IN-DEPTH

International Capital Markets

SWITZERLAND

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International Capital Markets

EDITION 13

Contributing Editor

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In-Depth: International Capital Markets (formerly The International Capital Markets Review) is an incisive overview of the legal and regulatory frameworks governing the capital markets in major jurisdictions worldwide. It offers practical guidance on a range of key issues, including the regulators' recent enforcement activities, prospectus requirements and other mandatory disclosures, tax considerations and much more.

Generated: December 13, 2023

Switzerland

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Summary

Introduction

Although a small country, Switzerland is one of the most important financial centres in Europe. SIX Swiss Exchange (SIX) belongs to the three largest European stock markets. The regulatory environment is issuer friendly, including due to the fact that there is almost no litigation against issuers, and the stock exchanges tend to be open for flexible solutions to accommodate issuers' needs, to the extent in line with the regulatory requirements. Besides these characteristics of Switzerland as a financial centre, Switzerland also profits from a high quality of living, a very stable currency and a friendly tax environment, including the possibility to obtain advance tax rulings.

i Swiss legal landscape

The Swiss capital market law landscape changed recently. The changes were, in particular, triggered by the entry into effect of the Financial Services Act (FinSA), and the Financial Institutions Act (FinIA) on 1 January 2020. The rules of the FinSA are detailed in the respective ordinance, the Financial Services Ordinance.

The FinSA governs the provision of financial services and the offering of financial instruments in Switzerland. It introduced a modern, comprehensive and harmonised prospectus regime applicable to all financial instruments, including equity and debt securities. Unless an exception is available, the prospectus duty applies either in the case of a public offering of securities in Switzerland or in the case of a listing of securities on a Swiss stock exchange. The FinSA also introduces a key investor information document (KIID) for financial instruments, which is required if securities are offered to retail investors, except for equity securities or plain vanilla bonds.

The FinIA essentially harmonises the licensing requirements for financial service providers, including securities firms.

The second, more recent, change concerns Swiss issuers, respectively the corporate law rules pursuant to which they are organised, which are the rules on the Swiss stock corporation. These rules are provided for in the Swiss Code of Obligations (CO) and have been comprehensively overhauled, specifically also with respect to listed companies. The revised rules entered into effect on 1 January 2023.

A further important act is the Financial Market Infrastructure Act (FinMIA), which stems from 2015. The FinMIA regulates financial market infrastructures such as stock exchanges, central counterparties, central securities depositories and payment systems. Furthermore, the FinMIA provides for rules on trading of OTC derivatives, disclosures of major shareholders, public takeovers, and insider trading and market manipulation.

Beyond the regulatory rules provided for in the FinSA, the FinIA and the FinMIA (and the private law rules provided for in the CO), further relevant capital market or more broadly financial law rules are, in particular, provided for in the Swiss Banking Act (BA) and the Swiss Collective Investment Schemes Act (CISA). The BA regulates banks and provides for a licence for Fintech companies. The CISA sets mainly forth the requirements concerning the establishment of Swiss collective investment schemes and the marketing of foreign collective investment schemes in Switzerland.

ii Relevance of international legislation

Switzerland is not a member of the European Union. Therefore, it has its own laws in the capital markets law field. However, some of them are – to a lesser or greater extent – modelled after EU law. The most noteworthy example is the new prospectus regime in the FinSA, which is based on the EU Prospectus Regulation. Furthermore, the rules on KIIDs in the FinSA are, for instance, based on the EU Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation and the rules on derivative trading in the FinMIA on the EU Market Infrastructure Regulation.

On an international level, there is no specific legislation directly applicable in the field. However, the relevant governmental and privately organised bodies, such as the SIX, consider international standards when issuing regulations – for instance of the International Organization of Securities Commissions concerning prospectuses, the International Capital Market Association (ICMA) concerning sustainable bonds and the Organization for Economic Cooperation and Development concerning corporate governance.

iii Regulators

The Swiss Financial Market Supervisory Authority (FINMA) is Switzerland's main financial market regulator. It grants licences to and performs the ongoing supervision of, among others, banks, securities firms and stock exchanges, which are privately organised in Switzerland. FINMA issues ordinances detailing the federal acts, as well as various documents specifying its practice (in particular the FINMA Circulars).

Switzerland has a longstanding tradition of self-regulation. Certain supervisory activities are thus not directly performed by FINMA but by privately organised institutions licensed or approved by FINMA.

The most important examples in the capital market field are the stock exchanges, which are private bodies that regulate themselves. The SIX is by far the most important Swiss stock exchange. The second Swiss stock exchange is the BX Swiss (BX). The two stock exchanges particularly specify the listing requirements and monitor whether issuers are complying with them. The central document for issuers are the listing rules of SIX and BX, which set forth the listing requirements and the duties to be fulfilled in order to maintain the listing. The bodies that review and approve offering or listing prospectuses are also private bodies. There are two such bodies in Switzerland, one of the SIX and one of the BX.

Beyond FINMA and these privately organised bodies, the Swiss Takeover Board (TOB) is a further important institution. The TOB is a governmental body overseeing public takeovers relating to Swiss companies listed in Switzerland or foreign companies with a primary listing in Switzerland, including share buy-back programmes.

The year in review

i Notable transactions and further market developments

There were only two IPOs that took place since Q3 2022. Both were spin-offs from well-known Swiss companies. In October 2022, Accelleron, the turbocharging business of ABB, was admitted to start trading on SIX, which marked the completion of Accelleron's spin-off from ABB. Very recently, Novartis executed the separation of its generics and biosimilar business Sandoz to create an independent company by way of a 100 per cent spin-off and a listing of the shares of Sandoz on the SIX on 4 October 2023. The market cap of Accelleron was approximately 1.7 billion Swiss francs at the time of the listing, and the market cap of Sandoz was approximately 10.5 billion Swiss francs. The other 15 listings of equity securities since Q3 2022 on the SIX were listings of global depository receipts (GDRs) of Chinese listed companies.

The Swiss debt capital market saw a good year in 2022 in terms of new bond listings, and the trend continues in 2023. In Q1 and Q2 2023 bonds with an overall volume of around 70 billion francs have already been listed on SIX. Particularly noteworthy transactions are difficult to discern. The hottest topic in relation to bonds has probably been the write down of Credit Suisse's Additional Tier 1 (AT 1) bonds in connection with the state-anchored acquisition of Credit Suisse by UBS.

The UBS/Credit Suisse deal has also an impact on the Swiss capital markets otherwise, as the two banks were the largest banking players when it came to equity and debt capital market transactions in Switzerland. With UBS and Credits Suisse becoming one, the choice for issuers seems thus, at a first glance, to have decreased. However, Swiss market participants are confident that old or new players, including foreign investment banks, will fill the gap.

In the field of public takeovers, there has been more activity than in previous years. The most significant transaction since summer 2022 was the tender offer by Mexican Fomento Económico Mexicano SAB for all shares in SIX-listed Valora at a valuation of Valora of around 1.1 billion Swiss francs (except for the UBS/Credit Suisse acquisition, which was technically a merger and not a public takeover). Not in terms of value but in terms of media attention, the most noteworthy transaction was probably the takeover battle concerning SIX-listed Global Asset Management (GAM).

ii Developments affecting debt and equity offerings

There have not been many developments since last summer in the capital markets regulatory field. For already listed issuers, an important topic is the ongoing specifications provided by SIX on the disclosure of price-sensitive facts (ad hoc disclosure). In particular, SIX takes a firm stance against labelling marketing announcements as ad hoc disclosures and mixing publications of price-relevant facts with marketing announcements. The latter requirement is sometimes not easy to accommodate in practice. Ad hoc disclosures may include additional information on top of merely the price-sensitive fact. Whether such information is additional information that is necessary or helpful for market participants to appreciate the price-sensitive fact – being still permissible –, or a mere marketing announcement can be difficult to determine.

The most noteworthy development was the already mentioned recent overhaul of the private law rules on Swiss stock corporations, which considerably affect Swiss issuers. The main changes for listed companies are that delistings will require a qualified majority resolution by the general meeting of shareholders (whereas currently delistings can still be decided upon, as a rule, by the board of directors), and the rights of minority shareholders will be enhanced through the reduction of various thresholds, for example, for initiating a special investigation (5 per cent of the share capital or votes required), for convening a general meeting (5 per cent of the share capital or votes required), or placing items on the agenda of a general meeting and proposing motions relating to agenda items (0.5 per cent of the share capital or votes required).

Furthermore, according to Article 734f CO, listed companies that exceed certain thresholds must either maintain a representation of both genders of at least 30 per cent on the board level and at least 20 per cent on the executive management level, or explain in their remuneration report why these benchmarks have not been met and explain measures to promote the gender less strongly represented (comply or explain). However, this rule applies for the first time only in the financial year beginning five years (for the board of directors) or 10 years (for the executive management) after it came into force on 1 January 2021. More pressure comes from proxy advisers. The guidelines of Institutional Shareholder Services and Glass Lewis require boards of Swiss listed companies to have, as a rule, a representation of both genders of at least 30 per cent on the board level from 2022 onwards.

Another environmental, social and governance (ESG) topic regarding which compulsory rules have been enacted in Switzerland concerns non-financial reporting. Swiss companies with listed debt or equity instruments that have more than 499 employees, and exceed a yearly balance sheet total of 20 million francs or yearly sales of 40 million francs, are obliged to prepare and publish a sustainability report. The respective duties are provided for in Articles 964a et seq. CO. The report must cover environmental matters, in particular CO_2 goals, social issues, employee-related issues, and human rights and anti-corruption compliance. The first report under the new rules must be published in 2024 covering the financial year 2023. The report must be approved and signed by the board of directors and approved by the general meeting of the shareholders. The duties are thus definitively duties to be taken care of at the board level. Companies already may issue a report pursuant to international standards if they ensure that it complies with the Swiss statutory information requirements. Furthermore, the Swiss government has recently announced its intention to assess a possible adaptation of the Swiss regime to the more extensive disclosure obligations under the new Corporate Sustainability Reporting Directive of the EU.

In the wake of the overhaul of Swiss stock corporation law, also the Swiss Code of Best Practice for Corporate Governance (SCBP) was revised. The SCBP is published by economiesuisse, a private Swiss business federation. In conjunction with its non-binding nature, the SCBP is a typical example of soft law. The revised version of the SCBP was published in February 2023. The SCBP provides for corporate governance standards in the form of non-binding recommendations addressing in particular Swiss listed companies. It follows a comply or explain approach, in that it allows companies to deviate or refrain from implementing the SCBP's recommendations if deviations are disclosed transparently and an explanation for the deviation is provided. The revised SCBP does not contain many innovations; however, considering its length and level of detail it is a good resource for best corporate governance practices, in particular, but not only, for Swiss listed companies.

On the debt side, it is also the ESG buzzwords that are responsible for the probably most important development: sustainable bonds. A legal definition of sustainable bonds is currently not available in Switzerland. The SIX has, however, introduced flags for green, social, sustainability and sustainability-linked bonds that are listed on the SIX. To be eligible for one of these categories and flagged accordingly by the SIX (including on its website), the bonds must fulfil certain criteria. Most importantly, the bonds must comply with the ICMA principles and guidelines for the applicable category, which are thus also the relevant standard for Switzerland listed sustainable bonds.

iii Developments affecting derivatives, securitisations and other structured products

In the derivatives, securitisation and structured products field there have not been many developments in the past year. The FINMA Financial Market Infrastructure Ordinance (FinMIO-FINMA) has been revised, which details the FinMIA, among others, when it comes to derivative transactions. Transactions involving derivatives with securities as underlying that are admitted to trading on a trading venue must be reported by the participants to the applicable trading venue and included by the trading venue in its market surveillance. The revised FinMIO-FINMA specifies the content of the reports concerning such transactions. Furthermore, it updates the catalogue of interest rate derivatives subject to a clearing requirement. The revised FinMIO-FINMA entered into effect on 1 February 2023.

In the securitisation field, from 2021, an important legislative project was the Swiss legal framework for blockchain and distributed ledger technology (DLT) companies. The legal framework introduced uncertificated register securities. Such securities allow for the legally secure issuance and transfer of rights by way of an entry in decentralised registers, such as blockchains, without a written instrument being required for their transfer. The respective rules are set forth in Articles 973d et seq. CO. Switzerland has thus created – as one of the first jurisdictions worldwide – a proper legal basis for security tokens (i.e., digital tokens that represent financial rights such as equity interests or bonds).

iv Cases and dispute settlement

The most prominent securities litigation concerns the write down of AT 1 bonds in connection with the UBS/Credit Suisse deal. On the basis of an emergency ordinance, FINMA ordered Credit Suisse to write down its AT1 bonds because the extraordinary government support provided to Credit Suisse in connection with the UBS acquisition arguably triggered such write down. The write down would, if upheld, entail the nullity of all rights of the bondholders, including any rights to any principal or interest. Considering the potential total loss, a lot of bondholders are seeking to overturn the AT1 write down. There are numerous different ways being explored to overturn the AT1 write down, including administrative proceedings to challenge the write-down decision of FINMA; civil proceedings against Credits Suisse (now UBS), in particular under the terms of the bonds; and more creative ways, such as arbitration proceedings against the government pursuant to bilateral investment treaties. More than 2,500 appellants have initiated administrative proceedings to overturn the FINMA decision before the Swiss Federal Administrative Court. Important questions in the proceedings are whether the extraordinary government support for Credit Suisse was indeed a relevant event under the terms of the bonds to trigger the write down, and whether the legal basis in the emergency ordinance was lawful, in particular in terms of the constitutional principle of proportionality. The proceedings are currently pending and it is not yet clear when the Swiss Federal Administrative Court will hand down a decision.

Another noteworthy dispute in the securities field related to a proxy fight concerning GAM. Initially, Liontrust, a London-listed asset manager, made a public takeover offer to the GAM shareholders involving a consideration in Liontrust shares only. The offer was initially supported by GAM's board of directors. It was, among other things, conditioned upon a sale of GAM's fund management services business, which has been a novel condition under Swiss takeover law. A group of shareholders under the name NewGAM opposed the takeover offer by Liontrust from the beginning. NewGAM challenged, among other things, the above-mentioned condition, but without success. The TOB upheld the condition upon the intervention of NewGAM. Furthermore, NewGAM made a partial public cash offer extending to approximately 17.5 per cent of the shares in GAM (which is possible under Swiss law, but rare). By way of this offer and further measures, including a media campaign, NewGAM was apparently successful in convincing a majority of shareholders to not tender their shares into the Liontrust offer. The Liontrust offer thus ultimately failed, and GAM and its board of directors started to focus on NewGAM. Recently, representatives of NewGAM have been elected to the board of directors of GAM, while the previous members of the board of directors of GAM resigned, and the partial tender offer by NewGAM has been declared successful.

v Relevant tax and insolvency law

In the field of tax law, the two most noteworthy developments are actually non-developments due to popular votes. In Switzerland an issuance stamp duty of 1 per cent applies on the value received by Swiss issuers for newly issued shares or other contributions by the shareholder (issuances of bonds are not subject to issuance stamp duty). An exemption on the first 1 million Swiss francs in exchange for ownership rights applies. Furthermore, while no withholding tax is levied on interest deriving from regular loan agreements, interest payments on bonds and similar debt securities by a Swiss issuer are, among other things, generally subject to a 35 per cent withholding tax. Such withholding tax may be recovered by investors resident in Switzerland and, subject to an applicable double tax treaty, also partially or fully by foreign investors. Both of these taxes are considered disadvantageous for Swiss issuers. In particular, even Swiss companies usually issue bonds from abroad, making use of foreign special purpose vehicles for such purposes, subject to certain anti-abuse avoidance rules. Against that background, the Swiss parliament decided to abolish these taxes, respectively aspects in relation thereto, and passed respective legislative proposals. However, the proposals were made subject to a popular vote and the Swiss people voted against them. The taxes described above thus remain in place.

Insolvencies of Swiss companies are in general governed by the Swiss Debt Collection and Bankruptcy Act (DEBA). The DEBA was not revised in substance during the past year. With respect to insolvencies of financial institutions, in particular banks, more specific and detailed provisions apply. The provisions governing insolvencies of banks, provided for in the BA and the respective ordinances, have been revised with effect as of 1 January 2023. The revisions concern mainly legal aspects by including the relevant provisions at the level of the act (the BA) instead of the ordinances. More substantial revisions concerning the rules governing bank insolvencies are to be expected in the wake of the Credit Suisse breakdown (see Section III).

vi Role of exchanges, central counterparties and rating agencies

The SIX, the main exchange in Switzerland, has been very active in the past few years in efforts to further open up the Swiss equity capital market for issuers. There have, in particular, been four initiatives as follows.

The SIX has introduced a new equity segment called Sparks. The new segment offers more relaxed listing requirements compared to those of the main segment and aims to open up the capital market in particular for small and medium-sized enterprises (SMEs) by developing a public equity market specifically designed for them.

The SIX also implemented a new framework for the listing of special purpose acquisition companies (SPACs). For reasons of transparency and investor protection, additional requirements apply to companies seeking a listing as a SPAC (compared to the SIX main segment).

Furthermore, the SIX has established a digital arm, the Swiss Digital Exchange (SDX), a fully integrated trading, settlement and custody infrastructure based on DLT. On SDX, both equity and debt securities can be listed.

The most recent development concerns the regulatory framework for the listing of depositary receipts. This framework has been reviewed with an effective date of 25 July 2022, in particular to accommodate listings of GDRs of Chinese-listed companies in the realm of the China-Switzerland Stock Connect programme.

The China-Switzerland Stock Connect programme was very successful and catered for a good part of the equity listings on the SIX last year. Sparks, SDX and the new SPAC segment have, on the other hand, not seen many issuers yet. The most likely reason is simply the unfortunate timing, as the IPO window has not been open since the initiatives became effective.

Another noteworthy development arises from the DLT and blockchain legislation. Besides the already mentioned facilitation of security token offerings, the legislation also introduced a new authorisation category for DLT trading facilities (or, more plainly, digital asset exchanges). DLT trading facilities stand out because they are entitled to offer services in the areas of trading, clearing, settlement and custody of digital assets (i.e., services throughout the entire trade lifecycle). Furthermore, unregulated companies and individuals can also be admitted as participants (i.e., trade directly). While no DLT trading facility licence has been granted by FINMA to date, a few companies are in the process of obtaining such a licence.

In the field of central counterparties and rating agencies there have not been any specific developments. The rules on central counterparties are provided for in the FinMIA, while Switzerland, unlike for instance the European Union, has no specific regulatory regime concerning rating agencies in place.

Outlook and conclusions

The Swiss debt capital market has remained at least stable in the past year and, including due to the rise of sustainable bonds, should continue to do so, or even grow.

On the other hand, the Swiss equity markets were – like the equity markets worldwide – very quiet in the past year. There are, however, IPOs in the pipeline that hopefully will materialise in the aftermath of the first positive signs, in particular from the US. Such growing IPO activity is also required to kickstart the above-mentioned new initiatives of the SIX, in particular the SME segment Sparks and the digital exchange SDX.

The next year will presumably also bring decisions in the above-mentioned disputes concerning the Credit Suisse AT1 Bonds.

On the regulatory side, the most awaited project in the capital markets law field concerns potential amendments to the FinMIA. They relate, among other things, to derivative trading, disclosures of major shareholders and duties of issuers to maintain the listing, in particular ad hoc disclosure duties and duties to report management transactions. In the derivative trading field, the revision concerns the reports of transactions in OTC derivatives to trade repositories. The new rules shall improve the quality and increase the relevance of the reports by better stipulating the requirements the reports must meet. In the area of disclosures of major shareholders, the 3 per cent reporting threshold is intended to be abolished (the lowest threshold coming then to lie at 5 per cent), existing legal uncertainties are intended to be eliminated and criminal liability is intended to be limited to material breaches of the disclosure duties. All these amendments are welcome. Ad hoc disclosures and management transactions are currently regulated by the listing rules of the stock exchanges, in particular the SIX – in line with the Swiss culture of self-regulation. The contemplated revision of the FinMIA suggests that these duties shall be regulated by the federal government and no longer by the stock exchanges. Whether these 'changes to a running system' are beneficial for market participants may be questioned. A first draft of the revised FinMIA should be available for consultation next year. Thereupon, market participants will have the possibility to comment thereon.

Furthermore, the UBS/Credit Suisse deal will likely also have regulatory impacts. Obviously, the Swiss too big to fail regime did not work when it came to the Credit Suisse breakdown. Therefore, discussions have been initiated about how to amend the regime, and also how to avoid future breakdowns of systemically relevant banks more broadly. A group of experts installed by the Swiss Federal Finance Department made first recommendations to that end, which unsurprisingly concern the provision of liquidity to banks in emergency situations and the capital requirements of banks. The report also mentions that FINMA needs additional tools to supervise institutions more effectively and intervene in a timely manner. Discussions are, however, still in an early stage.

Endnotes

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