Switzerland, an offering prospectus containing the minimum information required by articles 652a and 1156 CO (as the case may be) should be made available, failing which the issuer and other persons involved in the offering face the risk of prospectus liability under Swiss law.

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52 For example, in line with the qualitative aspects of the term public offering discussed in Section II.4.a) above, an offer to existing shareholders of a non-listed company can hardly be deemed to be public, irrespective of whether or not such shareholders are qualified investors.

53 For further details see above Section II.4.a), including footnote 23.

54 See Sections II.5. and III.5. above.

4. Practical Aspects regarding the Offering of Foreign Shares or Bonds in Switzerland

Within the context of an international public offering as described in the Introduction in Section I. above, the following practical aspects may thus be considered if the offer of shares or bonds is to be extended into Switzerland:

a) Offering in Reliance on Private Placement Exemption

Where parties intend to solicit only a relatively small number of investors in Switzerland on a private basis (e.g., by means of road-show or one-on-one meetings with pre-determined investors) to acquire the securities for investment purposes and not with a view to the public distribution thereof, no article 652a (or 1156) CO compliant prospectus is needed because the offer can be kept non-public.

If the offer is to be kept non-public, prudence would suggest that due to the above described uncertainties around quantitative safe harbours the offer in Switzerland be limited to *qualified investors* within the meaning of article 10(3) CISA[55]. Given the fairly broad meaning of the term qualified investor, this will normally suffice to cover all targeted groups of Swiss investors. If one follows the above line of arguments, *no quantitative limit* applies if the offer is limited to qualified investors, provided that only the customary advertising methods for this market are used for such purpose; however, this view is untested and, thus, keeping the number of contacted qualified investors low may support the non-public nature of the offer[56]. As a rule,

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55 In a typical international offering of foreign securities it will rarely be the case that a qualitative (other than the qualified investor) criterion as described in Section II.4.a) above can be established that would permit the offering of securities to a larger number of non-qualified investors in Switzerland without Swiss law compliant prospectus. Accordingly, in such circumstances, any offer to non-qualified investors bears the risk of making the offer public. Nonetheless, as discussed in detail above, the quantitative criterion deserves some merit. Therefore, within the context of a typical international offering of shares or bonds, the offer should in my view not be deemed public if only a small number of non-qualified investors is contacted in person in Switzerland. See also footnote 23 above.

56 For example, some Swiss banks have moved to a „100 qualified investor" rule, meaning that any offering activity in Switzerland of all involved parties should be limited to a maximum number of *100 qualified investors*. This should not be

investors should be contacted personally and widespread advertisements in Switzerland must be avoided. Generally, marketing efforts should be strictly coordinated by the Lead Manager and a list of all investors contacted in Switzerland should be kept.

The inclusion of a selling restriction into the prospectus may help to maintain the non-public nature of the offer though, as stated above, this may not suffice[57]. By way of illustration, the selling restriction might read:

> „The [shares/bonds] may not be publicly offered, distributed or redistributed on a professional basis in or from Switzerland, and neither this prospectus nor any other solicitation for investments in the [shares/bonds] may be communicated or distributed in Switzerland in any way that could constitute a public offering within the meaning of Articles 652a or 1156 of the Swiss Code of Obligations (‚CO'). [Without limitation to the generality of the foregoing, the [shares/bonds] may not be offered to any person in Switzerland who is not a ‚qualified investor' within the meaning of article 10(3) of the Swiss Federal Act on Collective Investment Schemes (‚CISA').] This prospectus may not be copied, reproduced, distributed or passed on to others without the Company's prior written consent. This prospectus is not a prospectus within the meaning of Articles 652a and 1156 CO or a listing prospectus according to Article 32 et seq. of the Listing Rules of the SWX Swiss Exchange and may not comply with the information standards required thereunder. We will not apply for a listing of the [shares/bonds] on any Swiss stock exchange."

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confounded with the 100 investor exemption available under article 3(2)(b) of the EU Prospectus Directive which refers to *non-qualified investors* and is not applicable in Switzerland. Swiss law recognises to a certain extent the principle of „EU compliant" interpretation within the context of Swiss statutes which voluntarily follow EU legislation (see BGE 129 III 350 E. 6; BIERI, 710 et seq.; PROBST, 237 et seq.; WYSS, 726). However, given that articles 652a and 1156 CO date prior to the relevant EU legislation it is difficult to apply this principle here; yet, the more recent CISA conceptually strives for EU compatibility (see Report [Botschaft] of the Swiss Federal Council of 23 September 2005 regarding the draft CISA; BBl 2005 6403) and if one recognises the principle of consistent interpretation of the term public offer under Swiss law, EU legislation may in the future indeed have an influence on how this term is to be construed under both the CISA and the CO.

57 See, for example, footnote 16 above. Generally, lead managers in a securities offering should consider to issue guidelines for marketing efforts in Switzerland which should be adhered to by all syndicate members (and the issuer).

Particular caution should be placed on the offering of securities of foreign investment companies and special purpose vehicles which may easily qualify as foreign collective investments schemes or structured products[58].

b) Public Offering

As can be seen from the above quoted articles 652a and 1156 CO, Swiss offering prospectus requirements for shares and bonds are not particularly demanding, provided that the securities will not be listed on a Swiss stock exchange. In particular, there is no need for a separate Swiss law prospectus or summary nor is there any registration or approval requirement, i.e. for a public offer it is sufficient that the „non-Swiss" prospectus contains the minimum information required by articles 652a and 1156 CO (as the case may be)[59]. Furthermore, if the international offering documents for foreign securities are in the English language, as a rule no translation into a Swiss national language is required under the CO.

Accordingly, where shares or bonds are offered to investors in Switzerland, instead of limiting such offer to a private placement without CO-compliant prospectus, the alternative approach may be to ensure that the prospectus contains the minimum information required by Swiss law[60] and that each investor is provided with a copy of such prospectus or, at least, that each investor is in a position to obtain a copy of the prospectus.

International offering documents which have been prepared in compliance with the EU Prospectus Directive normally by and large fulfil the requirements set out in articles 652a and 1156 CO. However, often there exists the following important exception which can make it difficult to use

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58 See Section II.2. and footnote 9 above. In particular, if the qualification of an instrument as a unit of a foreign collective investment scheme or structured product is doubtful, due care must be taken (e.g. in drafting appropriate selling restrictions) to keep the offer within the private placement exemption in order not to trigger CISA approval or documentary requirements.

59 With respect to structured products see footnote 31 above. By contrast, foreign collective investment schemes can only be publicly offered in or from Switzerland under the conditions described in Section II.3. above.

60 For a more detailed description of the respective Swiss prospectus content requirements see SCHLEIFFER/REHM.

the same prospectus without amendment for use in Switzerland: Articles 652a and 1156 CO, inter alia, require the inclusion into the prospectus of the most recent audited solo (in addition to consolidated) statutory accounts and, if the balance sheet dates back more than 9 months, an interim solo balance sheet.

Provided that the issuer (and the underwriting banks) are, in principle, willing and able to provide such additional financial information[61], various routes can be envisaged. First, the financial information can be included in the base prospectus. In practice, however, this approach is rarely practicable unless the requirement is identified at an early stage of the transaction. Alternatively, where incorporation of all information into the (same) prospectus document causes problems (e.g. because not all financial information required under Swiss law would be needed for the offering in all other jurisdictions outside of Switzerland) the prospectus can be amended by a „Swiss wrapper" which, apart from missing financial information, may also include typical Swiss tax language; for example, this route is sometimes chosen for the offer of foreign bonds which are issued under a programme and are not listed. Finally, incorporating the additional Swiss law required information by way of reference might be considered; however, the CO does not expressly permit incorporation by way of reference and it is untested whether or not Swiss courts would consider this to be sufficient[62].

V. Other Regulated Products

For the sake of completeness needs to be mentioned that the offering of foreign securities in Switzerland may exception-wise be subject to additional Swiss regulatory requirements. This is particularly the case for insurance products which may not be offered cross border into Switzerland without a

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61 This may, for example, not be the case if time does not permit (or it is not practicable) to obtain sufficient comfort from the auditors on such additional financials.

62 According to SCHLEIFFER/REHM, 1024, with whom I concur, incorporation by way of reference should be permitted under the following conditions: (i) the reference must be clearly visible, (ii) the prospectus and all documents incorporated by way of reference must be available in the same way and should be obtainable from the same source without delay, and (iii) there should be a base document which contains the main information.

proper license[63] (and which not always can easily be distinguished from other financial products).

VI. Summary

The offering of foreign securities in Switzerland requires a careful analysis of the issuer's status and the instrument offered, whereby the review scheme in Section I. above should closely be followed:

- Under the CISA, special rules apply for the offering of units of *foreign collective investment schemes* and (to a limited extent) *structured products* in or from Switzerland. The offering of foreign *collective investment schemes* in Switzerland requires the prior approval of the SFBC, unless the offer is made in reliance on the CISA private placement exemption. Foreign *structured products* can be offered in Switzerland without prior approval or registration of a prospectus, but unless the offer is made in reliance on the private placement exemption certain requirements in terms of documentation and distribution must be fulfilled. Importantly, foreign collective investment scheme units and structured products cannot always be easily distinguished from (ordinary) shares or debt securities which are not governed by the CISA.
- Outside the scope of application of the CISA, there is *no requirement for a prospectus to be filed with, or approved by, a Swiss supervisory body* in connection with the offering of securities in Switzerland by a foreign issuer, provided that the securities will be not listed on a Swiss stock exchange. This applies whether the securities are offered to the public or a category of investors such as institutional investors. However, in case of a *public offering* of newly issued shares or bonds in Switzerland, articles 652a and 1156 CO provide for certain minimum content requirements regarding an issue prospectus, the breach of which may result in prospectus liability. Hence, foreign issuers who wish to extend an offer of new shares or bonds into Switzerland must ensure

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63 See article 2(1)(b) of the Swiss Federal Insurance Supervision Statute (VAG), and WEBER ROLF/UMBACH PATRICK, Versicherungsaufsichtsrecht, Berne 2006, 60-61.

either that the prospectus contains the minimum information required by the CO or that the offer is not deemed to be public within the meaning of the CO.

– In contrast to the CISA, the CO (in its current version) does not expressly provide for a *qualified investor exemption.* However, in my view, the term „public offer" as used in the CO should be construed *consistently and in the same manner* as under the CISA, meaning (inter alia) that the prospectus requirements of articles 652a and 1156 CO should not apply if the offer is exclusively addressed to qualified investors within the meaning of the CISA.

Annexes (Summary Chart/Abbreviations/Bibliography)

Annex 1: Summary Chart

Foreign Collective Investment Scheme Units	
Regulatory requirements	**Exemption if non-public Offering/Selling Restriction**
Public offering *in or from* Switzerland requires prior approval of sales prospectus, constitutional documents, fund contract, etc. from SFBC. Conditions for approval: i. Prudential supervision in home country ii. Organisation, investor rights and investment policy requirement equivalent to those of CISA iii. Designation „collective investment scheme" does not provide grounds for confusion iv. Representative and paying agent are appointed for the distribution of units in Switzerland Conclusion: Public offering often not available or not practicable in the context of international offering of securities	Yes. Selling Restriction: Offering to be limited to „qualified investors". Selling restriction to disclose that no SFBC approval and supervision. Application of articles 652a/1156 CO under current law uncertain
Foreign Structured Products	
Regulatory requirements	**Exemption if non-public Offering/Selling Restriction**
No prospectus approval or filing requirement but public offering of foreign structured product *in or from* Switzerland only permitted, if i. *as regards distribution:* issued, guaranteed or distributed by Swiss licensed bank, insurance company or securities dealer or foreign	Yes. Selling Restriction: Offering to be limited to „qualified investors". Selling restriction to disclose that no SFBC approval and supervision. Application of articles

institution that is subject to equivalent standards of supervision and (unless product listed in Switzerland) with branch in Switzerland, and ii. *as regards documentation:* simplified offering prospectus, unless (a) structured product listed on a Swiss stock exchange, or (b) existence of an EU Prospectus Directive compliant prospectus together with Swiss summary, or (c) only offering from (but not in) Switzerland and transparency ensured by virtue of foreign regulations. Conclusion: Public offering in Switzerland in international offering context possible under certain circumstances – alternatively, private placement in reliance on CISA exemption	652a/1156 CO under current law uncertain
Foreign Shares and Bonds	
Regulatory requirements	**Exemption if non-public Offering/Selling Restriction**
No prospectus approval or filing requirement and no distribution or documentary requirements like for structured products. In case of „public offering" issue prospectus to include minimum information required pursuant to articles 652a/1156 CO.	Yes, but no express qualified investor exemption in current version of CO.

Annex 2: List of Abbreviations

BGE	Decision of the Swiss Federal Tribunal
CISA	Swiss Federal Act on Collective Investment Scheme of 23 June 2006
CISO	Ordinance of the Swiss Federal Council on Collective Investment Schemes of 19 December 2006
CISO-SFBC	Ordinance of the Swiss Federal Banking Commission on Collective Investment Schemes of 21 December 2006
CO	Swiss Code of Obligations
EU Prospectus Directive:	Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending directive 2001/34/EC
Lugano Convention:	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters made in Lugano of 16 September 1988
PIL Statute	Swiss Federal Statute on Private International Law of 18 December 1987
SBA	Swiss Bankers Association
SBA-Guidelines:	Guidelines of the Swiss Bankers Association of July 2007 on Informing Investors about Structured Products, <www.swissbanking.ch/en/999989_d.pdf>
SESTA	Swiss Federal Act on Stock Exchanges and Securities Dealing of 24 March 1995
SFBC	Swiss Federal Banking Commission
SFBC Circular 03/1	Circular of the Swiss Federal Banking Commission no. 03/01 of 28 May 2003 (version 29 August 2007) regarding Public Advertising

	within the Meaning of the Collective Investment Schemes Legislation
SFBC-FAQ	SFBC, Häufig gestellte Fragen (FAQ) – Strukturierte Produkte (Stand 19. Juli 2007), <www.ebk.admin.ch/d/faq/pdf/faq_strukt_prod_d.pdf>

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