THE INTERNATIONAL CAPITAL MARKETS REVIEW

EIGHTH EDITION

Editor
Jeffrey Golden

THE LAWREVIEWS

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PREFACE

This book serves two purposes – one obvious, but the other possibly less so.

Quite obviously, and one reason for its continuing popularity, *The International Capital Markets Review* addresses the comparative law aspect of our readers' international capital markets (ICM) workload and equips them with a reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based, no longer enjoys the luxury – if ever it did – of focusing solely at home within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology more and more permits a practitioner to tackle international issues.

Moreover, the client certainly may have multi-jurisdictional ambitions or, even if unintended, its activities often may risk multi-jurisdictional impact. In such cases, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

Ironically, the second purpose this book aims to serve is to equip its readers to do a better job as practitioners at home. In other words, reading the summaries of foreign lawyers, who can describe relevant foreign laws and practices, is perfectly consistent with and helpful when interpreting and giving advice about one's own law and practice.

As well as giving guidance for navigating a particular local, but, from the standpoint of the reader, foreign scene, the comparative perspectives presented by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory frameworks, thereby also giving lawyers, in-house compliance officers, regulators, law students and law teachers an opportunity to create a checklist of relevant considerations both in light of what is or may currently be required in their own jurisdiction but also as to where things there could, or should, best be headed (based on best practices of another jurisdiction) for the future.

Thus, an unfamiliar and still-changing legal jurisdiction abroad may raise awareness and stimulate discussion, which in turn may assist practitioners to revise concepts, practices and advice in both our domestic and international work. Why is this so important? The simple answer is that it cannot be avoided in today's ICM practice. Just as importantly, an ICM practitioner's clients would not wish us to have a more blinkered perspective.

Not long ago, I had the honour of sharing the platform with a United Kingdom Supreme Court Justice, a distinguished Queen's Counsel and three American academics. Our topic was 'Comparative Law as an Appropriate Topic for Courts'. The others concentrated their remarks, as might have been expected, on the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the more theoretical aspects of our discussion and ground them in the specific example of capital markets, and particularly the over-the-counter derivatives market.

Activity in that market, I said, could be characterised as truly global. More to the point, I posited, that, whereas you might get varied answers if you asked a country's citizens whether they considered it appropriate for a court to take account of the experiences of other jurisdictions when considering issues of constitutional law, in my view derivatives market participants would uniformly wish courts to at least be aware of and consider relevant financial market practice beyond their jurisdictional borders and comparative jurisprudence (especially from English and New York courts, which are most often called upon to adjudicate disputes about derivatives), even when traditional approaches to contract construction as between courts in different jurisdictions may have differed.

In such cases, with so much at stake given the volumes of financial market trading on standard terms and given the complexity and technicality of many of the products and the way in which they are traded and valued, there appears to me to be a growing interest in comparative law analysis and an almost insatiable appetite among judges to know at least how experienced courts have answered similar questions.

There is no reason to think that ICM practitioners are any differently situated in this regard, or less in need of or less benefited by a comparative view when facing up to the often technical and complex problems confronting them, than are judges. After all, it is only human nature to wish not to be embarrassed or disadvantaged by what you do not know.

Of course, it must be recognised that there is no substitute for actual and direct exchanges of information between lawyers from different jurisdictions. Ours should be an interdependent professional world. A world of shared issues and challenges, such as those posed by market regulation. A world of instant communication. A world of legal practices less constrained by jurisdictional borders. In that sense and to that end, the directory of experts and their law firms in the appendices to this book may help to identify local counterparts in potentially relevant jurisdictions (three new jurisdictions – China, the Netherlands and Switzerland – having been added this year). And, in that case, I hope that reading the content of this book may facilitate discussions with a relevant author.

In conclusion, let me add that our authors are indeed the heroes of the stories told in the pages that follow. My admiration for our contributing experts, as I wrote in the preface to the last edition, continues. It remains, too, a distinct privilege to serve as their editor, and once again I shall be glad if their collective effort proves helpful to our readers when facing the challenges of their ICM practices amid the growing interdependence of our professional world.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2018

Chapter 23

SWITZERLAND

Francois M Bianchi, Daniel Bono, Andrea Giger and Till Spillmann[1]

I INTRODUCTION

For a better understanding of the Swiss capital market, it is worth highlighting that Switzerland is neither a member of the European Union (EU) nor the European Economic Area (EEA). Consequently, the EU prospectus rules and other EU or EEA capital markets rules and regulations are not applicable in Switzerland. Since Swiss capital market participants largely depend on free and unrestricted access to the European (capital) markets, Switzerland regularly adapts its legislation to EU equivalence requirements to facilitate market access. As part of Switzerland's efforts to meet EU-equivalent standards, it is in the process of implementing a comprehensive reform package fundamentally changing the Swiss financial market regulatory framework, which is expected to enter into force by January 2020. One of the aims of the new rules is the regulatory harmonisation with the relevant EU rules (MiFID II,[2] MiFIR,[3] the Prospectus Directive,[4] the PRIIPs Regulation)[5] with adjustments made to reflect the specific Swiss circumstances.

The Swiss initial public offering (IPO) market was strong in 2018, with 10 IPOs during the first three quarters of 2018 on the SIX Swiss Exchange Ltd (exceeding the total of six companies joining the Swiss stock exchange in 2017) with an aggregate issue volume of more than 3.7 billion Swiss francs and a total market capitalisation of more than 9.5 billion Swiss francs. In the third quarter, SIX Swiss Exchange accounted for one of the three largest initial public offering volume in Europe in 2018. The Swiss debt market is also very active, particularly with respect to bonds and structured notes issues. According to the SIX website, as at September 2018, a total of 1,850 bonds were listed on SIX (of which 1,071 were Swiss bonds denominated in Swiss francs, 640 were foreign bonds denominated in Swiss francs, and 139 bonds were not denominated in Swiss francs). Further, there exists an active market for unlisted bonds or notes and privately placed debt securities.

1 Francois M Bianchi, Daniel Bono and Till Spillmann are partners and Andrea Giger is a senior associate at Niederer Kraft Frey AG.

2 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

3 Regulation (EU) No. 600/2014 on markets in financial instruments.

4 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

5 Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

i Structure of the law

The relevant Swiss capital market legislation governing the primary and secondary securities markets includes:

- *a* Swiss Code of Obligations governing the prospectus requirements for the public offering of equity and debt securities;
- *b* Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) governing the organisation and operation of financial market infrastructures, and the conduct of financial market participants in securities and derivatives trading;
- *c* Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIO) implementing the provisions of the FMIA;
- *d* Ordinance of the Swiss Financial Market Supervisory Authority on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIO-FINMA) implementing the provisions of the FMIA;
- *e* Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), stipulating provisions regarding supervision of the financial markets by the Swiss Financial Market Supervisory Authority (FINMA);
- *f* Ordinance of the Takeover Board on Public Takeover Offers providing rules on the requirements for public takeover offers;
- *g* Regulations of the Takeover Board, stipulating regulations governing the organisation of the Takeover Board;
- *h* the listing rules and all other rules, directives, circulars, prospectus schemes of SIX Swiss Exchange Ltd governing the listing and trading in securities on the SIX Swiss Exchange and laying down the principles for maintaining listings of equity and debt securities on the SIX Swiss Exchange;

  Guideline for Notes issued by Foreign Borrowers dated 1 September 2001 of the Swiss Bankers' Association;
- *i* Federal Act on Collective Investment Schemes (CISA), governing the issue of structured products;
- *j* Federal Ordinance on Collective Investment Schemes, implementing the provisions of the CISA;
- *k* Federal Act on Intermediated Securities, governing the custody, transfer and related issues of securities held with regulated custodians;
- *l* Federal Act on Banks and Savings Banks (the Banking Act);
- *m* Federal Ordinance on Banks and Savings Banks; and
- *n* Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act) and the corresponding implementing ordinances.

ii Stock exchange regulation

The principal stock exchange for the listing and trading of equity and debt securities, structured products, derivatives and other securities in Switzerland is the SIX Swiss Exchange in Zurich. It has adopted – based on the principle of self-regulation – a comprehensive set of its own regulations, directives and notices governing, *inter alia*, the requirements for admission to trading and listing and disclosure requirements. The second Swiss stock exchange is the BX Swiss, in Berne, which is comparatively small and mainly focuses on domestic issuers. Since 2018, BX Swiss is a wholly owned subsidiary of the Börse Stuttgart GmbH.

iii Structure of the courts

In principle, the Swiss court system is based on a three-tier hierarchy: the first-instance cantonal courts (which apply both cantonal and federal law), the second-instance cantonal appellate courts and the Federal Supreme Court (the highest judicial authority in Switzerland). As an exception to the principle of double instance at cantonal level, there are certain specific matters that are brought directly before an inferior federal court (e.g., the Federal Administrative Court or the Federal Criminal Court) and other matters that can be directly decided by the exclusive first cantonal instance. Some cantons have established a commercial court as a sole cantonal instance competent for certain disputes relating to commercial matters. Judgments of the first-instance cantonal courts are generally subject to appeal to the second-instance cantonal appellate courts, and judgments of an inferior federal court, the second-instance cantonal courts or the sole cantonal instance courts are subject to appeal to the Federal Supreme Court, if certain conditions are met. No special courts with jurisdiction over securities-related actions exist in Switzerland.

iv Regulatory bodies

FINMA is an independent regulatory body monitoring developments at financial institutions under its supervision and the financial market in Switzerland. FINMA has statutory authority to supervise securities exchanges, licensed banks, insurance companies, securities dealers and collective investment schemes. It authorises their operations to engage in financial market activity and ensures that the supervised institutions comply with the requisite laws, regulations and ordinances and maintain their licensing requirements. FINMA has certain limited powers to enforce the provisions of the FMIA and to proceed and take administrative measures against any failure to disclose shareholdings, insider trading and market manipulation. As a general rule, decisions of FINMA may be challenged at the Federal Administrative Court, the decisions of which may be appealed at the Federal Supreme Court. The prosecution of insider trading and market manipulation is the responsibility of Switzerland's attorney general.

The SIX Swiss Exchange is a self-regulated organisation whose investigative bodies supervise and enforce compliance with its rules, regulations and directives. Any appeals against a sanction decision made by a SIX Exchange regulation or disputes between the SIX Swiss Exchange and any listed company concerning the listing, delisting or trading of securities on SIX are filed with the Sanctions Commission or the Independent Appeals Board and can subsequently be submitted to the Board of Arbitration.

The Swiss Takeover Board enacts rules on public takeover offers and public share buybacks and supervises compliance with those rules. Decisions of the Takeover Board may be challenged before FINMA and, finally, the Federal Administrative Court.

In contrast to other jurisdictions (e.g., the United States, the EU and the EEA), in principle there is currently no requirement for a prospectus to be filed with, or approved in advance by, a regulatory authority in connection with the offering of equity or debt securities in, from or into Switzerland. This constitutes a major advantage for Swiss securities offerings with respect to time to market. However, with the contemplated implementation of the new prospectus regime (as discussed further in Section II.i), a requirement for *ex ante* approval of prospectuses, including in the case of secondary public offerings, will be introduced.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Of the numerous developments affecting debt and equity offerings in Switzerland, the following are of particular interest.

Entry into force of Swiss Financial Market Infrastructure Act

The FMIA entered into force on 1 January 2016, establishing a regulatory framework for financial market infrastructure and trading venues, disclosure of significant shareholdings in listed companies in Switzerland, insider trading and market manipulation, and public takeovers in conformity with the European Market Infrastructure Regulation (EMIR) and the Dodd–Frank Act. The FMIA also introduced regulations applicable to the over-the-counter (OTC) derivatives market.

With the enactment of the FMIA, significant changes to the rules regarding the disclosure of significant shareholdings in companies listed on a Swiss stock exchange have been introduced (e.g., disclosure of the direct acquirer and beneficial owner instead of the entire holding chain, introduction of a new definition of 'beneficial owner', filing by email and facsimile is considered sufficient). Furthermore, a new and separate reporting obligation of third parties having discretionary power to exercise voting rights has been introduced in addition to the reporting obligation of the beneficial owner.

Swiss Federal Financial Services Act to enter into force

The Swiss Federal Council presented the draft of the federal Financial Services Act (FinSA) on 4 November 2015, which has now been adopted by both chambers of Parliament and is currently expected to enter into force as of 1 January 2020. The FinSA will set out cross-sector rules for the provision of financial services, introduce a comprehensive and harmonised prospectus regime to meet EU equivalence requirements while reflecting specific Swiss circumstances, and will be applicable to all public offerings of financial instruments and all securities to be admitted to trading on a trading platform in Switzerland.

With regard to the offering of equity and debt securities, fundamental innovations of the Swiss capital markets regulation include:

a the requirement for approval for all offering and listing prospectuses by a new regulatory body (the 'review body') that is licensed and supervised by FINMA, irrespective of whether the securities are admitted to trading on a Swiss trading platform;

b an obligation to publish a prospectus not only for primary but also for secondary public offerings of securities in Switzerland;

c the codification of the private placement exemption and other exemptions to publish a prospectus in line with accepted Swiss standards and the EU Prospectus Directive;[6] and

d the requirement to prepare a basis information document in the case of offerings of financial instruments other than shares (or comparable equity securities) or debt instruments without derivative character to retail investors containing all necessary information to enable the client to make a decision about its investment, presented in an easily comprehensible way and designed to make financial instruments easier to compare.

6 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

While, in principle, the review body would have to approve a prospectus prior to a public offering or an admission of securities to trading on a Swiss trading platform, a prospectus for certain debt securities (e.g., bonds) can be approved after its publication, provided certain requirements are met. By preserving the advantage of the current approval process for listing prospectuses in the Swiss debt capital markets, Switzerland continues to ensure attractive time-to-market conditions for issuers of debt instruments.

Another significant change brought in by the FinSA is that prospectuses prepared under a foreign legislation may be approved by the review body if they are prepared according to international standards established by international organisations of securities regulators and the disclosure and ongoing reporting duties are equivalent to the requirements set forth in the FinSA.

Swiss Federal Financial Institutions Act to enter into force

The Swiss Federal Council presented the dispatch on the Federal Financial Institutions Act (FinIA) on 4 November 2015, which has been adopted by both chambers of Parliament and is expected to enter into force as of 1 January 2020. The FinIA essentially harmonises the authorisation rules for financial service providers and will, for the first time in Switzerland, subject independent portfolio managers and trustees to licensing requirements and continuous prudential supervision.

Circular No. 4 of SIX Swiss Exchange regarding the practice for the listing of bonds

In June 2016, the Six Swiss Exchange issued Circular No. 4 regarding the practice for the listing of bonds, clarifying that practice and providing additional guidance, in particular, on the listing of high-yield bonds and asset-backed securities. Circular No. 4 restates the SIX Regulatory Board's decision in October 2014 clearing the ground for the listing of high-yield bonds in Switzerland. The Regulatory Board's decision to allow the alternative fulfilment of the listing requirements by a substitute guarantor that is a direct or indirect subsidiary or sister company of the issuer under certain circumstances (e.g., that the guarantor subsidiaries and affiliate companies account for a significant share of group earnings before interest and tax) represented a change in its practice to facilitate the listing of high-yield bonds on SIX. It also introduced more stringent disclosure obligations to address any investor concerns resulting from this change in practice.

Circular 2018/2 of FINMA on the duty to report securities transactions

FINMA's Circular 2018/2 on the reporting of securities transactions entered into force on 1 January 2018. The purpose of this Circular is to impose reporting duties in order to improve transparency in securities trading. It introduces, among other things, a number of significant changes, such as the reporting of certain derivatives transactions in a securities journal and the obligation to provide transaction-specific beneficial ownership information.

FINMA Guidelines regarding initial coin offerings

Switzerland is one of the most popular places for initial coin offerings (ICOs). To provide increased legal certainty regarding regulatory matters and streamline the procedure for obtaining negative clearance regarding certain regulatory aspects of ICOs, FINMA published ICO guidelines in February 2018. These guidelines provide helpful clarification of FINMA's position on a number of issues.

FINMA distinguishes three categories of tokens:

a Payment tokens (i.e., cryptocurrencies), which are intended to be used as a means of payment and do not grant any claims against the issuer of the token. Payment tokens are subject to anti-money laundering regulations but will not be treated as securities.

b Utility tokens, which grant digital access to an application or service. They do not qualify as securities provided that their sole purpose is to confer digital access rights to an application or service and if the utility token can already be used in this way at the point of issue.

c Asset tokens, which represent assets such as a debt or equity claim against the issuer, or which enable physical assets to be traded on the blockchain. FINMA qualifies asset tokens as securities, which means that there are securities law requirements for trading asset tokens, and civil law requirements under the Swiss Code of Obligations (e.g., prospectus requirements).

If a token combines the functions of more than one of these categories, it is considered a hybrid token and has to comply with the requirements of all categories concerned.

While FINMA remains committed to ensuring that serious innovators can launch their ICO projects lawfully, it has been monitoring the sector closely and has taken enforcement action against ICO business models that violate or circumvent supervisory law. FINMA has also repeatedly drawn attention to the risks that ICOs pose for investors.

ii Developments affecting derivatives, securitisations and other structured products

As stated in subsection i, the FMIA entered into force on 1 January 2016. Since the major part of derivative trading involving parties in Switzerland is cross-border and the majority of transactions are entered into with counterparties located in the European Union, the newly introduced derivatives regulation is primarily a reflection of EU law. In short, the FMIA provides for three duties:

a clearing requirements via a central counterparty (CCP) for OTC derivatives;

b reporting obligations for OTC and exchange-traded derivatives; and

c risk mitigation measures for uncleared derivative transactions.

With respect to clearing requirements, FINMA has confirmed a clearing obligation for OTC standardised interest rate and credit derivatives (with the obligation for interest rate swaps limited to the euro, British pound, Japanese yen and US dollar). The categories of derivative that are in scope are set out in Annex 1 to the FMIO-FINMA, which entered into force on 1 September 2018. The clearing may be done through a Swiss CCP or a foreign CCP recognised by FINMA. The new regime will enter into force as of 1 March 2019 for transactions between members of authorised or recognised CCPs, 1 September 2019 for transactions between a clearing member and large financial counterparties, and 1 March 2020 for all other derivatives transactions.

With the entering into force of the new implementing provisions of the FMIA, reporting obligations have since have been enacted with the aim of creating a level playing field with the EMIR and the Dodd–Frank Act, and are comparable in scope to the EMIR. In April 2017, pursuant to its *Aufsichtsmitteilung 02/2017*, FINMA approved the first Swiss trade repository (SIX Trade Repository) and the first foreign trade repository (Regis-TR). This triggered the starting date for the obligation of Swiss market participants to report their derivative transactions to a trade repository. Although the FMIO provided for a phasing in of the new reporting obligation over a period of six to 12 months depending on the categorisation of counterparties, in summer 2018, the Swiss Federal Council decided to extend the transitional period for reporting of transactions by small non-financial counterparties (NFC-) until 1 January 2024. However, this decision does not affect the already implemented reporting obligation for financial counterparties and large non-financial counterparties (NFC+).

With respect to risk mitigation measures for derivative transactions not cleared through a FINMA authorised or recognised CCP, these types of derivative transactions will be subject to risk mitigating obligations, such as:

a operational and counterparty risk mitigation measures (i.e., timely confirmation of the terms of derivative transactions, portfolio reconciliation procedures, dispute resolving procedures and regular portfolio compression);

b a daily valuation of derivatives at market prices; and

c the exchange of appropriate collateral to mitigate the counterparty risk.

iii Cases and dispute settlement

Lawsuits involving breaches of securities law are not common in Switzerland. In its decision of 5 March 2018, the Federal Supreme Court held that the offer prospectus in connection with the issue of a (convertible) bond by a company did not contain the legal minimum disclosure requirements, which results in the (convertible) bonds not being exempt from the scope of the Banking Act. The Federal Supreme Court concluded that in view of the fact that the prospectus was not compliant with the minimum disclosure information, the issued financial instruments qualify as public funds and confirmed FINMA's decision to liquidate the company because of non-licensed acceptance of public funds. The decision underscores the significance of the preparation of a bond offer prospectus that complies strictly with all legal requirements.

No other relevant decisions were published in 2017–2018 in the area of Swiss capital market law.

iv Relevant tax and insolvency law

Corporate tax reform

Switzerland has been undergoing major corporate tax reforms. The third corporate tax reform package proposed by the Swiss Federal Council intended to abolish certain tax advantages for holding, domiciliary and mixed companies pursuant to an agreement with the European Union as well as implementing tax advantages deemed to be in line with EU rules.

The third corporate tax reform package hit a political roadblock when voters rejected it in a referendum in February 2017, with an unexpectedly high proportion of 59.1 per cent of the popular vote. While the Federal Council announced its intention to propose a new reform package as soon as possible, the referendum added a lot of uncertainty, in part because it is unclear whether a new package will be in place within the time frame agreed with the European Union.

In the meantime, the Federal Council has proposed a well-balanced new reform package and submitted it to the Swiss Federal Parliament. On 28 September 2018, the Swiss Federal Parliament adopted Tax Proposal 17 with a clear majority. Before the Federal Council can definitively set the date of entry into force, scheduled for 1 January 2020, it is likely that the approval of the Swiss electorate will also become necessary in a referendum. This is likely to be held on 19 May 2019. In parallel, the cantons are pushing ahead with implementation of the provisions of the Federal Tax Harmonisation Act into their cantonal tax laws.

Withholding tax reform

Another troubled Swiss tax reform project relates to withholding tax. Currently, a Swiss issuer of bonds must deduct a withholding tax of 35 per cent from interest, and certain other, payments made to investors inside and outside Switzerland (debtor-based regime).

Because it may be difficult for investors outside Switzerland to reclaim Swiss withholding tax, the current system makes it impracticable for Swiss issuers to directly access investors outside Switzerland. This had a material adverse effect on Swiss capital markets for decades. To address this issue, the Swiss Federal Council published draft legislation in December 2014 to, among other things, replace the current debtor-based regime with a paying agent-based regime for Swiss withholding tax, whereby a withholding would be required only for Swiss investors. The Federal Council withdrew the draft legislation in June 2015 and mandated the Swiss Federal Finance Department to appoint a group of experts to prepare a proposal for reform of the Swiss withholding tax system. Because of a popular initiative to enshrine banking secrecy in the Swiss constitution, this project was put on hold in 2015 pending the results of the referendum. To facilitate compliance by banks with the tougher capital requirements under Basel III prior to the reform of the Swiss withholding tax system, the Swiss Federal Council has exempted contingent capital instruments and bail-in bonds from the withholding tax until 2021.

On 9 January 2018, its sponsors withdrew the banking secrecy initiative. Following this withdrawal, the Swiss Federal Council and the group of experts have recommenced the withholding tax reform project. Implementation of the reform is expected to take about two years.

v Role of exchanges, CCPs and rating agencies

Financial market infrastructures (FMIs) in Switzerland include stock exchanges and other trading venues, CCPs, central securities depositories (CSDs), trade repositories and payment systems. FMIs require authorisation from FINMA before they can commence operations. Stock exchanges and trading venues must establish their own independent regulatory and monitoring organisation appropriate to their activities under FINMA supervision. CCPs shall require deposits of collateral in the form of initial margins, variation margins and default fund contributions from all trading participants to enable it to settle transactions in an orderly way. Furthermore, CCPs must have adequate capital and diversify their risk appropriately and must separate their own assets, receivables and liabilities from the collateral, receivables and liabilities of its participants. CSDs must ensure the proper and lawful custody, recording and transfer of securities and that the number of securities deposited with them equals the number of securities credited to their clients.

vi Other strategic considerations

Revised disclosure office notice of SIX Exchange Regulation (Notice I/09)

As part of the revision of Notice I/09 in September 2018, a new provision was introduced, stating that, upon expiry of the lock-up period, a reporting obligation for the lock-up group arises in every case to enhance transparency of the information provided on the electronic publication platform. In addition, it newly provides for the easing provisions regarding the disclosure of lock-up groups to be applicable also to lock-up groups not meeting their disclosure obligation in the prospectus.

Stock exchange directive on use of alternative performance measures to enter into force

The Regulatory Board of the SIX Swiss Exchange published a new directive on 8 June 2018, on the use of alternative performance measures (APMs) in response to the fact that the use of APMs has become increasingly common in listed entities' marketing communications, with many listed companies publishing APMs in addition to their financial reporting pursuant to applicable reporting standards. The directive sets out the principles for using APMs and requires related disclosures to be clear and transparent in order to mitigate the risk of investors being misled by APMs in view of their variety and limited comparability. The directive is applicable to all issuers whose equity securities are listed on the SIX Swiss Exchange and whose registered offices are in Switzerland, and to foreign issuers whose equity securities are listed on the SIX Swiss Exchange but not in their home country. It will be applicable for the first time to annual financial statements for financial years beginning on or after 1 January 2019. The directive does not apply to prospectuses relating to the listing of securities and investor presentations.

III OUTLOOK AND CONCLUSIONS

The continuing comprehensive reform of the Swiss financial market regulatory framework will usher in a new era of securities regulation and is essential in aligning Swiss regulations to the EU equivalence standards, in order to preserve access to the European financial markets. In particular, the introduction of a new harmonised prospectus regime aiming to establish a level playing field with corresponding EU prospectus regulations is an important step towards ensuring that Switzerland's capital markets environment remains attractive and keeps up with international standards. While parts of the new regulation will be in line with well-established Swiss market practice (e.g., the content of prospectus and private placement exemptions), other areas will require special attention from market participants and advisers.

Appendix 1

ABOUT THE AUTHORS

FRANÇOIS M BIANCHI

Niederer Kraft Frey AG

For more than three decades, François Bianchi has specialised in banking and banking regulation. He advises and represents financial institutions in regulatory proceedings before FINMA, the Swiss Financial Market Supervisory Authority. He also has a strong practice in white-collar crime and investigations.

François advises issuing houses, issuers and institutional investors in debt and equity capital market transactions, structuring and registration of collective investment schemes, structuring of derivative transactions, actively managed certificates, structured finance transactions, euro medium-term notes, warrant and structured products programmes.

DANIEL BONO

Niederer Kraft Frey AG

Daniel Bono regularly represents Swiss and international clients in some of the largest and most complex capital markets, banking and corporate/M&A transactions in Switzerland.

His practice focuses on capital markets transactions, derivatives and structured finance, corporate governance, general securities law matters as well as mergers and acquisitions. Daniel has represented investment banks, issuers and investors in a wide range of corporate and capital markets transactions, including initial public offerings, rights offerings, listings on the SIX Swiss Exchange, exchange offers and other liability management transactions, public offerings and private placements of debt securities, including regulatory capital instruments, asset-backed securities, high-yield bonds and equity-linked debt securities.

ANDREA GIGER

Niederer Kraft Frey AG

Andrea Giger's practice focuses on complex international and domestic private and public M&A, capital markets and corporate finance transactions. She also advises on general securities regulation and other corporate and commercial law matters.

Andrea has experience in representing investment banks and issuers in a range of capital market transactions, including initial public offerings and rights offerings. Andrea also has expertise in advising corporates and private equity investors on public and private M&A transactions in various industries, including public to private transactions, subsequent corporate reorganisation topics and domestic and cross-border acquisitions. Her practice includes advising borrowers and lenders on domestic and cross-border debt financing transactions, as well as other corporate and commercial law matters.

TILL SPILLMANN

Niederer Kraft Frey AG

Till Spillmann specialises in large and complex international and domestic private and public M&A, capital markets and corporate finance transactions. In addition, he advises on corporate governance and other corporate and commercial law matters.

During the past decade, Till has built remarkable expertise in advising private equity firms and corporate organisations on M&A transactions, including public to private transactions and subsequent corporate reorganisation topics. Till regularly advises underwriters and issuers on all aspects of capital market transactions, with a focus on equity capital market transactions, such as initial public offerings and rights offerings. Till's practice also includes advising lenders, borrowers and private equity sponsors on complex financing transactions, in particular acquisition, leveraged, syndicated and real estate financing transactions.

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