Debt Capital Markets

Contributing editors
David Lopez, Adam E Fleisher and Daseul Kim

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GETTING THE DEAL THROUGH

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Switzerland

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

For a better understanding of the Swiss market, it is worth highlighting that Switzerland is not a member of the EU or EEA. Consequently, the EU prospectus rules and other EU or EEA capital markets rules and regulations are not applicable to debt securities offerings in Switzerland. Further, while the Swiss Code of Obligations (CO) stipulates some minimum content requirements for prospectuses in public offerings, no related prospectus approval or registration requirements exist and, thus, the Swiss Financial Market Supervisory Authority (FINMA) exercises no approval function. More stringent rules, however, apply in the case of listed debt securities offerings, which are subject to a formal listing application proceeding before the relevant stock exchange, the most notable one being the SIX Swiss Exchange (SIX). Interestingly, however, SIX allows for a provisional admission to trading of debt securities, which means that the time to market can be very short for issuances of Swiss-listed debt securities. Moreover, a fundamental overhaul of Swiss prospectus rules is expected to enter into force in 2018 (see 'Update and trends').

SIX is the most relevant stock exchange in Switzerland. Therefore, to the extent that this chapter deals with securities listed in Switzerland, this will relate to a listing on SIX.

Typical debt securities offerings include:

- listed bonds or notes;
- unlisted public bonds or notes; and
- unlisted private placements of bonds or notes.

The terms 'bonds' and 'notes' are not used on a uniform basis. In our view, bond issues connote long-term debt securities and include straight bonds such as fixed-rate bonds, floating-rate bonds, convertible bonds, zero-coupon bonds, dual currency bonds, subordinated bonds, warrant bonds, asset-backed securities (ABSs), covered bonds, contingent convertible bonds (CoCos) and write-off bonds. Typical note issues imply short or mid-term debt securities and include plain vanilla notes or structured notes. For structured notes that qualify as structured products, special regulatory provisions are applicable (see question 15). However, several other definitions exist for the terms 'bonds' and 'notes' and a strict distinction according to the term of the debt security may not be possible at all times in practice.

The Swiss debt market is very active, in particular, with respect to bonds and structured notes issues. In recent years, Swiss and foreign banks and insurance companies have successfully issued innovative debt instruments for regulatory capital purposes, including CoCos, write-off bonds and other hybrid instruments. In addition, Swiss pension funds and private banks require a continuous supply of investment opportunities. The overall SIX turnover (of all listed securities) in 2016 was 1.279,311 trillion Swiss francs (whereas the turnover of bonds was 153.189 billion Swiss francs).

2 Describe the general regime for debt securities offerings.

The applicable rules with respect to debt securities offerings depend primarily on whether the offering is public or private. Among public offerings, a further distinction must be made based on whether the securities are intended for listing on SIX or not.

Listed public offerings

Whenever debt securities are publicly offered, in other words submitted for public subscription or listed on a stock exchange in Switzerland, the issuer must prepare and make available to investors a prospectus that complies with article 1156 paragraph 1 and 2 CO and, by way of reference, article 652a CO.

If the securities are to be listed on SIX, the detailed SIX listing requirements must be fulfilled in addition to the prospectus requirements pursuant to the CO. The SIX regulations relevant for the listing of debt instruments consist of the SIX Listing Rules (LR), the SIX-Scheme E (Bonds), the Additional Rules for the Listing of Bonds (ARB) and the Directive on the Procedures for Debt Securities (DPDS). No distinct prospectus scheme exists thus far for ABSs.

As the prospectus requirements pursuant to the CO are not particularly demanding, an LR-compliant prospectus generally contains the minimum disclosure requirements of the CO. Therefore, the same document is usually used as the listing and offering prospectus.

The listing of debt instruments on SIX requires the prior registration of the issuer, the filing and approval of the prospectus by SIX and finally the provisional and definitive listing of the debt instrument. It is important to note that SIX allows for a provisional admission to trading of debt securities. The application for provisional admission to trading is submitted online to SIX via the internet based listing (IBL) system. Provided that the form has been filled out completely and correctly, the provisional admission to trading can be granted as early as three trading days after submission of the application. The issuer then must submit the physical listing application (including the prospectus) to SIX within two months of the first trading day.

This is a significant advantage compared with other marketplaces (see questions 4 and 11).

Requirements for the listing of debt securities on SIX

Requirements for the issuer are as follows:

- track record: the issuer should have existed as a company for at least three years (subject to exceptions, eg, in the case of an ABS);
- financial record: the issuer should be able to produce the past three years' annual financial statements, presented in accordance with the financial reporting standards applicable to the issuer;
- audit report: the issuer's auditors must confirm the compliance of the accounts with the financial reporting standards applied;
- accounting standards: International Financial Reporting Standards (IFRS), US Generally Accepted Accounting Principles (GAAP) or under certain conditions the accounting standards of the issuer's home country (local GAAPs) may be used;
- equity capital: on the first day of trading, the issuer's reported equity capital must be at least 25 million Swiss francs (or an equivalent amount in another currency). If the issuer is the parent company of a group, this requirement refers to the consolidated reported equity capital; and
- guarantor: all the above requirements regarding track record, financial records, as well as the issuer's equity capital, may be waived if a third party provides a guarantee in respect of the securities (and the guarantor fulfils the above requirements).

The requirements for debt securities are as follows:

- applicable law: bonds governed by the laws of any OECD member state may be listed. Upon application, other foreign legal systems may be recognised, provided that they meet international standards in terms of investor protection and transparency regulation;
- minimum capitalisation: the aggregate nominal value of a bond issue must be at least 20 million Swiss francs (or an equivalent amount in another currency);
- paying agent: the issuer must ensure that services related to interest and capital, as well as all other corporate actions, are provided in Switzerland. The issuer may appoint a third party that has such capabilities in Switzerland (a bank, securities dealer or other institution that is subject to supervision by FINMA); and
- additional requirements for convertible securities: convertible securities may be listed if the equity securities to which they relate have already been listed on SIX or on another regulated market, or if they are being listed at the same time. The regulatory board may deviate from this principle if it is ensured that investors have the information they need to reach an informed assessment of the value of the underlying equity securities.

It should be noted that the regulatory board of SIX may grant exemptions from the above, provided that this is not against the interests of the investors or the stock exchange and provided that the applicant can provide evidence that the purpose of the provisions in question can be served satisfactorily by other means.

Unlisted public offerings
Besides the limited prospectus requirements set out in the CO, no other additional rules exist. The content and style of the offering documentation in unlisted public debt securities offerings are determined by the Swiss market standard.

Private placements
With regard to private placements (ie, the offering of debt securities exclusively to a restricted circle of investors), no particular prospectus duty exists. In practice, however, a prospectus is often prepared on a voluntary basis. The content and style of the offering documentation in unlisted private debt securities offerings are determined by the Swiss market standard.

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 contrast to other jurisdictions (eg, the US and the EU/EEA), in principle, there is no requirement for a prospectus to be filed with or pre-approved by a supervisory body (ie, FINMA or another regulatory authority) in connection with the offering of debt securities in, from or into Switzerland. This constitutes a major advantage of Swiss securities offerings with respect to time to market. If the securities are to be listed on SIX, the formal process described in more detail below becomes applicable.

Further, special rules and regulations, which are not described in this context, apply for the issuance of certain regulatory capital instruments, equity offerings, units or shares of collective investment schemes and structured products (see question 15 for a very brief description concerning structured products).

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

Pursuant to article 1156 CO, bonds and notes may only be offered publicly on the basis of a prospectus. See question 2 regarding registration and filing requirements.

The requirements regarding the content of such prospectus depend on whether the securities are intended to be listed on SIX or not.

Listed public offerings
The SIX prospectus requirements are similar to the Prospectus Directive, but less extensive and more flexible. The content of the listing prospectus of debt securities is governed by SIX-Scheme E (Bonds). In particular, the listing prospectus must contain, inter alia, information about the issuer (and, where applicable, the guarantor), description of the securities, risk factors, selling restrictions, No-MAC statement, information on special features of the security (such as convertible bonds, exchangeable securities, or warrant bonds), security and ISIN number, a responsibility statement, etc. In the case of an ABS, a transaction summary and overview must be included. The listing prospectus may be provided in one of the following forms:

- a complete listing prospectus for each individual issue (stand-alone prospectus); or
- a complete issuing prospectus for each individual issue consisting of an issuance programme that has been registered with SIX and final terms (Final Terms) for each bond or note issued under the programme (SIX-registered issuance programme).

Apart from the listing prospectus, the following main documents are required for a listing of debt securities on SIX:

- issuer declaration;
- guarantor declaration (if applicable);
- declaration of consent;
- Swiss wrapper; and
- Final Terms.

If a foreign base prospectus does not fulfil the SIX requirements, in addition to the stand-alone prospectus or issuance programme, in the case of a SIX-registered issuance programme, a Swiss wrapper or country supplement that provides missing information that applies specifically to Switzerland must be submitted to SIX. Special provisions apply for bonds previously listed abroad, in particular, certain information marked in SIX-Scheme E may be omitted (article 31 et sequens ARB).

Moreover, for permanent global certificates, a copy of the certificate must be submitted (article 4 paragraph 1 point 4 DPDS). In the case of book-entry securities – if not required by the articles of association of the issuer or the general terms and conditions of the issuance – a description of the means by which those having rights may obtain proof of their holding must be submitted by the issuer. In the case of book-entry securities based on foreign law, the relevant legal text and its translation into German, French, Italian or English must also be submitted (article 4 paragraph 1 point 5 DPDS).

Unlisted public offerings
In the case of unlisted public debt offerings, very few requirements exist. Namely, a prospectus according to article 1156 paragraph 1 and 2 CO (and by way of reference, article 652a CO) must be published. It must contain the following information on the issuer and guarantor:

- content of commercial register entry;
- share capital;
- provisions of the articles of association relating to any authorised or contingent capital increase;
- the number of dividend rights certificates and the nature of the associated rights;
- the most recent annual accounts and consolidated accounts with audit report and, if more than nine months has elapsed since the accounting cut-off date, the interim accounts;
- the dividends distributed in the past five years or since the company was established; and
- the date of the resolution concerning the issue of new debt securities.

Private placements
For private debt offerings of foreign debt in Switzerland, the content requirements are based on foreign rules and regulations. However, Swiss market practice should also be considered, in particular, with respect to Swiss selling restrictions. For Swiss private debt offerings, the content of the prospectus should follow Swiss market practice.

5 Describe the drafting process for the offering document.

For straight debt securities (including such that shall be listed on SIX), the drafting process of the offering document is comparably straightforward and guided by the content requirements set forth in the LR and the CO for unlisted public offerings of debt securities (see question 4). Key topics are the availability of financials (typically incorporated by way of reference), the No-MAC and responsibility statements as required by the LR, tax disclosure, selling restrictions, and risk factors. In addition, when the prospectus is filed with SIX, a SIX-Scheme E check form (that evidences to SIX that all required information has been included) must be submitted.

The offering documents for private placements are drafted according to Swiss market standard. There are no clear legal thresholds that are decisive to help determine whether to make certain disclosure or not, but the prospectus must not contain any false, misleading or incomplete statements.

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 issuance of Swiss law governed debt securities is normally dealt with in a bond or note purchase agreement concluded by the issuer and the lead manager(s). The terms and conditions of debt securities are also set out in the prospectus. In the case of an issuance programme that allows for the issuance of multiple products, the final terms are provided in the form of a separate document for each individual product that constitutes the offering documentation, together with the issuance programme.

No public register or authority exists where such documents can be accessed. They are made available by the issuer, lead manager or global coordinator of the securities issue, either on their webpage or upon request in printed form.

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

There is no general requirement for a prospectus to be filed with, or pre-approved by, a supervisory body in connection with the offering of debt securities in or into Switzerland. In the case of the issuance of debt instruments by Swiss banks and Swiss insurance companies that shall qualify as regulatory capital, pre-approval of FINMA is usually obtained in order to ensure that FINMA will acknowledge such instruments for regulatory capital purposes.

In the case of a listing on SIX, a listing application to SIX is required and SIX Exchange Regulation (SER) examines the compliance of the listing prospectus with SIX regulations based on the listing application. In the case of a successful application to provisional trading, the physical listing application (including the prospectus) must be submitted to SIX within two months of the first trading day, and SIX will thereafter examine the full documentation (see question 2).

If the debt securities are to be listed on SIX, a listing prospectus is required and must be published in one of the following forms:

(i) printed in at least one newspaper with a national distribution (not relevant in practice);
(ii) provided free of charge in printed form at the issuer's head office and at those financial institutions that are placing or selling the securities; or
(iii) electronic publication on the issuer's website and potentially also on the websites of those financial institutions that are placing or selling the securities.

A printed copy must be provided to investors free of charge on request. Exceptions to the prospectus duty may apply if certain conditions are met (article 33 et sequens LR). With respect to unlisted debt securities, no regulatory requirements similar to those applicable in the EU exist. Nevertheless, from a civil law perspective, options (ii) and (iii) are recommended.

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?

Unless listed, public offerings of debt securities are, in principle, not subject to review and authorisation (see questions 2 and 7).

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

In general, the regulators may not refuse a public offering of debt securities, as such offerings are not subject to regulatory approval (see question 7). However, in the case of SIX listed debt securities, SIX may not approve the offering documentation if it does not fulfil the formal listing requirements. Further, FINMA has the authority to impose restrictions on Swiss regulated financial institutions (eg, banks and insurance companies) in connection with the assumption of additional debt and has certain discretion in connection with the recognition of banking or insurance regulatory capital.

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

Public offerings are subject to article 1156 CO in connection with article 652a CO and, in the case of listed debt securities, to SIX regulations. Private offerings are, in principle, unregulated. In Switzerland, no registration with a supervisory authority is required and, therefore, no safe harbour provisions exist.

Due to a lack of clear guidance by Swiss courts, the meaning of the term 'public offering' for purposes of the CO has been, and continues to be, the subject of a legal debate, and there is no bright line test for determining whether an offering is public. Each offering should therefore be evaluated on a case-by-case basis, weighing all relevant facts (eg, marketing, number and type of investors, nature of any on-selling).

With respect to cross-border offerings by foreign issuers into (but without listing in) Switzerland, Credit Suisse, UBS and Zürcher Kantonalbank together with Niederer Kraft & Frey Ltd and other major Swiss law firms have issued a position paper, which, inter alia, discussed the delimitation of the terms public and non-public offerings in Switzerland and related practical aspects (see www.caplaw.ch/wp-content/uploads/2013/03/CapLaw_03_11.pdf).

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

Listed public offerings

New issuers (ie, issuers or guarantors who have not listed any type of securities on SIX for the past three years) need to be pre-approved by SIX. The new issuer's 'recognised representative' (which may be a bank, law firm, auditing or advisory firm) must submit a written listing application (including a confirmation that the issuer fulfils all the requirements relating to the listing and maintaining of the listing (issuer declaration)). SIX will, in principle, make a decision regarding the admission of a new issuer to provisional trading within three trading days after receipt of all the required documents. If exceptions to the requirements for new issuers are requested, the decision will be made within 20 trading days.

Debt securities intended for listing may be admitted provisionally to trading on SIX (this is not to be confused with grey market trading). The recognised representative must submit the relevant application electronically through the automated web application IBL. The application must contain a description of the securities, provide assurance that all the listing requirements are fulfilled and confirm that a listing application (if applicable, including the prospectus) will follow.

Key steps in the listing process are detailed below:

Preparing and fulfilling listing requirements	Listing	Post-listing requirements
• Selection of advisers • Due diligence • Verification of listing requirements • Listing structure setup • Pre-verification application • Preparation of listing prospectus / listing documentation	• Application for provisional admission to trading • Listing application	• Financial reporting • Ad hoc publicity • Other reporting requirements

Provisional trading can begin within three trading days (in some cases just one trading day) following receipt of the electronic application. The issuer then has two months from the start of trading to file, through its recognised representative, the listing application together with the required declarations and the listing prospectus. The listing application must contain a short description of the transaction, the formal application to list the securities on SIX, and a reference to the required supporting documents. The decision will generally be issued within a maximum of 20 trading days.

The listing process on SIX is subject to an indicative timeline that can be found at www.six-swiss exchange.com/ebooks/issuers/bond_listing_guide/files/assets/basic-html/page13.html.

Unlisted public offerings

Debt securities not listed or admitted to trading, but offered to the public, must comply with the provisions set out in articles 1156 et sequens CO. In particular, they can only be offered based on an issue prospectus.

Private placements

A non-public offering of debt securities in or into Switzerland, which are not listed on any Swiss exchange or any other regulated market in Switzerland, is not subject to any requirements under the CO. The drafting of the offering documentation (if any) is determined by Swiss market standard (see question 4) and prepared to minimise potential civil liability issues.

However, special rules apply for private placements with clients of a Swiss bank of debt securities of non-Swiss issuers that are denominated in Swiss francs and are governed by Swiss law. The Swiss Bankers Association's Guidelines Regarding Notes from Foreign Issuers provide for a prospectus requirement if debt securities of non-Swiss issuers that are denominated in Swiss francs and governed by Swiss law are directly placed with the clients of Swiss banks involved in the issuance.

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?

The usual closing documents are the prospectus, the purchase agreement, the agreement among underwriters, the agency agreement, the terms and conditions of the debt securities, legal opinions, comfort letters, subscription forms and the securities register or the global certificate.

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

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

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

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

According to the SIX website (data as at 30 January 2017), a total of 1,753 bonds (of which 972 were Swiss bonds denominated in Swiss francs, 717 were foreign bonds denominated in Swiss francs, and 64 bonds were not denominated in Swiss francs) were listed on SIX. In addition, over 2,400 bonds were admitted to trading in the international bonds segment. Of the total bonds listed or admitted to trading on SIX, there were 19 convertible bonds, 36 CoCos and 18 ABSs. Further, there exists an active market for unlisted bonds and privately placed debt securities. In addition, Switzerland is (among very few other countries) leading with respect to the issuance of regulatory capital debt securities. Further, there exists a very active structured products market.

Statistics on the value added generated by the issuers of structured products in Switzerland are published by the Swiss Structured Products Association (SVSP). The statistics take account of listed as well as unlisted structured products. The quarterly turnover in Q3 2016 was 53.7 billion (2.9 per cent below the figure for Q3 2015), 65 per cent of which was generated by yield-optimisation products, followed by leverage products (16 per cent) and participation products (13 per cent). Currencies (46 per cent) and equities (42 per cent) remain the most frequently used underlying assets. Unlisted products accounted for 71 per cent, representing a large majority of Swiss structured products. Around two-thirds of sales (65 per cent) are generated in the primary market, while transactions are almost exclusively executed on the secondary market (nearly 96 per cent). Euros (35 per cent), US dollars (35 per cent) and Swiss francs (16 per cent) serve as the main currencies for Swiss structured products, comprising 86 per cent of sales.

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

As a basic rule, the ARB apply to all bonds (including convertible bonds, bonds with warrants, ABSs and loan participation notes) that are issued by Swiss and foreign issuers and that are eligible for listing on SIX.

Convertible bonds may be listed on SIX if the equity securities to which they relate have already been listed on SIX or on other regulated markets, or if they are being listed at the same time. The regulatory board of SIX, however, may allow exceptions if it is ensured that investors have sufficient information in order to determine the value of the underlying equity securities.

Special provisions apply to bonds that are issued by a foreign issuer, denominated in a foreign currency, and already listed on another foreign exchange (international bonds). The LR do not apply to international bonds.

For debt securities that qualify as structured products according to article 5 paragraph 1 of the Federal Act on Collective Investment Schemes (CISA), the Additional Rules for the Listing of Derivatives and the respective SIX-Scheme F (Derivatives) apply. Further, special regulatory provisions such as the duty to publish a simplified prospectus may apply for the distribution of structured products to non-qualified investors (article 5 paragraph 1 lit. b CISA). According to article 5 paragraph 4 CISA, the prospectus duty of article 1156 CO is not directly applicable for structured products. However, it is a SIX requirement for listed products and market standard for unlisted products that an issuance programme is published for structured products. Legal scholars have controversially tried to extend the prospectus liability according to article 752 CO or article 1156 CO to structured products. For unlisted structured products, a foreign issuer is required to have a Swiss branch if distribution to non-qualified investors is targeted. A Swiss branch of a foreign institution pursuant to article 4 paragraph 1 lit. b of the Ordinance on Collective Investment Schemes may be a representative office, a branch office, a subsidiary, a sister company or a group company provided that it stands under consolidated supervision at group level. Further, products for distribution to non-qualified investors must be issued or guaranteed (respectively, secured in equivalent manner) by a supervised financial intermediary according to article 5 paragraph 1 lit. a point 1-4 CISA (ie, a Swiss bank, insurance, or securities dealer, or a foreign institute with equivalent prudential supervision).

Issuers of debt securities are required to use IFRS, in certain cases US GAAP, or Swiss GAAP FER, or the accounting standards stipulated in the Swiss Banking Act (article 6 et sequens SIX-Directive on Financial Reporting (DFR)). Foreign issuers may also apply their home country standard (if recognised by SIX) (article 8 paragraph 1 DFR). Details in this respect are set out in Annex 1 of the DFR. Further implications regarding accounting, if any, depend on the applicable accounting rules and regulations.

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

Debt securities

Debt securities are securitised claims of a creditor against a debtor. In contrast to equity securities, there are no voting or participation rights

concerning the issuing company attached to debt securities. Subject to contrary contractual arrangements, the beneficiary cannot contribute to the decision-making of the debtor or affect the way assets and revenues are used. The creditor's claim is independent of the debtor's success. Convertible bonds are qualified as debt securities (but may be subject to specific regulatory rules due to the inherent option to convert the debt securities into equity securities).

Equity securities

Equity securities embody rights in a company or an association. They are held by virtue of their owner's capacity as a member of the company or association. These rights may be purely proprietary in nature. However, they may also confer a right to participation. As a general rule, equity securities entitle the holder to a share in the profit generated by the company and in any surplus in the case of a liquidation of the company.

Implications with regard to listings on SIX

With regard to listing or admission to trading on SIX, the distinction between debt and equity securities is important, as different listing requirements (eg, with regard to the content of the listing prospectus) and procedures apply. The listing of equity securities on SIX is governed by the LR, while the listing of bonds is governed by the general provisions of the LR, and the ARB. The ARB are applicable to all bonds (including convertible bonds, bonds with warrants, ABSs and loan participation notes) that are issued by Swiss and foreign issuers and that are eligible for listing on SIX. Special provisions may apply for structured notes.

Further, separate listing procedures are applicable for debt securities (which are governed by the DPDS), and equity securities (which are governed by the Directive on the Procedures for Equity 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?

The offering of debt instruments by way of a private placement in Switzerland is generally accompanied with appropriate selling restrictions in the issue documentation. Absent any transfer restrictions imposed by the terms and conditions of the debt securities and subject to any subsequent behaviour by investors constituting a bypassing of the Swiss private placement rules, the transfer of privately offered debt securities in the secondary market, as a general rule, is not restricted.

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

Public offerings

According to article 156 of the Federal Law on International Private Law, claims based on the public offering of bonds may be derived from the law applicable to the issuer or the law of the location of the offering. Consequently, the Swiss rules must be considered by foreign and by Swiss issuers. Therefore, as a basic principle, the same rules apply to the listing of debt securities by domestic and foreign issuers. The same principle applies for offerings exclusively within Switzerland. Nevertheless, in the case of international offerings, the rules and regulations of countries other than Switzerland may be applicable.

Further, specific SIX regulations may apply to bonds issued by foreign issuers denominated in a currency other than Swiss francs, which may be admitted to trading on SIX in a separate segment called 'international bonds'. Listing in this segment has the advantage of a substantially simplified and abridged listing procedure governed by the Rules for the Admission of International Bonds to Trading on SIX Swiss Exchange (RIB). A bond issue may be admitted to trading in the international bonds segment if it is already listed on an exchange recognised by the SIX Regulatory Board, or if it fulfils one of the following requirements:

- the bond issue originates from an issuer that already has bonds of an equal or longer duration listed on an exchange recognised by the SIX regulatory board;
- the bond issue originates from an issuer that has equity securities listed on an exchange recognised by the SIX regulatory board; and
- the issuer is an OECD member state or a political subdivision of an OECD member state.

The admission to trading of international bonds on SIX is governed by the RIB and the respective implementing provisions. International bonds admitted to trading in the international bonds segment are not deemed to be listed on SIX and the LR is not applicable. Alternatively, a regular listing of bonds denominated in foreign currencies is also possible.

For further guidance, see also the above referred position paper on cross-border offerings by foreign issuers into Switzerland issued by Credit Suisse, UBS and Zürcher Kantonalbank together with Niederer Kraft & Frey Ltd and other major Swiss law firms. The position paper has been published in Caplaw 3/2011: www.caplaw.ch/wp-content/uploads/2013/03/CapLaw_03_11.pdf.

Private placements

With respect to private placements, very few rules exist that are determined by market standard. In the case of international offerings, the rules of regulations of countries other than Switzerland may be applicable.

See question 11 with regard to the prospectus requirement for debt securities of non-Swiss issuers denominated in Swiss francs and governed by Swiss law, which are placed directly with the clients of Swiss banks involved in the issuance.

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

No.

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

Fixed-price underwriting is a common form of an underwriting arrangement in Switzerland, in particular with regard to straight debt offerings, and means that the whole issue is bought by the underwriter (or underwriters, in the case of a syndicate) at a fixed price.

Underwriting agreements are very much in standardised form and relatively short if compared with foreign standards. Nevertheless, they typically contain a robust indemnity clause under which the issuer agrees to indemnify the underwriter against any losses, claims, damages or liabilities to which the underwriter may become subject, insofar as such losses, claims, damages or liabilities arise out of untrue statements or omissions in the prospectus or other materials prepared in connection with the issue, or the breach of representations, warranties and undertakings under the underwriting agreement.

The underwriting agreement also typically contains a clause allowing the underwriter to terminate the agreement in the case of force majeure (which may take the form of a suspension of trading, a moratorium on commercial banking activities, material adverse change to the financial condition of the issuer, material adverse change in international financial conditions, calamity, crisis and others).

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

The regulation of underwriters in Switzerland is governed by a variety of rather fragmented rules and regulations. Of most relevance are various provisions set forth in the Swiss Federal Stock Exchange Act (SESTA), the Stock Exchange Ordinance (SESTO), the Banking Act (BA) and the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA). In particular, underwriters who commercially underwrite securities issued by third parties (on a firm basis or against commission) and offer them to the public on the primary market are deemed to be issuing houses pursuant to article 3 paragraph 2 SESTO, which, in turn, qualify as securities dealers pursuant to article 2 paragraph 1 SESTO. Whoever intends to carry out the activities of a securities dealer may be subject to authorisation by FINMA (article 10 paragraph 1 SESTA). The underwriting agreements per se do not require any additional approvals.

Update and trends

Please note that, following the regulatory developments in the EU, Switzerland is reforming its financial market architecture.

Of particular importance with regard to the offering of debt securities is the proposed introduction of a new law, the Federal Financial Services Act (FIDLEG), which aims to regulate the creation of financial instruments and related services in a consistent manner in order to ensure client protection. The FIDLEG will apply to financial services providers, client advisers, securities providers and issuers of financial instruments. As one of its main features, the FIDLEG will introduce a regulatory prospectus duty that will, in principle, be applicable to all types of financial instruments. Moreover, an obligation to produce and publish a basic information sheet for most publicly offered financial instruments will be introduced. Furthermore, as one of its key points, the FIDLEG will introduce certain organisational and point of sale duties (including client segmentation and the obligation to perform appropriateness or suitability checks), registration obligations for client advisers (ie, the natural persons) of certain 'unregulated' financial services providers and a tighter regulation of cross-border activities into Switzerland. The FIDLEG's new prospectus duty, the introduction of the basic information sheet and the requirement to have prospectuses approved by an approval authority (Prüfstelle) are important changes in the area of debt capital markets and will have a strong impact on banks, securities dealers, issuers and distributors of financial products, fund management companies, (external) asset managers and client advisers.

Another proposed new law, the Federal Financial Institutions Act (FINIG), is intended to regulate the activities of financial institutions in Switzerland. In particular, it will contain new rules on the approval process for fund management companies, asset managers of collective assets, and (regular) asset managers. The bill means a change of paradigm for external asset managers in Switzerland, as they would become subject to a regulatory approval duty and a prudential supervision for the first time. Pure investment advisers will not be subject to prudential supervision under the FINIG. However, as already mentioned, client advisers of 'unregulated' financial services providers will need to be registered in the client advisers register introduced by the FIDLEG.

Neither FIDLEG nor FINIG are expected to enter into force before 2018.

In order to complete the picture of the new Swiss financial markets regulations the Federal Financial Infrastructure Act (FINFRAG) must be mentioned. The new law regulates primarily financial markets infrastructure (and trading venues) as well as derivatives trading. The FINFRAG has already become effective on 1 January 2016.

Further guidance on the proposed new financial market laws (and their effects on market participants) is available in the publication Switzerland's New Financial Market Architecture of the NKF Banking, Finance & Regulatory Team which can be downloaded from the NKF website: www.nkf.ch/en/publikationen_suche/fachgebiete.php.

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

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

Normally, trades in debt securities executed via SIX are cleared by SIX x-clear and settled at SIX SIS Ltd (SIS). SIS acts as a central depository and effects the settlement of stock exchange and off-market transactions in Switzerland. SIX uses an integrated settlement solution (a facility based on the cooperation of recognised central securities). Exceptions are possible in certain cases.

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

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

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

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

24 Describe how issuers manage their outstanding debt securities.

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 the recent market conditions with low interest rates, many debt security issuers considered repurchasing outstanding bonds and replacing them with bonds at lower yield. Sometimes issuers are also able to repurchase their bonds at a discount. In addition, many banks have made tender and exchange offers in order to issue bonds or notes that comply with their regulatory capital requirements (ie, Tier 2 CoCos or write-off bonds).

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

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

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

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

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?

A person is liable under civil law for the wilful or negligent provision or dissemination of information on an issue of debt securities that is inaccurate, misleading or in breach of statutory requirements (article 752 CO). The prerequisites of a prospectus liability are:

- false, misleading or incomplete statements in the prospectus (or marketing material);
- damages occurred by the investors;
- the damages were caused by such false, misleading or incomplete statements; and
- fault for such statements (intentionally or negligently).

The claimant (investor) must prove that false, missing or misleading statements caused the damage. Prospectus liability targets not only the

issuer and its directors but, in principle, also all other persons (including the underwriters, lead managers, auditors, and advisers) involved in the drafting of the prospectus. The liability analysis is equivalent to other types of securities.

Importantly, prospectus liability not only attaches to the formal prospectus but may also extend to similar communications.

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 SESTA may be relevant.

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 provisions (see question 28). Further, they could also be qualified as criminal offences (which may result in criminal proceedings against the persons involved in such behaviour). Moreover, SIX has disciplinary powers in cases of improper activities in relation to securities listed on SIX and may decide to implement various sanctions (see question 28).

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

Sanctioning powers of FINMA

FINMA's enforcement actions are primarily taken against companies 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, proprietors or employees of supervised companies. In addition, more strict market behaviour rules have been adopted recently, including stricter rules on insider dealing and market abuse. These rules apply to all market participants and are supervised by FINMA. Cases of criminal behaviour insider dealing and market manipulation are enforced by the Swiss federal prosecutor.

In administrative proceedings for the purpose of financial market enforcement versus 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 or dealers from practicing 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 public offering of debt securities in Switzerland without the use of an offering prospectus may qualify as banking activity for which the issuer would require a banking licence. Non-compliance with that rule can lead to severe sanctions by FINMA.

Sanctioning powers of SIX

In the event of non-compliance with the LR and its implementing provisions, SER and the Sanctions Commission may impose sanctions against the issuer 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, guarantors and recognised representatives:

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

29 What are the main tax issues for issuers and bondholders?

For Swiss issuers, the Swiss withholding tax at the current rate of 35 per cent on interest payments under domestic bond issues is the main tax issue. Temporary exemptions (for bonds issued prior to 1 January 2022) are available only in the case of CoCos issued by systemic relevant banks (commonly called 'too big to fail' banks) as well as in the case of certain write-off bonds qualifying for regulatory capital. An additional temporary exemption applies to certain bail-in-bonds. In particular, for access to the international capital market, the Swiss withholding tax on interest payments represents a competitive disadvantage. In this context, the Swiss Federal Council proposed on 17 December 2014 an updated legislation project regarding a change from the issuer principle to the paying agent principle for Swiss withholding tax on interest payments: only interest payments under, inter alia, bonds to Swiss-resident individual bondholders would be subject to the Swiss withholding tax. Swiss resident bondholders, however, would be entitled to a full refund of such Swiss withholding tax if, inter alia, the income subject to such Swiss withholding tax is properly declared in the income tax return of the Swiss resident bondholder. This legislation project has been put on hold and shall be re-discussed only before the end of the year 2021. Further, bonds, like any other taxable securities, are subject

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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.

Getting the Deal Through

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Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
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Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
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Mediation
Merger Control
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Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
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