Debt Capital Markets 2021

Contributing editors
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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Debt Capital Markets*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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LEXOLOGY Getting The Deal Through

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MARKET SNAPSHOT

Market climate

1 | 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). In January 2021, approximately 3,350 bonds were listed or admitted to trading on SIX, of which approximately 55 per cent were issued by Swiss issuers. The other listed bonds are issued by foreign issuers from around 40 jurisdictions across five continents.

The SIX bond segment comprises a wide range of instruments, including straight bonds, floating-rate notes, convertibles and exchangeables, asset-backed securities and loan participation notes. Bonds are also traded on CH-Repo-OTC Spot Market where the Swiss National Bank (SNB) holds auctions of treasury bills, federal bond issues and SNB bills. Furthermore, there is an active market for unlisted bonds and privately placed debt securities.

Regulatory framework

2 | 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 nor the European Economic Area. 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), which 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 became effective on 1 December 2020;
- the requirement to prepare and make available 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

The 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 certain types of debt securities, prospectus approval may be obtained after the publication of the prospectus (ex post prospectus approval).

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.

Review bodies are private entities that must be licensed by the Swiss Financial Market Supervisory Authority (FINMA). Review bodies are the sole competent authorities to approve prospectuses under the new prospectus rules and will also be vested with other administrative powers. SIX Exchange Regulation AG (SER), a separate and independent entity of SIX, and BX Swiss AG have been licensed as review bodies by FINMA.

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

SER also acts as an independent self-regulatory authority that monitors compliance with the rules issued by its regulatory board and, in the case of rule violations, initiates sanction proceedings within the scope of self-regulation, which are judged by the judicial bodies.

Basic information document

In addition, under the FinSA where debt securities with derivative character are offered to retail clients, a 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

The 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 other things:

- offerings limited to investors classified as professional clients as defined in the FinSA;
- offerings addressed to fewer than 500 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 the securities are being publicly offered, as well as certain exemptions that apply in the context of the admission to trading on a trading venue in Switzerland.

The 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 the FinSA, no prospectus will be required.

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

3 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 the Financial Services Act (FinSA) and the Financial Services Ordinance (FinSO), issuers seeking a listing on a Swiss stock exchange must comply with the listing rules of the relevant stock exchange.

Prospectus approval by a review body

The FinSA generally introduced 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, to preserve time-to-market advantages under the rules prior to the entry into force of the FinSA and the FinSO, prospectus approval for certain types of debt securities can be obtained after publication of the prospectus (ex post prospectus approval) (article 51(2) FinSA and article 60 FinSO). 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 (Annex 7 to FinSO).

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 securities house in writing. The most important information generally comprises the information stipulated in the applicable annex to the 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 a 10-day period applying to debt securities with a term of 90 to 180 days and a 5-day period applying to debt securities with a term of 30 to 89 days), the prospectus must be submitted to a review body for approval.

Approval of foreign prospectuses in Switzerland

The review bodies may also approve a prospectus produced in accordance with foreign laws and regulations if: (1) the prospectus was produced in accordance with international standards established by international organisations of securities regulators; and (2) the information duties, including in respect of financial information, are equivalent to those under Swiss law. Audited stand-alone financial statements are not required.

Pursuant to article 54(2) and (3) FinSA, the review bodies must publish a list of countries and competent authorities for which a 'one-sided passporting' applies, which means that a prospectus approved by the relevant competent authority is automatically approved in Switzerland, provided that the prospectus is filed with a review body in Switzerland and published in accordance with the Swiss publication rules (article 64(3) FinSA). Automatic approval only applies for prospectuses in the English, German, French or Italian language.

The list published by SIX Exchange Regulation AG, for example, includes the competent authorities of Liechtenstein, Norway, the United Kingdom, all EU countries (in all cases excluding prospectuses in accordance with the alleviated disclosure requirements for wholesale debt securities under the EU Prospectus Regulation), Australia and the United States.

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 Swiss Exchange AG (SIX) and other regulations set out the listing requirements for the issuer (eg, capital resources, annual financial statements and auditors) and the debt securities (eg, minimum capitalisation of the issue and paying agents). Additional rules apply in respect of the approval of new issuers.

Bonds intended for listing may be provisionally admitted to trading. An application must be submitted electronically by the 'recognised representative' of the issuer to SIX through its Internet Based Listing tool (for which access must be applied for beforehand) and must contain a description of the securities, provide an assurance that all the listing requirements are fulfilled (eg, an approved or recognised prospectus is available), the securities are structured in a manner previously approved by the Regulatory Board and confirm that a listing application will follow.

Provisional trading can begin at the earliest three trading days following receipt of the application. The issuer then has two months from the start of trading to file the listing application together with the required declarations and the listing prospectus. If the listing application is subsequently not filed or not approved, the admission to trading lapses, and the issuer can be fined and prohibited from applying for a provisional admission to trading of securities for up to three years.

Prospectus requirements

4 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 requires the preparation and publication of a prospectus. 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 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).

Annex 2 to the FinSO includes 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.

Prospectuses can be divided into the registration form, which contains information about the issuer, the security description and the summary. Banks and security houses, which regularly issue debt securities, can use a base prospectus, which must be approved by a review body. The base prospectus includes all relevant information, except for the final terms of the securities to be issued under it. The final terms must be published and filed with a review body, but no formal approval is required.

The FinSO also includes provisions for formal prospectus supplements, which are required, inter alia, if there are any material new developments between approval of the prospectus and the finalisation of the public offer or admission to trading. The review body has seven calendar days for the approval of a formal supplement.

Prospectuses prepared in accordance with foreign laws and regulations may be approved by the review body if certain criteria are met, and may even be considered as 'automatically' recognised in Switzerland, but they still need to be submitted to the review body.

Documentation

5 | Describe the drafting process for the offering document.

While the offering document is ultimately the responsibility of the issuer, typically the investment banks and advisers involved in the offering provide input, primarily in respect of disclosure related to the debt instruments to be offered, while the issuer primarily focuses on issuer-related disclosure.

The drafting process of the offering document is primarily guided by the content requirements set forth in the FinSO and the applicable SIX rules and regulations.

6 | 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.

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

According to the FinSA, subject to certain exemptions in relation to the duty to publish a prospectus or the timing of the prospectus review and approval, all prospectuses must be reviewed and approved by a review body licensed with the Swiss Financial Market Supervisory Authority with regard to completeness, coherence and comprehensibility before the public offering or admission to trading of the debt securities on a trading venue.

Authorisation

8 | 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 must 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 must 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 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 has the option to request another 10 calendar days to determine whether the modified prospectus can be approved.

9 | 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. The review process is of a formal nature, which means that the review body determines whether the prospectus is complete, coherent and comprehensible.

In addition, in the case of listed securities, the exchange admission body may not approve the listing application if it does not fulfil the formal listing requirements.

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

The FinSA provides for express exemptions from the duty to publish an approved prospectus in connection with public offerings.

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 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).

Offering process

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

Listed and public offerings

Pursuant to the 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 or listing process (ie, by the exchange admission body).

The issuer must submit a complete prospectus (or base prospectus) to the review body for review (focusing on completeness, coherence and comprehensibility). The review body has 10 (or, in the case of new issuers, 20) calendar days to carry out the review.

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 the review and approval. If the new facts 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 must also submit the confirmation statement from a Swiss bank or securities house to the review body with the prospectus to be reviewed.

In addition to the approval process, new issuers must also be admitted to trading by the exchange admission body (most commonly SIX). The new issuer's 'recognised representative' (which, in case of a first-time issuer, must be a bank or securities house or, in case of other issuers, can also be lawyers, audit or advisory firms) must submit a written listing application (including evidence of approval of the prospectus in accordance with the FinSA, or, in the case of a listing without a prospectus, an explanation of the relevant exemption from preparation of a 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 and will pay the listing fees. 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).

Closing documents

12 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

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

The typical charges for listing bonds on SIX are as follows.

General	
Processing of a listing application	2,000 Swiss francs
Listing of new bonds or the increase of an existing listed bond	10 Swiss francs per million Swiss francs nominal value (or equivalent in another currency)
Prospectus review or approval	
Examination or approval of a complete stand-alone prospectus	5,000 Swiss francs
Registration form	2,500 Swiss francs
Separate securities description and summary	2,500 Swiss francs
Examination or approval of a foreign prospectus	8,000 Swiss francs
Examination or approval of a base prospectus	6,000 Swiss francs
Prospectus review or approval	
Examination or approval of prospectus supplements	100 to 3,000 Swiss francs
Registration of new issuers	
Registration of a new issuer (ie, issuers that have not listed securities for more than three years)	10,000 Swiss francs
Bonds with a maturity of a maximum of 12 months	
Examination of the listing application	5,000 Swiss francs

For submissions made in a physical format (instead of electronically), the fees may increase by up to 50 per cent.

Additional fees (2 to 300 Swiss francs) apply for the deposition of prospectuses and related documents. In the event of physical deposition, an additional fee of 2,000 Swiss francs is due.

KEY CONSIDERATIONS

Special debt instruments

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

Of the 3,329 bonds listed or admitted to trading on SIX Swiss Exchange AG (SIX) as at 18 January 2021, 37 were convertible bonds, 36 were contingent convertible notes (CoCos) and 23 were asset-backed securities (ABS). There are only a limited number of issuances of convertible bonds and ABS, but these instruments are issued on a regular basis. There have been issuances of innovative regulatory capital instruments by banks and insurance companies. Furthermore, there is a very active structured products market.

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

Annex 2 of the Financial Services Ordinance (FinSO) sets out general minimum disclosure requirements for bonds. In addition, Annex 2 includes specific minimum disclosure requirements for convertible and exchangeable bonds, option bonds and ABS. There are specific annexes for derivatives and collective investment schemes.

In addition, depending on the type of special debt security, additional rules apply.

- Collective investment schemes: the offering of (Swiss and) foreign collective investment schemes in (or from) Switzerland is subject to extensive regulation pursuant to, inter alia, the Collective Investment Schemes Act (CISA) and may require approval by the Swiss Financial Market Supervisory Authority. Because of the extensive regulation specific to collective investment schemes, this article includes only very limited information related to those schemes. Because of the broad definition of collective investment schemes, debt issuances through a special purpose vehicle (SPV) or under a foreign law trust structure may be deemed collective investment schemes and, therefore, be subject to the extensive regulation under the CISA.
- Derivatives and structured products: these (ie, certain debt securities with embedded derivative components) are also subject to additional regulatory requirements. The requirements for admission to trading and listing are included in the Additional Rules for the Listing of Derivatives issued by SIX.
- ABS: there are specific additional disclosure requirements for ABS. SPV issuers are exempt from the three-year financial track record and minimum equity capital requirements.

- Convertible and exchangeable bonds: the underlying equity securities of convertible or exchangeable bonds must be listed at least at the same time that the convertible debt instrument is listed. The SIX Regulatory Board may grant an exemption if sufficient information is available for the equity securities.
- Guaranteed Bonds: certain requirements for the issuer can be fulfilled by the guarantor instead (eg, financial track record, financial statements and minimum equity capital). The SIX Directive on Guarantee Commitments sets out minimum requirements for guarantees. Under certain circumstances, guarantees under foreign laws are recognised.

In addition, for certain types of special debt securities, there is an obligation to make available a basic information document. Debt securities to be listed and traded on SIX pursuant to the Standard for Bonds must adhere to one of the approved accounting standards.

Classification

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

The Financial Services Act (FinSA) and the FinSO distinguish between equity securities and debt securities. Equity securities are defined as shares pursuant to the Swiss Code of Obligations (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. The FinSA also includes a definition of investment fund interests and derivatives and structured products, which are subject to additional regulatory requirements.

Under the 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

17 | 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 general selling restrictions to ensure compliance with the applicable private placement safe harbours pursuant to the FinSA, there are no specific transfer restrictions or other limitations imposed on privately offered debt securities pursuant to the FinSA.

In the context of private placements, the transaction documentation (eg, underwriting agreement and information memorandum) typically includes undertakings by the relevant parties not to offer and sell the debt securities in a way that could trigger prospectus requirements under the FinSO and the FinSA so that the relevant offer of the debt securities qualifies for one of the safe harbours provided in the FinSO and the FinSA.

In addition, the FinSA and the 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 rules of the EU Markets in Financial Instruments Directive.

Cross-border issues

18 | Are there special rules applicable to the 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.

Bonds issued by a non-Swiss issuer in a currency other than Swiss francs that are already listed on another foreign exchange (ie, international bonds) are admitted to trading on the segment for international bonds on SIX but not listed on SIX Swiss Exchange. The Rules for the Admission of International Bonds to Trading on SIX Swiss Exchange include additional requirements for the admission to trading on SIX Swiss Exchange.

There are no special rules for Swiss domestic issuers offering debt securities only outside Switzerland.

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

No.

Underwriting

20 | 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-price basis once they are satisfied that there is sufficient investor demand at the end of the bookbuilding 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 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, including a suspension of trading, a moratorium on commercial banking activities, material adverse change to the financial condition of the issuer or a material adverse change in international financial conditions.

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

Of most relevance for the regulation of Swiss underwriters 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, Swiss 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. These provisions apply solely in respect of Swiss underwriters (no extraterritorial applicability).

Furthermore, pursuant to article 3(3)(a) and (b) FinSA, advising on structuring or raising capital, as well as the placement of financial instruments, with or without a firm commitment is not deemed as regulated financial services pursuant to the FinSA; therefore, financial institutions (with all required licences pursuant to home jurisdiction rules) can provide the services described above on a cross-border basis in Switzerland without requiring additional regulatory approvals in Switzerland.

Transaction execution

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

SIX Group, which is held by around 120 national and international financial institutions, operates the infrastructure for the Swiss financial centre. Once a trade has taken place on SIX Swiss Exchange, SIX settles the transaction electronically through SIX SIS's integrated clearing and settlement system, which provides full automation of all the relevant clearing and settlement steps and offers a choice of clearing and settlement partners, including Euroclear Bank and Clearstream for non-Swiss franc bonds (a list of recognised clearing and settlement organisations is available).

Because the application for provisional admission to trading of a bond takes at least three stock exchange days, Swiss bonds will typically start trading four days after pricing at the earliest, and settlement of the transaction can occur on the day of provisional admission at the earliest. For Swiss franc domestic bonds, however, it is more common for settlement to occur two days after the start of provisional trading.

Holding forms

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

Public debt securities are typically initially issued in the form of permanent global bearer notes (typically for non-Swiss issuers) or in the form of uncertificated securities (typically for Swiss issuers). Uncertified securities are created by registration in a register of uncertificated securities of the issuer, which typically shows the underwriters as initial purchasers of the notes. Subsequent transfers are not recorded in the register of uncertificated securities.

Because public debt securities on SIX Swiss Exchange are traded in the form of intermediated securities pursuant to the Federal Intermediated Securities Act, the global bearer notes and the uncertificated securities are converted into intermediated securities by entering the debt securities in the main register of SIX SIS AG (or another financial intermediary accepted by SIX Swiss Exchange for this purpose). Intermediated securities are then created once SIX SIS AG (or another financial intermediary) credits the debt securities to the securities account of one or more participants.

Typically, trades in debt securities executed via SIX Swiss Exchange are cleared by SIX x-clear Ltd and settled at SIX SIS AG (for Swiss franc bonds) or SIX SIS Ltd, or Euroclear Bank and Clearstream (for non-Swiss franc bonds). SIX SIS AG acts as a central depository and effects the settlement of stock exchange and off-market transactions in Switzerland for Swiss bonds.

Outstanding debt securities

24 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 to issue bonds or notes that comply with their regulatory capital requirements (ie, Tier 2 CoCos or write-off bonds).

Market abuse and insider trading 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

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

For debt securities listed on SIX Swiss Exchange AG (SIX), there are a number of ongoing reporting obligations as set out in the SIX Listing Rules and the implementing regulations, primarily in the SIX Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes.

These rules require the reporting of certain changes in respect of the issuer (eg, change of auditors or financial reporting standards) and the bonds (eg, early repayment, reset of interest rate, change of paying agent and invitation to bondholders' meeting). Standardised forms and entry screens are available to issuers to enable them to fulfil their regular reporting obligations.

In addition, issuers of debt securities listed on SIX Swiss Exchange must publish annual reports in accordance with a recognised accounting standard within four months of the close of the financial year. For debt securities, there is no obligation to publish interim financials. For guaranteed bonds, certain ongoing reporting obligations can be performed by the guarantor.

Furthermore, issuers of debt securities listed on SIX Swiss Exchange must comply with the SIX ad hoc disclosure rules pursuant to article 53 of the SIX Listing Rules and the SIX Directive on Ad hoc Publicity (certain non-Swiss issuers with a listing in their home markets can apply local law rules), which require issuers to report certain price-sensitive facts as soon as the main elements thereof are known to the issuer (ad-hoc publicity). An issuer may postpone the disclosure of a price-sensitive fact where the fact is based on a plan or a decision of the issuer, and the disclosure of the fact might prejudice its legitimate interests. In such a case, the issuer must ensure that the relevant facts remain confidential for the period of the postponement. In the event of a leak, the issuer must inform the market immediately.

In addition to ongoing reporting obligations, issuers must always comply with the insider trading and market abuse rules pursuant to the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, a breach of which may result in criminal liability.

Liability regime

26 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?

Under the Financial Services Act (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 the 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 the information was provided against better knowledge or without an appropriate disclaimer about the uncertainty regarding future developments. The Financial Services Ordinance (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).

The FinSA also introduces administrative criminal liability leading to a fine in case of, inter alia, the intentional provision of false information or withholding of material facts in connection with a prospectus or basic information document (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

27 | 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. Further, they could also qualify as criminal offences (which may result in criminal proceedings against the persons involved in such behaviour). SIX also has disciplinary powers in cases of improper activities in relation to securities listed on SIX and may decide to implement various sanctions.

Enforcement

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

Sanctioning powers of FINMA

Enforcement actions by the Swiss Financial Market Supervisory Authority (FINMA) 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's office.

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 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), letter (b) 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 those obligations may qualify as a 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

29 | 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, which is levied irrespective of the type of investor. Swiss withholding tax primarily serves a safeguarding purpose. Therefore, domestic investors are entitled to a full refund of the Swiss withholding tax.

However, in respect of foreign investors, the Swiss withholding tax system results in a grave competitive disadvantage for Swiss bond issuers and Swiss debt capital markets. This is because foreign investors may not be entitled to a full refund under the applicable double-taxation treaty, and claiming the refund may place a considerable administrative burden on foreign investors. Consequently, Swiss issuers generally issue guaranteed bonds through foreign subsidiaries in jurisdictions without withholding tax. Several failed attempts have been made to reform the Swiss withholding tax system.

The implementation of Basel III required Swiss banks to issue large amounts of new regulatory capital instruments, in particular special contingent convertible bonds (CoCos) and write-off bonds that were required for 'too big to fail banks' (initially for the two Swiss global systemically important banks Credit Suisse and UBS). Because CoCos absorb losses when the capital of the issuing bank falls below a certain level (by way of write-down or conversion into equity of the bank), the Swiss regulator expressed a preference for the instruments to be issued by Swiss entities and governed by Swiss law.

To facilitate the recapitalisation of Swiss banks, the Swiss parliament exempted CoCos and AT1 instruments from withholding tax from 2013. Initially, the exemption was limited until 2016; however, in 2015, the exemption was extended until 31 December 2021, and bail-in bonds were added. It is expected that the exemption will be further extended.

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 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

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

In April 2020, the Federal Council initiated a public consultation procedure for a proposed reform of the Swiss withholding tax rules to strengthen the Swiss debt capital markets. Based on the public consultation procedure, the Council resolved, in September 2020, to continue the reform of the Swiss withholding tax rules. The main objectives of the reform include the abolition of withholding tax on interest on bonds and of the transfer stamp duty for domestic bonds

The Federal Council instructed the Federal Department of Finance to issue proposed legislation in the second quarter of 2021. The proposed legislation will then be debated in the Swiss parliament. If passed by the Swiss parliament, the relevant legislation will be subject to the popular legislative referendum. Because a popular referendum requires only 50,000 signatures, and selective tax reductions may be unpopular amid massively increased government spending to mitigate the economic damage resulting from the covid-19 pandemic, there is a risk that the abolition of withholding tax will be rejected in a popular vote.

Coronavirus

31 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

During the first wave of the cvoid-19 pandemic in Europe in spring 2020, and during the second wave in autumn and winter 2020, Switzerland was among the countries with the highest number of covid-19 cases per capita in the world.

In response to the first wave, the Federal Council introduced a number of measures in March 2020 to slow the spread of covid-19, including closures of schools, non-essential shops, bars and restaurants, as well as entertainment and leisure facilities. It also introduced emergency legislation to mitigate the economic impact of the pandemic, including compensation for short-time work and daily allowances for self-employed persons.

The measures also included an emergency bridge credit facility for small and medium-sized enterprises (SMEs) guaranteed by the government (full guarantee for SME loans up to 500,000 Swiss francs and 85 per cent for loans between 500,000 Swiss francs and 19.5 million Swiss francs), which was operated by 123 participating Swiss banks. The State Secretariat for Economic Affairs estimated that a total of 135,005 covid-19 SME loans up to 500,000 Swiss francs were granted, with a total volume of 13.8 billion Swiss francs. Approximately one in five Swiss SMEs obtained a covid-19 SME loan. The total volume of the covid-19 emergency bridge credit facility was approximately 16.8 billion Swiss francs.

Other emergency legislation enacted by the Federal Council included the Covid-19 Insolvency Ordinance, which entered into force on 20 April 2020 for a period of six months and, inter alia, provided SMEs with fast access to a protective moratorium for up to six months, subject to far fewer formal requirements than a general composition memorandum. The Ordinance has since expired and is no longer in force.

After withstanding the first covid-19 wave in spring 2020 relatively unscathed, Switzerland was hit hard by the second wave in autumn 2020. According to experts, Switzerland did not test its population enough in the summer and, thus, failed to detect the increase in infections by the virus in time. In response, certain cantons implemented local lockdowns in hard-hit areas, but there was strong political resistance to a new nationwide lockdown. Amid the emergence of a new and more virulent strain of the covid-19 virus, the Federal Council enacted a new national lockdown that entered into force on 19 January 2021.

Because the emergency legislation enacted by the Federal Council in response to the first covid-19 wave in spring 2020 automatically expired after six months, the Swiss parliament enacted the Covid-19 Act to provide a more permanent legal basis for the Federal Council to maintain the measures that remain necessary to deal with the covid-19 pandemic. The Act covers a wide range of measures, including health

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care, worker protection, immigration law and asylum rights, compensation for loss of earnings and unemployment insurance. Furthermore, it provides or lays the legal foundations for judicial, procedural, corporate and insolvency law measures and measures in the cultural and media sector.

A newly formed association called Friends of the Constitution, to which many covid-19 and vaccination sceptics belong, announced that it has collected the 50,000 signatures required for a popular referendum against the Covid-19 Act. If the popular referendum is successful, the Covid-19 Act will be subject to a popular vote.

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