Practical Law™

GLOBAL GUIDE 2016/17
CAPITAL MARKETS

ACC Association of Corporate Counsel

Equity capital markets in Switzerland: regulatory overview

Capital Markets Team
Niederer Kraft & Frey Ltd

global.practicallaw.com/8-501-2602

MAIN EQUITY MARKETS/EXCHANGES

1. What are the main equity markets/exchanges in your jurisdiction? Outline the main market activity and deals in the past year.

Main equity markets/exchanges

Zurich-based SIX Swiss Exchange Ltd (SIX) (*www.six-swiss-exchange.com*) operates the principal equity exchange in Switzerland. As of 31 December 2015, the market capitalisation of all SIX-listed shares of issuers domiciled in Switzerland and Liechtenstein was about CHF1.5 trillion. As of 30 June 2016, 262 companies were listed on the SIX.

The only other equity exchange in Switzerland is the BX Berne eXchange (BX) (*www.berne-x.com*). The BX is much smaller than the SIX and mainly targets small and medium-sized Swiss enterprises. As of 30 June 2016, 17 companies were listed on the BX.

Market activity and deals

As of 30 June 2016, there were two initial public offerings (IPOs) on the SIX. VAT Group AG, the leading global manufacturer of high-end vacuum valves and related products and services, successfully completed its CHF621 million IPO, with trading commencing on 14 April 2016. Most recently, Investis Holding AG, a Swiss residential property company, completed its CHF148 million IPO with trading commencing on 30 June 2016. In addition, WISeKey International Holding Ltd listed class B shares on the SIX on 31 March 2016.

In 2015, there were 3 IPOs on the SIX, worth a total of about CHF2.45 billion, including the IPO of Sunrise Communications Group AG, the second largest integrated telecommunications provider in Switzerland, with a total offer size of CHF2.27 billion. The Sunrise Communications Group AG IPO was the largest Swiss IPO since 2006 and the largest telecoms IPO in the Europe, Middle East and Africa region since 2004.

2. What are the main regulators and legislation that applies to the equity markets/exchanges in your jurisdiction?

Legislative framework

The current legislative framework that applies to equity securities markets and exchanges in Switzerland consists of the following:

- Swiss Code of Obligations of 30 March 1911 (unofficial English translation at: *www.admin.ch/ch/e/rs/2/220.en.pdf*).
- Financial Markets Infrastructure Act (FMIA) (*Finanzmarktinfrastrukturgesetz*) of 19 June 2015 (unofficial English translation at: *www.admin.ch/opc/en/classified-compilation/20141779/201601010000/958.1.pdf*).
- Financial Market Infrastructure Ordinance (FMIO) (*Finanzmarktinfrastrukturverordnung*) of 25 November 2015 (unofficial English translation at: *www.admin.ch/opc/en/classified-compilation/20152105/201601010000/958.11.pdf*).
- Additional ordinances issued by the Swiss Financial Market Supervisory Authority (FINMA).

These statutes and regulations contain rules that impose direct obligations on issuers and other market participants, such as specific content requirements for offering and listing prospectuses, disclosure rules in respect of qualified shareholdings and rules on insider trading and market manipulation.

In addition, the Federal Act on Collective Investment Schemes (unofficial English translation available at: *www.admin.ch/opc/en/classified-compilation/20052154/index.html*) and the Federal Act on Combating Money Laundering (unofficial English translation available at: *www.finma.ch/FinmaArchiv/gwg/e/dokumentationen/gesetzgebung/bundesgesetzgebung/pdf/AMLA_e.pdf?lang=en*) contain provisions applicable to equity markets and exchanges in Switzerland, depending on the type of security concerned.

There are currently new legislative proposals for a comprehensive reform of the Swiss financial markets (*see Question 26*).

Regulatory bodies

FINMA. The main financial market regulatory body in Switzerland is FINMA. FINMA delegates certain aspects of the regulation of the Swiss financial markets to a number of private or semi-private self-regulatory bodies that it licenses and supervises. For example, the SIX Group Ltd is mandated with the issuance, monitoring and enforcement of regulations related to the SIX.

The regulations governing Switzerland's financial markets are currently undergoing significant revisions, including certain changes to the supervisory role and competencies of FINMA and the other regulatory bodies responsible for overseeing the Swiss financial markets. Under these reforms, FINMA will retain its broad mandate and continue to operate alongside the other regulatory bodies. However, following the full implementation of the FMIA, the proposed Financial Services Act (known as FIDLEG) and the proposed Financial Institutions Act (known as FINIG), FINMA will also become the competent supervisory authority for ensuring compliance with these new pieces of legislation. In addition, FINMA will be granted new enforcement tools under the FINIG and there will be increased co-operation and exchanges of information between FINMA and other Swiss and foreign supervisory, regulatory, governmental and judicial authorities. For further information, see *Question 26*.

SIX Regulatory Board. The SIX Regulatory Board is one of the most important self-regulatory bodies under FINMA's supervision with regard to equity markets and exchanges in Switzerland (*www.six-exchange-regulation.com/en/home/profile/regulatory-*

board.html). It is responsible for issuing, supervising and enforcing rules and directives applicable to SIX issuers and participants, including the:

- SIX Rule Book.
- SIX Listing Rules.
- Various participant directives.

The issuance or placement of equity securities (as opposed to their listing) does not currently require registration with, or authorisation by, FINMA or any other regulatory body. However, under the new proposed prospectus regime in FIDLEG, any prospectus for a public offering would need to be approved by a competent authority, which is anticipated to be the SIX (*see Question 26*).

SIX Exchange Regulation. The SIX Exchange Regulation, an independent and autonomous entity within SIX Group Ltd (*www.six-exchange-regulation.com/en/home/profile/six-exchange-regulation.html*), regulates and monitors participants and issuers listed on the SIX. In particular, it carries out tasks prescribed under Swiss legislation and under the rules and regulations issued by the SIX Regulatory Board, and monitors compliance with these regulations. The SIX Exchange Regulation can, subject to the relevant rules:

- Prescribe sanctions.
- Submit sanction proposals.
- Inform the chairman of the board of directors of SIX Group Ltd, the supervisory authorities and, where appropriate, the competent public prosecuting authorities of suspected violations of the law or other wrongdoing by market participants.

SIX Disclosure Office. The SIX Disclosure Office supervises and oversees compliance with the disclosure of qualified shareholdings (*www.six-exchange-regulation.com/en/home/investor/obligations/disclosure-of-shareholdings/board.html*), including disclosure of shareholdings in connection with IPOs. It is responsible for:

- Receiving notifications of changes in shareholdings.
- Granting exemptions or relief from certain reporting obligations.
- Delivering decisions on whether a reporting obligation exists.

Swiss Takeover Board (TOB). The TOB (*www.takeover.ch*) is responsible for issuing general rules and ensuring compliance with the provisions applicable to public takeover offers and share buybacks.

EQUITY OFFERINGS

3. What are the main requirements for a primary listing on the main markets/exchanges?

Main requirements

Issuers seeking to list their shares on a stock exchange in Switzerland must comply with the applicable exchange listing rules. The SIX Listing Rules, for example, are largely modelled on Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive), although they are less extensive and more flexible. The SIX Listing Rules and various additional rules issued by the SIX set out the main steps a company must undertake for a listing of its shares. In particular, the SIX Listing Rules require that a listing application be submitted and a prospectus be approved and published before the shares are admitted to trading on the SIX.

The SIX prospectus review and approval process takes 20 trading days. Generally, the SIX approval process for prospectuses is less onerous than in most EU jurisdictions and the US. For example, the review by the SIX is typically limited to a scheme rule check and amended drafts of the listing prospectus can be filed within the SIX 20-trading day review period without adversely affecting the offering's timeline. In practice, the approval process is structured so that SIX approval is obtained before the printing of the prospectus and the start of the offering period.

The issuance or placement of equity securities (as opposed to their listing) does not currently require registration with, or authorisation by, the Financial Market Supervisory Authority (FINMA) or any other regulatory body in Switzerland. However, according to the new proposed prospectus regime under the Financial Services Act, any prospectus for a public offering would need to be approved by a competent authority (*see Question 26*).

Listing application. Either the issuer or a SIX-recognised representative prepares and submits the listing application to the SIX. The listing application must contain a short description of the equity securities to be listed and a request for the planned first trading day. Generally, the following documentation must be submitted to the SIX, together with the duly signed listing application:

- The listing prospectus (*see Question 12*).
- An "official notice", if required (*Articles 40a and 40b, SIX Listing Rules*).
- A copy of the current extract of the issuer from the commercial register.
- A copy of the valid articles of association of the issuer.
- Evidence that the issuer's auditors fulfil the requirements of auditors for public companies.
- An original of the duly signed declaration by the lead manager that the free float of relevant equity securities is sufficient (if required).
- If necessary, an original of the duly signed declaration by the issuer that any printed share certificates will comply with the SIX printing regulations. In the case of book-entry securities, the issuer must submit an explanation of how the holders of these securities can obtain proof of their holding.
- A duly signed declaration by the issuer stating that (*Article 45, SIX Listing Rules*):
  - its responsible bodies agree with the listing;
  - the listing prospectus and official notice (if required) are complete under the SIX Listing Rules;
  - there has been no material deterioration in the issuer's assets and liabilities, financial position, profits and losses and business prospects since the listing prospectus was published;
  - the issuer has read and acknowledges the SIX Listing Rules together with any applicable Additional Rules and the corresponding implementing provisions, as well as the SIX rules of procedure and sanction regulations, and recognises them expressly in the form of a declaration of consent. The issuer further recognises the board of arbitration determined by the SIX and expressly agrees to be bound by any arbitration agreement. The issuer also recognises that its continued listing is conditional on its agreeing to be bound by the version of the legal foundations that is in force at any given time; and
  - it will pay the listing fees.

Regulatory standards. In preparing a listing application, the issuer must indicate which regulatory standard it is applying and

demonstrate that the corresponding requirements are met. The following main regulatory standards are available for listings on the SIX:

- **International Reporting Standard.** This is aimed at international investors. It has the most comprehensive transparency requirements and requires the application of international financial reporting standards (IFRS), US generally accepted accounting principles (US GAAP) or another internationally recognised accounting standard.
- **Swiss Reporting Standard.** This is aimed at domestic investors. Issuers can apply Swiss GAAP FER, with the other listing requirements remaining consistent with the International Reporting Standard.
- **Standard for Investment Companies.** This is for the listing of equity securities issued by investment companies (that is, companies that solely invest in collective investment schemes and that do not perform any other commercial activity).
- **Standard for Real Estate Companies.** This is for the listing of equity securities issued by real estate companies (that is, companies that generate at least two-thirds of their revenue from real estate-related activities).

For an overview of the requirements for each of the regulatory standards available for listing on the SIX, see *www.six-exchange-regulation.com/en/home/issuer/admission/listing/regulatory-standards.html*.

Minimum size requirements

Under the regulatory standards, an issuer's consolidated equity capital, as reported on its consolidated balance sheet as at the first day of trading, must amount to at least CHF2.5 million for all the standards listed above. Collective investment schemes must hold assets of at least CHF100 million. Exchange-traded funds differ from classic investment funds in this respect and are not subject to minimum capitalisation requirements (although there is a requirement that one or two market makers commit to posting firm bids and asks, the spread between which does not exceed a predefined percentage of indicated net asset value).

Trading record and accounts

Under the regulatory standards, an issuer must generally have both:

- Existed as a company for at least three years.
- Produced audited annual financial statements for the three full financial years preceding the listing application.

The three-year rule does not apply to companies that are listed under the Standard for Investment Companies or the Standard for Real Estate Companies. However, companies with shorter financial history may benefit from exemptions granted by the SIX Regulatory Board (if necessary) where it appears to be in the interests of the issuer or of the investors, namely in cases where the issuer either:

- Is the result of a corporate reorganisation such as a merger, spin-off or other transaction in which a pre-existing company or portions of a company are continuing as commercial entities.
- Has not yet been able to present financial statements for the prescribed period of time, but wishes to access the capital markets to finance its strategy for growth (young companies).

To benefit from an exemption, the issuer must also provide the SIX Regulatory Board with a guarantee that investors are adequately informed to form a qualified opinion on the issuer and the admitted securities.

Where exemptions are granted, issuers must either:

- Comply with stricter transparency requirements, such as quarterly reporting until annual accounts for three complete financial years are available (for young companies).
- Provide additional financial information, such as pro forma financials (in the case of listed entities resulting from a corporate reorganisation).

For further details, see the SIX Directive on Exemptions regarding Duration of Existence of the Issuer (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_02-DTR_en.pdf*) and the SIX Directive on the Presentation of a Complex Financial History in the Listing Prospectus (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf*).

Minimum shares in public hands

At least 20% of all the issuer's outstanding securities of the same category must be publicly owned with capitalisation of at least CHF25 million. The definition of free float for the purposes of the SIX Listing Rules is set out in the Directive on the Distribution of Equity Securities (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_03-DDES_en.pdf*).

Special listing requirements for foreign issuers

Foreign issuers of equity securities are subject to certain additional listing requirements, which are set out in the SIX Directive on the Listing of Foreign Companies (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_05-DFC_en.pdf*). Generally, these additional requirements are not very onerous and do not pose particular issues in practice. See *Questions 4* and *8* for further details.

4. What are the main requirements for a secondary listing on the main markets/exchanges?

Main requirements

The SIX Directive on the Listing of Foreign Companies sets out the requirements for a secondary listing on the SIX in respect of foreign companies already listed on an exchange recognised by the SIX Regulatory Board.

Generally, the applicable issuer requirements in connection with secondary listings are deemed fulfilled if the equity securities are listed on a recognised exchange with equivalent listing provisions. This requirement is usually fulfilled with an opinion from counsel in the respective jurisdiction regarding the sufficiency of investor protection rules in that jurisdiction. Additionally, if an issuer submits an application for the listing of equity securities to the SIX within six months of the same equity securities having been listed on the primary exchange, the SIX Regulatory Board will recognise the listing prospectus prepared in connection with the listing on the primary exchange as approved by the competent body for that exchange, provided that certain technical information is added for the Swiss market (for example, security number, paying agent, settling agent and trading currency).

If, however, the listing on the SIX occurs more than six months after the listing on the primary exchange, the issuer must submit a:

- Short-form prospectus that contains most of the information on the equity securities required by prospectus Scheme A (*see Question 12*).
- Description of the issuer.
- "No material change" clause.

The short-form prospectus must contain a reference to the secondary listing and to the trading currency on the SIX.

Trading record and accounts

The short-form prospectus must also contain:

- The audited annual consolidated financial statements for the past three full financial years.
- Additional interim financial statements, if the balance sheet in the last audited financial statements is more than nine months old on the date on which the short-form listing prospectus is to be published.

The annual and any interim financial statements must be prepared in accordance with the financial reporting standards of the primary exchange and be submitted to the SIX Exchange Regulation.

Minimum shares in public hands

The free float is considered adequate for a secondary listing if either the:

- Capitalisation of the shares circulating in Switzerland is at least CHF10 million.
- Applicant can otherwise demonstrate that there is a genuine market for the equity securities concerned.

5. What are the main ways of structuring an IPO?

The structure of an IPO is determined by a number of factors, such as the:

- Underlying purpose of the offering (for example, financing growth, financing an acquisition, diversification of the shareholder base or the desire of investors to liquidate their investment). Depending on the purpose of the IPO, certain restrictions may apply, such as a lock-up period for major existing shareholders during which they are not allowed to sell their shares.
- Type of securities to be listed.
- Targeted investor base (for example, a retail offering, an offering to ultra high net-worth individuals, to institutional investors in Europe or in the US or to employees).

The three main ways to structure an IPO are:

- Primary offering/offer for subscription, where the issuer increases its share capital and offers the new shares for subscription to the public or to designated investors.
- Secondary offering/offer for sale, where an existing shareholder offers his (previously privately held) shares for sale to the public or to designated investors.
- A combination of the two.

On a slightly more granular level, the shares can be offered directly to potential investors or be placed through an underwriting process. IPOs in Switzerland typically involve an underwriting by a bank or a syndicate of banks.

The most common price-fixing mechanism is the bookbuilding process, where the syndicate banks try to determine at what price and in which size to offer the shares based on the demand from institutional investors, in order to maximise the IPO proceeds.

If new share capital needs to be created, this can be done by way of an ordinary capital increase or sourced from authorised capital (*see Question 6*).

6. What are the main ways of structuring a subsequent equity offering?

The main ways of structuring a subsequent equity offering are principally the same as for an IPO (*see Question 5*), that is:

- An offer for subscription of additional shares (of the same type/class) issued by the issuer.
- An offer for sale of existing shares by an existing shareholder.
- A combination of the two.

Swiss corporate law gives pre-emptive rights to shareholders with respect to any issuance of equity or equity-linked debt instruments. Unlike many other jurisdictions, there is no threshold (for example, 10%) below which shareholders do not have pre-emptive rights.

If new share capital needs to be created, this can be done by way of:

- Ordinary capital, where the shareholders instruct the board of directors to increase the company's share capital within three months from the shareholders' resolution, and can exclude pre-emptive rights for valid reasons.
- Authorised capital, where the shareholders amend the articles of association of the company to include authorised capital in order to authorise the board of directors to issue a maximum number of new shares within a period of up to two years from the shareholders' resolution, and can exclude pre-emptive rights for valid reasons.
- Conditional capital, where the shareholders amend the articles of association of the company to create unissued share capital for equity-linked debt, bonds with warrants or employee share options, and can exclude pre-emptive/subscription rights for valid reasons. The new capital will be effectively created by operation of law on conversion/exercise of the options.

All types of new share capital require, at some point, shareholders' approval at a shareholders' meeting, which must be called at least 20 days in advance. However, in the case of authorised and conditional capital, no additional shareholders' approval is required at the time of issuance of the shares and the board of directors usually has more flexibility to determine the timing of the offer, its size and the issue price. In addition, the shareholders cannot challenge the withdrawal of their pre-emptive rights on issuance of the new shares if these fall within the scope of the (pre-)authorisation.

In the context of the implementation of the capital adequacy requirements under Basel III, the following two new types of equity capital were introduced by the Banking Act on 1 March 2012 for all Swiss banks that are organised as a stock corporation (*Aktiengesellschaft*):

- Reserve capital (*Vorratskapital*), which is a new type of authorised capital designed to provide the board of directors with maximum flexibility to issue new share capital at short notice in the event of a deterioration of the bank's capital base.
- Conversion capital (*Wandlungskapital*), which is a new type of conditional capital designed as a source of capital for contingent convertible bonds that convert into shares on the occurrence of certain regulatory triggers.

7. What are the advantages and disadvantages of rights issues/other types of follow on equity offerings?

Rights offerings

Due to the statutory pre-emptive rights of existing shareholders, most subsequent equity offerings in Switzerland are structured as rights offerings.

The most common form of rights offering in Switzerland is a traditional rights offering where a company raises capital by offering existing shareholders the opportunity to subscribe for new shares in proportion of their shareholdings and under the same terms as any other investor.

Rights offerings are typically structured as a two-stage process with an accelerated institutional offering and a secondary retail tranche. Other types of accelerated rights offerings are not very common in Switzerland.

Discounted versus at-market rights offerings

If the new shares are offered at a discount to the current market price, the subscription rights of the existing shareholders are typically tradable so that shareholders that are unable or unwilling to exercise their rights can realise some value as a compensation for the dilution of their shareholdings.

Generally, discounts cannot exceed 33 ⅓% of the existing share price, as higher discounts may qualify as taxable distributions under Swiss tax law.

If market conditions permit an issuer to conduct an at-market rights offering, the rights allocated to existing shareholders are typically not tradable as they have no intrinsic value.

Private placements

Swiss companies that need to raise funds quickly and with more certainty typically place shares sourced from authorised capital with institutional investors in a non-pre-emptive placement by way of accelerated bookbuilding.

8. What are the main steps for a company applying for a primary listing of its shares? Is the procedure different for a foreign company and is a foreign company likely to seek a listing for shares or depositary receipts?

Procedure for a primary listing

The SIX Listing Rules and various additional rules issued by the SIX set out the main steps a company must take for a primary listing of its shares. In particular, the SIX Listing Rules require that a listing application be submitted and a prospectus be approved and published before the shares are admitted to trading on the SIX. The listing application must contain a short description of the equity securities to be listed and a request for the planned first trading day.

See *Question 3, Main requirements* for the full list of documents that must be submitted to the SIX with the listing prospectus and a duly signed listing application.

The listing application must be submitted to the SIX by the issuer or by a recognised representative no later than 20 trading days before the intended listing date. If the issuer intends to use a bookbuilding procedure, the listing application must be submitted no later than 20 trading days before the start of the bookbuilding period.

Procedure for a foreign company

Generally, the SIX Listing Rules and their implementing provisions apply equally to issuers that do not have their registered office in Switzerland and intend to list their equity securities on the SIX. In addition to these provisions, there are specific requirements that apply only with respect to foreign issuers, as set out in the SIX Directive on the Listing of Foreign Companies (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_05-DFC_en.pdf*).

In particular, a foreign issuer whose equity securities are not listed on another exchange recognised by the SIX Regulatory Board can only submit an application for a primary listing. For a primary listing, the foreign issuer must demonstrate that it has not been refused listing in its home country under investor protection legislation. This requirement is usually satisfied by either:

- An opinion delivered from an independent law firm.
- A relevant extract from the decision issued by the competent authority in the issuer's home country in connection with the registration process in question.

A foreign issuer whose equity securities are listed on another exchange recognised by the SIX Regulatory Board can choose between a primary and a secondary listing on the SIX. The same applies if a company is planning on listing simultaneously on another primary exchange and on the SIX (dual listing). In principle, exchanges that are members of the Federation of European Securities Exchange and the World Federation of Exchanges are recognised by the SIX Regulatory Board as having equivalent listing provisions.

In connection with the listing prospectus, a foreign issuer must:

- Describe the publications in which announcements required by an issuer under the issuer's home country company law will appear.
- Recognise the Swiss courts as having jurisdiction over claims arising out of, or in connection with, the listing on the SIX.

In addition, the SIX Regulatory Board reserves the right to modify the listing procedure as appropriate if, under the foreign issuer's home country's company law, the time at which the equity securities are legally created is not the same as that under Swiss law (that is, by entry in the commercial register).

In addition to International Financial Reporting Standards (IFRS) and US generally accepted accounting principles (US GAAP), foreign issuers that wish to list their shares on the SIX according to the International Reporting Standard can also apply their home country standard, provided that these standards are recognised by the SIX Regulatory Board. Presently, the only additional standard recognised by the SIX Regulatory Board for this purpose is EU-IFRS.

Procedure for depository receipts

The SIX Listing Rules set out specific requirements for listing global depository receipts, in addition to having a designated regulatory reporting standard for global depository receipts. See *Question 3* for a further discussion regarding SIX's regulatory standards.

In essence, the issuer of the underlying shares must generally fulfil the listing requirements of an issuer planning a primary listing on the SIX, subject to certain additional disclosure requirements (for example, additional information in the prospectus regarding the underlying equity securities and the depository as described in SIX's Scheme D). In addition, the depository must be a bank or securities trader that is subject to the supervision of a competent federal agency or a comparable foreign supervisory authority, and the underlying shares must be held on a fiduciary basis.

ADVISERS: EQUITY OFFERING

9. Outline the role of advisers used and main documents produced in an equity offering. Does it differ for an IPO?

Role of advisers

The main parties/advisers supporting an issuer in an equity offering include:

- Banking syndicate/underwriters.
- Legal and financial advisers.
- Auditors.
- Investor and public relations agencies.

Advisers assist the issuer in the preparation of the required offering and ancillary documentation, such as the listing and offering

prospectus, the listing application and the underwriting agreement. Advisers may also:

- Provide legal and tax opinions and comfort letters.
- Liaise with the competent regulatory authorities, such as the SIX Exchange Regulation.
- Conduct due diligence.
- Prepare research guidelines and conduct research themselves.

A lead manager or global co-ordinator is often appointed to co-ordinate and supervise the offering process. The lead manager or global co-ordinator may also suggest the other underwriters or members of the syndicate and appoint them in agreement with the issuer. In addition, the lead manager or global co-ordinator is usually responsible for (among other things):

- The validation of the business plan and the evaluation of the issuer.
- Advising on strategy and timing.
- Conducting business due diligence.
- Researching and marketing the specific investment case to potential investors in order to estimate the demand for the equity securities.
- Structuring the offering.
- Allocating the shares to the other underwriters/members of the syndicate and subsequently placing the shares with interested investors, usually by way of a bookbuilding procedure.

Main documents

The listing application must be submitted to the SIX by the issuer or by a recognised representative no later than 20 trading days before the intended listing date or the start of the bookbuilding period. Subject to certain exemptions (*see Question 11*), the issuer must also publish a listing prospectus and, where required, an "Official Notice" and submit a duly signed declaration regarding its compliance with the SIX Listing Rules (*see Question 8*).

Further documents that are usually required in connection with an offering include:

- The underwriting agreement and possibly sub-underwriting agreements and commitment letters from cornerstone investors.
- The agreement among managers/the syndicate agreement.
- A securities lending agreement (in the case of a selling shareholder).
- Lock-up undertakings.
- Legal opinions, tax opinions and/or comfort letters.

EQUITY PROSPECTUS/MAIN OFFERING DOCUMENT

10. When is a prospectus (or other main offering document) required? What are the main publication, regulatory filing or delivery requirements?

Prospectus required

An offering prospectus is required when new shares are offered to the public in Switzerland (*Article 652a, Swiss Code of Obligations (CO)*). An invitation for subscription of equity securities is public unless addressed to a limited number of persons (*Article 652a, paragraph 2, CO*). See *Question 11* for further information regarding private placements in Switzerland.

Main publication, regulatory filing or delivery requirements

The offering prospectus must be made available to investors, but is not currently subject to any filing or approval requirements with any Swiss regulator.

However, under the proposed Swiss financial market reforms, any prospectus for a public offering will need to be reviewed and approved by a competent authority with respect to its completeness, coherence and comprehensibility. It is expected that the SIX will be mandated to act as the competent authority to approve prospectuses. See *Question 26* for further information regarding these reforms.

Currently, only stock exchange listing prospectuses need to be approved before the first day of trading on the relevant exchange (*see Question 8*).

11. What are the main exemptions from the requirements for publication or delivery of a prospectus (or other main offering document)?

Private placements

An offering prospectus is required when new shares are offered to the public in Switzerland (*Article 652a, Swiss Code of Obligations* (CO)). An invitation for subscription of equity securities is public unless addressed to a limited number of persons (*Article 652a, paragraph 2, CO*). Generally, a public offering is understood to be an offering made to an indefinite number of investors by means of public advertisement (for example, newspaper announcement, mailshots, web pages with unrestricted access). By contrast, if issuers solicit a limited number of selected investors individually, including by inviting them to road shows, the offering could arguably be considered private, provided that there are no public advertisements or similar communications relating to the offering. In other words, in the absence of public advertising, any offer to a selected and limited circle of investors could arguably be construed as a private placement.

However, as the term "public offering" is not clearly defined under Swiss law and because there is no express private placement safe harbour for share offerings, what constitutes a selected and limited circle of investors has been and continues to be subject to legal debate.

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

- **Qualitative approach.** This approach considers whether investors were selected based on objective criteria or whether the investors have a pre-existing specific relationship with the issuer (that is, typically existing shareholders or employees).
- **Quantitative approach.** Given the need for numeric guidance, practitioners and legal scholars have developed a quantitative rule of thumb that focuses on the number of offerees. The most restrictive view is that any offer made to more than 20 investors is deemed a public offer. There is a trend among practitioners, however, to advocate an increase of this threshold to up to 150 qualified investors (as defined under the Swiss Federal Act on Collective Investment Schemes, which practitioners and legal scholars often apply by analogy to equity offerings).

However, as there is currently no private placement safe harbour, regardless of whether a qualitative or quantitative approach is applied, each equity offering into Switzerland and the accompanying requirement of a Swiss-compliant offering prospectus must be considered on a case-by-case basis. See *Question 26* for further information regarding reforms in relation to the codification of private placement exemptions.

SIX listing prospectus exemptions

Exemptions from the requirement to produce a listing prospectus may be available in any of the following circumstances (*SIX Listing Rules*):

- A compliant listing prospectus or information document equivalent to a listing prospectus has already been published in the past 12 months with regard to the listing of the same securities.
- The securities to be listed account for less than 10% of securities of the same class that have already been listed (calculated over a 12-month period).
- The securities to be listed are issued in exchange for securities of the same class that are already listed, provided that the new securities are not issued in connection with a capital increase by the issuer.
- The securities to be listed are issued in connection with the conversion or exchange of other securities or as a result of the exercise of rights associated with other securities of the same class.
- The securities to be listed are offered in connection with a takeover by way of exchange offer, provided that a document is available which contains information equivalent to that in a listing prospectus.
- The securities to be listed are offered, allotted or to be allotted in connection with a merger, provided that a document is available which contains information equivalent to that in a listing prospectus.
- The securities to be listed are offered, allotted or to be allotted free of charge to existing holders of such securities, and dividends paid out in the form of securities, provided that:
  - the securities are of the same class as those already listed; and
  - a document is available which contains information on the number and type of securities and the reasons for and the details of the offer.
- The securities to be listed are offered, allotted or to be allotted by the issuer or an affiliated company to current or former members of the board of directors or executive board or to employees, provided that:
  - the securities are of the same class as those already listed; and
  - a document is available that contains information on the number and type of securities and the reasons for, and details of, the offer.

In addition, a short-form listing prospectus can be used if both:

- Securities from the same issuer are already listed.
- The new securities are offered on the basis of ordinary or preferential subscription rights, either free of charge or against payment.

Foreign issuers

The exemptions from the requirement to produce a listing prospectus set out in the SIX Listing Rules are equally applicable to foreign issuers whose equity securities are listed, or to be listed, on the SIX (*SIX Directive on the Listing of Foreign Companies*).

In addition, in the case of secondary listings by foreign issuers, no new listing prospectus is required if the issuer submits the application for the listing of its equity securities within six months of the same equity securities having been listed on the primary exchange, provided that certain technical information is added for the Swiss market. If the SIX listing takes place more than six months after the listing on the primary exchange, a short-form prospectus must be submitted.

12. What are the main content or disclosure requirements for a prospectus (or other main offering document)? What main categories of information are included?

In connection with equity offerings, issuers must publish a prospectus both under the Swiss Code of Obligations (CO) and the SIX Listing Rules. The content and disclosure requirements under these two regimes are discussed in greater detail below.

Notably, the new proposed prospectus regime under the Financial Services Act includes certain requirements regarding the content of prospectuses, which will need to be reviewed and approved by a competent authority with respect to completeness, coherence and comprehensibility. It is expected that the SIX will be mandated to act as the competent authority to approve prospectuses. See *Question 26* for further information.

Issuance or offering prospectus

An offering prospectus is required when new shares are offered to the public in Switzerland (*Article 652a, CO*). The offering prospectus must include information on the:

- Content of the existing entry in the commercial register, with the exception of details relating to the persons authorised to represent the company.
- Existing amount and composition of the share capital, including the number, nominal value and type of shares and the preferential rights attaching to specific share classes.
- Provisions of the articles of association relating to any authorised or conditional capital increase.
- Number of dividend rights certificates and the nature of the associated rights.
- Most recent annual accounts and consolidated accounts with audit report and, if more than six months have elapsed since the accounting cut-off date, the interim accounts.
- Dividends distributed in the past five years or since the company was established.
- Resolution concerning the issue of new shares.

The offering prospectus must be made available to investors, but is not currently subject to any filing or approval requirements with any Swiss regulator (but see *Question 26*). However, a breach of the CO prospectus requirements can, in any event, lead to prospectus liability claims (*see Question 13*).

The question of whether a prospectus complies with the CO prospectus requirements is also relevant for non-Swiss issuers offering shares to the public in Switzerland without listing shares on the SIX. Typically, additional disclosure items will be included in a Swiss wrapper or in the prospectus.

Listing prospectus

A listing prospectus must be approved and published before the shares are admitted to trading on the SIX (*SIX Listing Rules*) (*see Question 3*). Often, Swiss issuers that list shares on the SIX prepare a prospectus that complies with both the SIX Listing Rules and the CO prospectus requirements (that is, an offering and listing prospectus).

In essence, the listing prospectus must provide sufficient information for competent investors to reach an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer, as well as of the rights attached to the equity securities. In addition, any special risks must be specifically mentioned.

An issuer of equity securities on the SIX must prepare a listing prospectus that contains information prescribed in Scheme A (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/schemes/04_03-SCHA_en.pdf*). Separate schemes are available for the listing of equity securities of investment companies (Scheme B) and real estate companies (Scheme C).

Generally, the following information is included in a listing prospectus:

- A summary.
- General information about the issuer, such as its name, registered office, legal form and purpose.
- Information on the securities offered (including the rights attached to these securities) and on the offering.
- Risk factors.
- Use of proceeds.
- Dividends and other distributions.
- Capitalisation.
- Information on the business activities of the issuer, its turnover, assets and investments.
- Information on the board of directors and the management of the issuer, and on its auditors.
- Shares, share capital and voting rights.
- Significant shareholders. For issuers domiciled in Switzerland, this information must be provided in accordance with Article 120 of the Financial Markets Infrastructure Act.
- Offering restrictions.
- Taxation.
- Audited annual consolidated financial statements for the past three full financial years, prepared in accordance with the applicable financial reporting standard, and additional financial statements if the balance sheet in the last audited annual financial statements is more than nine months old on the date on which the listing prospectus is to be published.
- Persons responsible for the content of the listing prospectus.

In addition, the following are typically included in the listing prospectus, but are not technically required:

- An industry overview and market trends section.
- A management discussion and analysis of financial condition and results of operation section.

Finally, information contained in previously or simultaneously published documents can be incorporated by reference into the listing prospectus.

For companies applying for the listing of their equity securities on the International Reporting Standard of the SIX, financial statements must be prepared in accordance with International Financial Reporting Standards (IFRS) or US generally accepted accounting principles (US GAAP). If a company applies for listing on the Swiss Reporting Standard, the preparation of its financial statements must be in accordance with Swiss GAAP FER or the standard under the Banking Act. Swiss GAAP FER is comparable to IFRS or US GAAP, but is more principle-based. A working capital statement is required under IFRS, US GAAP, Swiss GAAP FER and the standard under the Banking Act. See *Question 3* for a more detailed discussion regarding SIX regulatory standards.

If an issuer's financial history is complex, the SIX can require additional financial disclosure, such as pro forma financials as further described in the SIX Directive on the Presentation of a Complex Financial History in the Listing Prospectus (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf*). Therefore, it is highly recommended to approach the SIX in advance to discuss any nuances or complexity in an issuer's financial statements.

Issuers that are not incorporated in Switzerland can also apply the accounting standards of their home country, provided that these standards are recognised by the SIX Regulatory Board. Currently, the only additional standard recognised by the SIX Regulatory Board for the listing of equity securities by foreign issuers is EU-IFRS.

13. How is the prospectus (or other main offering document) prepared? Who is responsible and/or may be liable for its contents?

The prospectus is usually prepared by the issuer with the assistance of its legal and tax advisers, its auditors, together with the lead bank and its counsel. The required financial and corporate information is provided by the issuer and its auditors.

The applicable Swiss civil law rule on prospectus liability (contained in Article 752 of the Swiss Code of Obligations (CO)) provides redress where information that is inaccurate, misleading or in breach of statutory requirements is included in a prospectus or a similar statement/communication disseminated in connection with the issue of shares, bonds or other securities. Any person involved, whether wilfully or through negligence, is liable to the acquirer of the securities for any resulting losses. Therefore, prospectus liability claims in relation to prospectuses and similar statements/communications (for example, press releases, research reports and road show materials) can be brought in Switzerland against all persons who were involved in the drafting or the dissemination of the prospectus or similar statements/communications, including the:

- Issuer/company whose shares are offered to the public.
- Members of the issuer's board of directors.
- Management of the issuer.
- Syndicate banks.
- Auditors.
- Legal advisers.
- Public notaries.
- Other external advisers/experts.

Notably, the underwriting agreement executed in connection with an equity offering usually provides that the issuer and/or selling shareholders (if any) will indemnify the underwriters, among other things, in the event of prospectus liability claims based on false or misleading statements provided, or material information omitted, by the issuer and/or selling shareholders (if any).

To establish a prospectus liability claim, the claimant must show that the following conditions are met:

- The issue prospectus or similar statements/communications and information in connection with the issue of equity securities (including research reports, press releases and information posted on the issuer's website) contained information that was inaccurate, misleading or otherwise in breach of statutory requirements.
- The defendant was wilfully or negligently responsible for these statements.
- The claimant suffered damages.

- The damages were caused by the inaccurate, misleading or legally non-compliant information.

The standard of proof is not a strict evidence standard (balance of probabilities), but rather one of predominant probability.

For example, an issuer is in breach of the statutory requirements if the statutory disclosure requirements under Article 652a of the CO are not met in the prospectus or if there is no prospectus at all where required by law. If facts material to the investment decision are omitted from the prospectus, this is considered to be misleading.

Not only the prospectus, but also any other information provided in connection with the offering (such as press releases, research reports and road show materials) may be considered "similar statements/communications" under Article 752 of the CO, and can therefore be the basis of a prospectus liability claim. Certain risks can be mitigated by including a disclaimer in the relevant materials stating (among other things):

- That the document is not a prospectus.
- That any investment decision should be based on the prospectus.
- Where the prospectus can be obtained.

In addition, a restricted period usually applies during which no information about the issuer's business or its earnings and financial situation that is not otherwise contained in the prospectus can be disclosed.

Certain defendants in a prospectus liability claim can often mitigate and defend themselves against claims of wilful or negligent conduct by evoking a "due diligence defence". Switzerland does not have official due diligence guidelines, and, therefore, the essence of this defence will be based on standard market practice and the adherence to these established due diligence undertakings, which demonstrate that the defendants acted with due care and diligence in the preparation of the prospectus and/or similar statements/communications. Recognised due diligence undertakings include:

- Comprehensive documentary due diligence.
- Meetings with management.
- Review of the issuer's business plan.
- Review of financial statements and meetings with the issuer's accounting personnel and auditors.
- Interviews with third parties (such as customers and suppliers).
- Site visits.
- Directors' and officers' questionnaires.
- Negotiation of representations and warranties in the underwriting agreement.
- Legal opinions and disclosure letters from legal counsel.
- Comfort letters from auditors.
- Officers' certificates.
- Bring-down diligence calls.

In addition to initiating a prospectus liability claim, a claimant can also try to invoke general remedies under Swiss contract or tort law.

A person liable for a false or misleading prospectus may also be subject to criminal prosecution, for example, in the case of fraud (*Article 146, Swiss Penal Code*) or forgery of documents (*Article 251, Swiss Penal Code*).

See *Question 26* for further information regarding proposed reforms relating to prospectus liability under Swiss law.

MARKETING EQUITY OFFERINGS

14. How are offered equity securities marketed?

Equity securities are usually marketed in the following ways:

- Pre-offer marketing to selected financial institutions.
- Analyst presentations.
- Research reports distributed to investors.
- Pilot fishing and anchor investor meetings.
- Targeted investor education.
- Media one-to-ones.
- News/analyst conferences.
- Media relations.
- Road shows during the offer period.
- Press releases.
- Annual/interim reports.
- Market monitoring.
- Factsheet.
- Issuer's website updates.

15. Outline any potential liability for publishing research reports by participating brokers/dealers and ways used to avoid such liability.

See *Question 13*.

BOOKBUILDING

16. Is the bookbuilding procedure used and in what circumstances? How is any related retail offer dealt with? How are orders confirmed?

During the pre-marketing stage of an equity offering, one or several investment banks that are appointed by the issuer to act as underwriter(s) solicit non-binding estimates from institutional investors in respect of the price that these investors would be prepared to pay for the relevant equity securities. On the basis of this information and the issuer's results, as well as the market valuation, a preliminary price range is determined and published in the preliminary prospectus.

The bookbuilding process is subsequently used to generate, capture and record investor demands for equity securities during an IPO or other equity offering in order to support efficient price discovery based on the preliminary price range. In furtherance of this, bids from institutional and retail investors are collected by the underwriters at various prices, within the specified price range. After the subscription period ends, at the time of the closing of the order book and the allocation of the equity securities, the final price at which the equity securities are to be offered is determined. The final offer price is normally set the evening of the day preceding the first trading day. Institutional investors can revise or revoke their indications of interest while retail investors must buy the allocated equity securities at the price specified at the end of the bookbuilding procedure, if the price is within the range of the investor's bid.

UNDERWRITING: EQUITY OFFERING

17. How is the underwriting for an equity offering typically structured? What are the key terms of the underwriting agreement and what is a typical underwriting fee and/or commission?

In Switzerland, an investment bank or a banking syndicate often underwrites issuances of equity securities. The banks enter into an underwriting agreement with the issuer, under which the banks underwrite up to a certain number of equity securities and sell them on to investors for a commission of about 2% to 5% of the gross proceeds of the sale of the shares (reflecting various possible fee appropriations, including base fee, selling fee, management fee and incentive fees).

The underwriting agreement usually contains the following key terms:

- A description of the capital and the shares of the issuer.
- The obligations of the underwriters, such as:
  - managing the offer process;
  - subscribing for and on-selling of the equity securities;
  - ensuring full payment of the net proceeds.
- A statement of the issuer that the company has been validly formed and registered.
- A provision regarding the allocation of the shares.
- An over-allotment option (greenshoe option).
- Security lending and stabilisation provisions.
- Provisions on payment of commission, fees and expenses.
- Provisions concerning the listing of the shares.
- A declaration of the issuer regarding the accuracy and completeness of the statements contained in the prospectus and the other offering documents.
- An internal agreement of the parties involved in the listing or offering of the securities on a specific allocation of liability.
- An indemnification provision in favour of the underwriters by the issuer and/or selling shareholders (if applicable). However, any limitations of the issuer's liability towards the underwriters do not limit its liability towards third parties.
- Representations, warranties and undertakings.
- Provisions governing the right of the underwriters (and, if applicable, of any cornerstone investors) to withdraw their participations and termination events.
- Confidentiality provisions.

In the case of a secondary offering, the underwriting agreement also includes representations and warranties of the selling shareholder. The selling shareholder usually represents and warrants that:

- It is the lawful and beneficial owner of the shares and has a valid and marketable title to them.
- The shares are free of any encumbrances (such as security interests, any other third-party claims or restrictions of transferability).

TIMETABLE: EQUITY OFFERINGS

18. What is the timetable for a typical equity offering? Does it differ for an IPO?

The timetable of an equity offering, including an IPO, depends on both the type and the size of the offering. In addition, certain offerings may require a greater amount of preparation on the part of the issuer, particularly with respect to securing shareholder approval, corporate governance and structure and accounting and reporting requirements (as applicable). IPOs in Switzerland generally take between four and six months. Secondary equity offerings require less time and, depending on the nature of the offering and the issuer, may not require all the tasks that are required in an IPO. An indicative IPO can generally be organised into the following five phases.

Planning and preparation phase

During the IPO planning and preparation phase, there are likely to be many workstreams operating in parallel and which may overlap. During this phase, these workstreams generally address the following tasks:

- Discuss and develop the issuer's strategy, business plan, equity story (that is, investment case) and offering structure.
- Establish a timetable and hold kick-off meetings.
- Select the responsible team both internally at the issuer and externally, including the underwriters, the bookrunners and any other managers (that is, the banking syndicate) and legal and financial advisers.
- Make any necessary changes in respect of the company's corporate structure to meet legal or operational requirements (the length of this phase depends on the required restructurings (if any) and the issuer's focus).
- Consider matters concerning capital, financial and accounting/tax structures.
- Start due diligence exercises (which includes business, financial and legal due diligence and will continue throughout the prospectus drafting process).

Drafting phase

During the drafting phase, the issuer and its advisers:

- Draft the prospectus and other key legal documents.
- Develop marketing and presentation materials, such as analyst and pilot fishing investor presentations.
- Engage with the issuer's auditors regarding the presentation of financial information in the prospectus and the delivery of comfort letters.
- Attend courtesy meetings at the SIX to discuss the contemplated offering structure and content of the prospectus.

Negotiation and investor education phase

During the negotiation and investor education phase, the IPO workstreams generally address the following tasks:

- Shareholders' resolutions in respect of the offering and capital increase (if applicable).
- Negotiation of the underwriting agreement and any sub-underwriting agreements (if applicable).
- Deliver the analyst presentation and review research reports.
- Preparation of the SIX listing application.

- Submission of the listing application together with the preliminary listing prospectus and any additional required documents.
- Draft road show presentations and other materials for analysts, press and investors.
- Respond to the SIX comments (if applicable).
- Inclusion of interim financial statements into offering documents and updating analysts (if applicable).
- Issue a press release regarding the issuer's intention to float, followed by the publication of analysts' research reports.

During this period, issuers typical receive approval by the SIX for the listing of equity securities.

Pre-trading and marketing phase

About two weeks before the first day of trading, the IPO workstreams generally address the following tasks:

- Approval of the prospectus and underwriting agreement by the board of directors of the issuer.
- Final price discussions with the board of directors of the issuer and setting of price range.
- Execution of the underwriting agreement.
- Start the offer period, publish the prospectus, start price-fixing process (for example, a bookbuilding process) and start road show presentations.

About one to two trading days before the first day of trading, the IPO workstreams generally address the following tasks:

- Subscription and payment of the nominal value of the equity securities to be offered.
- Registration of capital increase in the commercial register of the issuer.
- Establishment of the final offer price and execution of the pricing agreement to the underwriting agreement, and pricing supplement to the offering and listing prospectus (if applicable).
- Allocation of shares to investors.

First trading day and aftermarket phase

Following the first trading day, the IPO workstreams generally address the following tasks:

- Stabilisation of the shares and disclosure of stabilisation measures (within five trading days).
- Settlement and payment of net proceeds (usually within two trading days of the first trading day).
- Exercise of the over-allotment option (30 calendar days after first trading day) and disclosure of exercise of the over-allotment option (within five trading days after exercise).

STABILISATION

19. Are there rules on price stabilisation and market manipulation in connection with an equity offering?

In 2013, the new Swiss rules on insider dealing and market manipulation entered into force (*see Question 24*). These rules prohibit transactions that manipulate the market in the relevant equity securities, but also set out certain permitted behaviours (safe harbours), which include price stabilisation after a public placement of securities.

Securities transactions undertaken for the purpose of price stabilisation are permitted if the following conditions are met (*Article 126, Financial Market Infrastructure Ordinance*):

- They occur within 30 days of the public offering of the respective securities.
- They are made at a price that is not higher than the offer price or, in the case of subscription and conversion rights, not above their market price.
- The maximum period during which stabilisation can occur and the identity of the securities dealer who has been appointed as stabilisation agent have been published before the start of trading of the relevant securities.
- The stock exchange has been notified of any stabilisation activities within five trading days and the issuer published a notice of these activities within five trading days from expiry of the stabilisation period.
- The issuer informed the public within five trading days after exercise of any over-allotment option about the time of exercise and the relevant number and type of securities.

The stabilisation safe harbour is not available in the case of a private placement.

The exercise of over-allotment options also falls within the scope of the stabilisation rules (*see above*). Under this mechanism, which is commonly used as part of an IPO or other equity offering to ensure a successful aftermarket performance, syndicate banks are granted the right to purchase equity securities, generally representing up to an additional 15% of the offer size, at the offer price for a 30-day period after the first trading day.

TAX: EQUITY ISSUES

20. What are the main tax issues when issuing and listing equity securities?

The issuance of new shares by, and capital contributions to, a company resident in Switzerland are subject to a one-off capital duty of 1%, with issuances of up to CHF1 million being exempt. Exemptions also apply for certain restructurings.

The transfer of Swiss equity securities is subject to securities transfer tax at a rate of 0.15%, whereas the transfer of foreign equity securities is taxed at a rate of 0.3%, in each case if at least one of the parties or intermediaries involved qualifies as a Swiss securities dealer (as defined in the Swiss Federal Stamp Duty Act). Certain types of transactions or parties are exempted (for example, group restructurings and Swiss and foreign funds).

Additionally, if in the context of a rights offering the new shares are offered at a discount to the current market price, the discount should usually not exceed 33 ⅓%, as a higher discount may be considered as a taxable distribution under Swiss law.

CONTINUING OBLIGATIONS

21. What are the main areas of continuing obligations applicable to listed companies and the legislation that applies?

The SIX Listing Rules and the various additional rules, in particular the Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes (DRRO) (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_20-DRRO_en.pdf*), set out the requirements for maintaining a listing on the SIX, with a focus on periodic financial reporting, general reporting and disclosure obligations.

An issuer of equity securities must comply with the following continuing obligations to maintain a listing on the SIX:

- Timely disclosure of any price-sensitive facts (ad hoc publicity) (SIX Directive on Ad hoc Publicity) (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_17-DAH_en.pdf*).
- Publication of the annual report comprising the audited annual financial statements, in accordance with the applicable financial reporting standard, and the corresponding audit report.
- Publication of semi-annual financial statements.
- At the beginning of each financial year, publication of a corporate calendar covering at least the current financial year, which must be kept up to date.
- Notification of any change in the rights attached to the listed equity securities, in good time before the entry into force of that change.
- Regular reporting concerning information on the issuer, such as:
  - change of name of the issuer;
  - change of registered office;
  - change of auditors;
  - change of balance sheet date (closing of accounts for financial year);
  - dividend payments;
  - changes to the issuer's capital structure (for example, a capital increase through creation of conditional or authorised capital and a capital decrease); and
  - in respect of primary-listed foreign issuers, free float and shareholder structure.
- Information on annual and extraordinary general meetings of shareholders.
- Timely disclosure of transactions in the company's equity securities by members of the board of directors and senior management (regardless of the transaction value).
- Publication of information relating to corporate governance (*SIX Directive on Information relating to Corporate Governance*).
- Payment of the annual listing fees.
- Disclosure of qualified shareholdings (the thresholds are 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔%) (*Article 120, Financial Markets Infrastructure Act*).

22. Do the continuing obligations apply to listed foreign companies and to issuers of depositary receipts?

The continuing obligations contained in the SIX Listing Rules and the various additional rules also generally apply to primary-listed foreign companies. However, the SIX Directive on Ad hoc Publicity only applies to:

- Issuers whose registered office is in Switzerland.
- Issuers whose registered office is outside Switzerland if the equity securities listed on the SIX are not listed in the issuer's home country.

23. What are the penalties for breaching the continuing obligations?

In the case of a breach of the SIX Listing Rules or of any additional rules or regulations issued by the SIX, the SIX Sanction Commission can impose one or more of the following sanctions on issuers, guarantors or recognised representatives:

- Reprimand.
- Fine of up to CHF1 million (in cases of negligence) or CHF10 million (in cases of wrongful intent).
- Suspension of trading.
- De-listing or reallocation to a different regulatory listing standard.
- Exclusion from further listings.
- Withdrawal of recognition.

In addition, failure to disclose a qualified shareholding in a listed company (as required under Article 120 of the Financial Markets Infrastructure Act) may, among other penalties, lead to a fine of up to CHF10 million for intentional acts and a fine not exceeding CHF100,000 for negligent acts.

MARKET ABUSE AND INSIDER DEALING

24. What are the restrictions on market abuse and insider dealing?

The main provisions relating to market abuse and insider dealing are included in the Financial Markets Infrastructure Act (FMIA) and the Financial Market Infrastructure Ordinance (FMIO).

Market abuse/insider dealing under administrative law

Unlawful dealing with inside information. A person who knows, or should know, that information constitutes inside information acts unlawfully if he (*Article 142, FMIA*):

- Exploits this information to acquire or dispose of securities that are admitted to trading on a stock exchange or similar trading platform in Switzerland, or uses financial instruments derived from such securities.
- Exploits this information to make a recommendation to another person to acquire or dispose of, or use financial instruments regarding any of such securities.
- Communicates this information to another person.

Exploitation requires that the transaction be based on the inside information.

Market manipulation. A person commits market manipulation if he either (*Article 143, FMIA*):

- Publicly disseminates information that he knows, or should know, will send a false or misleading signal in relation to the supply, demand or price of securities admitted to trading on a stock exchange or similar trading platform in Switzerland.
- Carries out transactions or executes buy or sell orders that he knows, or should know, will send a false or misleading signal in respect of securities admitted to trading on a stock exchange or similar trading platform in Switzerland.

Unlike the criminal law offence (which is limited to simulated transactions), the administrative law regime extends to real transactions that are carried out to manipulate the market for the relevant securities.

Safe harbours/exemptions. The main safe harbours and other exemptions regarding both market abuse and insider dealing are:

- **Share buybacks** (*Article 123, FMIO*). However, it remains unclear how debt buybacks will be treated under the new regime.
- **Stabilisation in public offerings** (*Article 126, FMIO*). While stabilisation in the case of public placements is exempt (*see Question 19*), the exemption does not appear to be available to private placements.
- **Certain other securities transactions** (*Article 127 FMIO*). These include pre-offer stakebuilding or transactions in securities by the Swiss Confederation, cantons, communities and the Swiss National Bank which are not made for investment purposes.
- **Certain permitted communications of inside information** (*Article 128, FMIO*). Communications of inside information are permitted if:
  - the recipient needs to have this information to perform its statutory or contractual duties (for example, in the case of a mandated adviser, an employee's superior or the board of directors of an issuer); or
  - the communication of this information is a prerequisite for the entry into a contract and certain precautions are being taken (for example, granting due diligence access to potential bidders in a merger and acquisition transaction).

Market abuse/insider dealing under criminal law

Insider dealing. A person commits insider dealing if, as a primary insider (that is, an officer or member of an executive or supervisory body of an issuer, a person controlling or controlled by the issuer or a person who due to its participation or activity is supposed to have access to inside information), it obtains for himself or for another person a financial advantage by (*Article 154, FMIA*):

- Exploiting inside information to acquire or dispose of securities admitted to trading on a stock exchange or similar trading platform in Switzerland or by using financial instruments derived from such securities.
- Exploiting inside information to make a recommendation to another person to acquire, dispose of or use financial instruments regarding such securities.
- Communicating inside information to another person.

A person also commits an offence if he has received inside information from a primary insider or by other illegitimate means and obtains for himself or another person a financial advantage by exploiting this inside information to acquire or dispose of the securities. In this case, the offender is referred to as a tippee. This also applies to a person who accidentally becomes aware of inside information and exploits it in the same way and for the same purpose.

Market price manipulation. A person commits market price manipulation if, with the aim of significantly influencing the price of securities admitted to trading on a stock exchange or similar trading platform in Switzerland, thereby achieving a financial advantage for himself or another person, either (*Article 155, FMIA*):

- Disseminates, against better judgement, wrong or misleading information.
- Effects sales and purchases of securities which, on both sides, are made directly or indirectly for the account of the same person or persons affiliated for this purpose.

Any breach of the market abuse provisions under criminal law requires that the person concerned acted with intent and was not merely negligent.

Safe harbours/exemptions. The safe harbours and exemptions applicable to market abuse under administrative law also apply to the market abuse provisions under criminal law (*Article 14, Swiss Penal Code*) (*see above, Market abuse/insider under administrative law: safe harbours/exemptions*).

Penalties for market abuse/insider dealing

Administrative law. The Financial Market Supervisory Authority (FINMA) is responsible for the enforcement of administrative law market abuse rules against all market participants. While FINMA has wide reaching investigative powers, it only has limited means to impose sanctions for unlawful behaviour. However, FINMA can:

- Issue declaratory rulings.
- Confiscate or order the disgorgement of illegally generated profits.
- Publish final rulings based on its findings.

FINMA can also impose sanctions on FINMA-supervised institutions, including the imposition of a professional ban.

Criminal law. Criminal insider dealing and market price manipulation are subject to federal jurisdiction, that is, prosecutions are the responsibility of the Office of the Federal Attorney General of Switzerland and the court of first instance is the Swiss Federal Criminal Court.

Insider dealing under Article 154 of the FMIA is punishable by up to three years in prison or a fine. However, if the financial advantage gained exceeds CHF1 million, the individual is punishable with a fine or up to five years in prison. The same penalties apply to market price manipulation under Article 155 of the FMIA. Insider dealing by a tippee can be punished by up to one year in prison or a fine, or by a fine only if the person became aware of the inside information accidentally.

DE-LISTING

25. When can a company be de-listed?

De-listing

Voluntary de-listing. The rules regarding the de-listing of equity securities at the request of the issuer are set out in the SIX Directive on Delisting of Equity Securities, Derivatives and Exchange Traded Products (*www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_12-DD_en.pdf*).

The two main categories of de-listing initiated by the issuer include:

- Ordinary de-listing: the issuer decides to de-list due to the costs and additional requirements associated with being listed.
- Qualified de-listing: the issuer has no or very few shareholders left following, for example, a public tender offer, a merger or liquidation.

An issuer can apply to the SIX Regulatory Board to cancel a listing of equity securities. The application must be submitted by the issuer at least 20 trading days before the announcement of the de-listing and must contain:

- A written justification for the de-listing.
- A duly signed statement from the issuer that its responsible bodies agree to the de-listing.
- Details of the free float of the equity securities.
- Any other relevant documentation, such as offering prospectuses and confirmations pertaining to court decisions.

The SIX Regulatory Board can decide on the date of the de-listing announcement and last trading day. In the case of ordinary de-listings, the period between the de-listing announcement and the

last day of trading (continued listing period) must in principle be not less than three and not more than 12 months in order to offer shareholders the possibility to sell their shares before the de-listing.

However, the SIX Regulatory Body can shorten the continued listing period in the case of qualified de-listings to as little as five trading days in specific cases, including:

- A merger or liquidation.
- A takeover offer (provided that the intention to cancel the listing has already been announced in the corresponding notice).
- When a simultaneous application is being made for the listing of new equity securities to replace those that are being de-listed.
- When the securities have been declared null and void in accordance with Article 137 of the Financial Markets Infrastructure Act (that is, in the context of a public offer, the outstanding equity securities are cancelled (and subsequently re-issued) on the application of an offeror holding more than 98% of voting rights in an offeree company).

The de-listing announcement must be published by the issuer in an official notice and, if applicable, an ad hoc statement. The de-listing decision of the SIX Regulatory Board must be published on its website and as a media release.

Shareholders can challenge the de-listing decision of the SIX Regulatory Board with regard to the length of the continued listing period within 20 trading days after the publication of the decision on the SIX Exchange Regulation website. Shareholders must demonstrate that they have an interest worthy of protection in having the decision revisited. However, shareholders cannot challenge the issue of whether a de-listing is in the interest of the company or its shareholders. In the case of qualified de-listings, for which the continued listing period may be reduced to as little as five trading days, a shareholder must immediately request that his appeal be granted suspensive effect, which invariably results in a longer trading period before a qualified de-listing can take effect. In qualified de-listings, issuers can however request a conditional de-listing decision earlier in a transaction timeline in order to have the appeals procedure initiated and avoid delays.

The shareholders' right to appeal the de-listing decision, both in the case of ordinary and qualified de-listings, and to potentially postpone the de-listing date by several months, significantly reduces the predictability of the de-listing process for both issuers and bidders of SIX-listed targets.

Compulsory de-listing. The SIX Regulatory Board can cancel the listing of equity securities in any of the following circumstances:

- The solvency of the issuer is in serious doubt, or insolvency or liquidation proceedings have already been commenced, in which case the securities will be de-listed no later than the time at which their tradability is no longer guaranteed.
- The SIX Regulatory Board deems that there is no longer a sufficiently liquid market in the securities.
- Trading in the relevant securities has been suspended for a continuous three-month period and the reasons for this suspension continue to exist.
- The listing requirements set out in Article 26 of the SIX Listing Rules are no longer fulfilled.

Number of de-listings. As of 31 May 2016, four de-listing notices have been published on the SIX website for 2016. In 2015, 13 de-listing notices were published. However, the SIX website only contains the de-listing notices of issuers that have opted for electronic publication, rather than print publication.

Suspensions

The SIX can temporarily suspend the trading of securities, either at the request of the issuer or on its own initiative, if there are unusual circumstances that indicate to the SIX that suspension is advisable. Unusual circumstances include the breach of important disclosure obligations by the issuer or its failure to otherwise comply with the rules of the SIX or those of a central counterparty. The SIX can publicly announce the suspension and name the issuer concerned.

REFORM

26. Are there any proposals for reform of equity capital markets/exchanges? Are these proposals likely to come into force and, if so, when?

The Swiss financial market regulatory framework is currently undergoing fundamental and comprehensive reforms. The main purposes of these reforms are to:

- Harmonise Swiss regulations with existing and new EU regulations, such as:
  - Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR);
  - Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive);
  - Directive 2014/65/EU on markets in financial instruments (MiFID II); and
  - Regulation (EU) 600/2014 on markets in financial instruments (MiFIR).
- Ensure access of Swiss financial institutions to the European market by fulfilling the equivalence requirements under MiFID II.

These new financial market regulations are predominately set out in the:

- Financial Markets Infrastructure Act (FMIA), which came into force on 1 January 2016.
- Proposed Financial Services Act (knows as FIDLEG).
- Proposed Financial Institutions Act (known as FINIG).

The FMIA is of particular relevance in the context of equity capital markets in Switzerland, as it primarily regulates financial market infrastructure, disclosure of shareholdings, insider trading, market manipulation and public takeover offers. In addition, the current draft of FIDLEG includes proposals for (among others):

- A new prospectus regime for public offerings of securities in Switzerland.
- The codification of private placement exemptions.
- Revisions of the prospectus liability regime.

These proposals are discussed in greater detail below. The Swiss Federal Council finalised and adopted the draft of FIDLEG on 4 November 2015 and submitted it to the Swiss Parliament, which is expected to debate on the proposed wording of the Act in 2016/2017.

Proposed new prospectus regime

To establish a level playing field with internationally comparative prospectus disclosure standards, the Swiss Federal Council's draft of the FIDLEG sets out, among other things, content and prior approval requirements for all public offering prospectuses. These requirements are substantially modelled on the Prospectus Directive. Currently, only stock exchange listing prospectuses must

be approved before the first day of trading, and only in respect of equity securities.

Under the new legislation, subject to certain exemptions (such as eligible debt offerings), all prospectuses will need to be reviewed and approved by a competent authority with respect to completeness, coherence and comprehensibility before the publication of the offering or the admission to trading on a Swiss trading platform. Additionally, first-time issuers will be required to submit their prospectus for approval at least 20 calendar days before the publication of the offering or the admission to trading on a Swiss trading platform. It is expected that the SIX will be given the mandate to act as competent authority to approve prospectuses. In addition, in the context of IPOs, the approved prospectus will also need to be published at least six business days before the end of the offering period, therefore implementing a new minimum statutory requirement for the duration of IPOs.

Codification of private placement exemptions and exemptions from the duty to publish a prospectus

There are currently no express private placement safe harbours for share offerings under Swiss law (*see Question 11*). The draft of FIDLEG includes express exemptions from the duty to publish a prospectus, which are largely consistent with the exemptions under the current Prospectus Directive and existing SIX regulations. The list of exempt transactions includes, among other things:

- Offerings limited to investors classified as professional clients.
- Offerings addressed to less than 150 investors classified as retail clients.
- Offerings with a minimum investment of CHF100,000 or of securities with a denomination of at least CHF100,000.
- Public offerings of certain types of securities (for example, exchange of equity securities for equity securities of the same class).
- Admission to trading of securities without a concurrent public offering in Switzerland.

Regarding private placements that do not require a prospectus, FIDLEG further provides that offerees must however be able to take note of the essential information within the framework of the offer.

Proposed revisions of the prospectus liability regime

FIDLEG also includes changes to the current prospectus liability regime (*see Question 13*). While the current regime will largely remain intact, it is proposed that defendants will need to show that they did not act intentionally or negligently in order to avoid prospectus liability, rather than the burden of proof being borne by the claimants. In addition, the draft of FIDLEG introduces:

- Administrative criminal liability in the case of intentional violation of Swiss prospectus rules.
- Limitations of liability in connection with required summaries and forward-looking statements included in prospectuses.

ONLINE RESOURCES

BX Berne eXchange

W www.berne-x.com

www.berne-x.com/listing

Description. Official website of the BX Berne eXchange.

Eurex Zürich

W www.eurexchange.com

Description. Official website of Eurex Zürich.

SIX Swiss Exchange

W www.six-swiss-exchange.com

www.six-exchange-regulation.com

Description. Official website of the SIX Swiss Exchange.

Swiss Financial Market Supervisory Authority (FINMA)

W www.finma.ch

www.finma.ch/e/regulierung/gesetze/pages/default.aspx

Description. Official website of the FINMA.

Swiss Takeover Board

W www.takeover.ch

www.takeover.ch/legaltexts/overview/lang/en

Description. Official website of the Swiss Takeover Board.

Practical Law **Contributor profile**

Capital Markets Team

Niederer Kraft & Frey Ltd
T +41 58 800 8000
F +41 58 800 8080
E nkf@nkf.ch (see also below)
W www.nkf.ch

- Christoph Balsiger, Partner (christoph.balsiger@nkf.ch).
- François M. Bianchi, Partner (francois.m.bianchi@nkf.ch).
- Daniel Bono, Partner (daniel.bono@nkf.ch).
- Thomas Brönnimann, Partner (thomas.m.broennimann@nkf.ch).
- Christina Del Vecchio, Senior Associate (christina.delvecchio@nkf.ch).
- Marco Häusermann, Partner (marco.haeusermann@nkf.ch).
- Philippe A. Weber, Partner (philippe.a.weber@nkf.ch).

Recent transactions

- Acting as transaction counsel on Repower AG's rights offering generating gross proceeds of CHF171.3 million.
- Acting for EFG International AG on its rights offering generating gross proceeds of CHF295 million.
- Acting for VAT Group AG in its IPO on SIX Swiss Exchange with a total offer size of CHF621 million and an implied market capitalisation of CHF1.350 million (largest IPO in Europe to date in 2016).
- Acting for EDAG Engineering Group AG in its EUR600 million IPO on the Frankfurt Stock Exchange (largest IPO of a Swiss company abroad in 2015).
- Acting for the managers on Evolva Holding SA's rights offering generating gross proceeds of CHF57.4 million.
- Acting for the underwriting banks in the entire financing of the acquisition of World Duty Free by Dufry AG, of which the rights offering tranche (CHF2.2 billion) became the largest Swiss rights offering in 2015.
- Acting for the joint bookrunners on Swiss Prime Site AG's rights offering generating gross proceeds of CHF424 million.
- Acting for the underwriters on Sunrise Communication Group AG's CHF2.3 billion IPO on SIX Swiss Exchange and IPO-related refinancing transactions (largest Swiss IPO since 2006).
- Acting as sole issuer counsel to SFS Group AG in its IPO on SIX Swiss Exchange with a total market capitalisation of CHF2.4 billion.