

THE INITIAL PUBLIC  
OFFERINGS  
LAW REVIEW

Editor  
David J Goldschmidt

THE LAWREVIEWS

THE INITIAL PUBLIC OFFERINGS  
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The Initial Public Offerings Law Review  
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David J Goldschmidt

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# PREFACE

Welcome to the inaugural edition of *The Initial Public Offerings Law Review*. While it is largely agreed that the first ‘modern’ initial public offering (IPO) was by the Dutch East India Company (VOC) in 1602, IPOs now take place in nearly every corner of the world and involve a wide variety of companies in terms of size, industry and geography. Several of the earliest exchanges are still at the forefront of the global IPO market, such as the NYSE and LSE, however, the world’s major stock exchanges now are scattered around the globe, and many of them are now public companies themselves. Aside from general globalisation, shifting investor sentiment and economic, political and regulatory factors have also influenced the development and evolution of the global IPO market. For example, markets in the Asia-Pacific region, including Hong Kong, Shanghai and Tokyo, have enjoyed a significantly stronger presence in the global IPO arena in recent years owing to economic growth in the Asian markets.

Every exchange operates with its own set of rules and requirements for conducting an IPO. Country-specific regulatory landscapes are often dramatically different between jurisdictions as well. Whether a company is looking to list in its home country or is exploring listing outside of its own jurisdiction, is it important that the company and its management are aware of the requirements from the outset as well as potential pitfalls that may derail the offering. Moreover, once a company is public, there are ongoing jurisdiction-specific disclosure and other requirements with which it must comply.

Virtually all markets around the globe have experienced significant volatility in recent years. In 2016, the uncertainty surrounding the US presidential election, the unexpected outcome of the Brexit vote and numerous other geopolitical issues facing regions throughout the world furthered the general decline in both overall deal count and proceeds raised. Moving forward, however, many regions have a healthy IPO pipeline for the coming 12 months, including many household names.

*The Initial Public Offerings Law Review* seeks to introduce the reader to the global IPO regulatory environment and main stock exchanges in 16 different jurisdictions. Each chapter provides a general overview of the IPO process in the region, addresses regulatory and exchange requirements and presents key offering considerations. We hope this inaugural edition of *The Initial Public Offerings Law Review* introduces the reader to the intricacies of taking a company public in these jurisdictions and serves as a helpful handbook for companies, directors and managers.

**David J Goldschmidt**

Skadden, Arps, Slate, Meagher & Flom LLP  
New York  
March 2017

# SWITZERLAND

*Philippe A Weber, Thomas M Brönnimann and Christina Del Vecchio*<sup>1</sup>

## I INTRODUCTION

With its modern financial market infrastructure and competitive regulatory framework, Switzerland offers issuers and investors alike an attractive capital markets environment. Issuers listing on exchanges in Switzerland stem from a range of industries, including the financial, retail, industrial and pharmaceutical industries. Generally, domestic companies tend to list in Switzerland; however, foreign companies also consider either a primary or secondary listing in Switzerland to gain better access to international institutional investors. In addition, the Swiss market has strong representation from certain industries that may attract foreign peer companies, especially with regard to the pharmaceutical, biotech and financial services industries.

## II GOVERNING RULES

### i Main stock exchanges

SIX Swiss Exchange (SIX) operates the principal equity exchange in Switzerland, with 264 companies listed as of 31 December 2016 (of which 227 were Swiss-domiciled issuers). As of 31 December 2016, the market capitalisation of all SIX-listed shares of issuers domiciled in Switzerland and Liechtenstein was approximately 1.4 trillion Swiss francs. The only other equity exchange in Switzerland is BX Berne eXchange (BX). The BX is much smaller than the SIX and mainly targets small and medium-sized Swiss enterprises. As of 31 December 2016, 18 companies were listed on the BX.

### ii Overview of listing 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 the EU Prospectus Directive, though 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 has to 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 prior to the shares being 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 United States. For example, the review by the SIX is

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<sup>1</sup> Philippe A Weber is a managing partner, Thomas M Brönnimann is a partner and Christina Del Vecchio is a senior associate at Niederer Kraft & Frey Ltd.

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 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 any regulatory body in Switzerland. However, pursuant to the new proposed prospectus regime under the draft Financial Services Act (FIDLEG), any prospectus for a public offering would need to be approved by a competent authority (see Section V, *infra*).

### ***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 as well as 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:

- a* the listing prospectus (described in greater detail in Section II.ii, 'Prospectus', *infra*);
- b* an official notice pursuant to Articles 40a and 40b of the SIX Listing Rules (if required).  
An official notice is required:
  - if the listing prospectus is not provided in full to potential investors in order to advise investors where the listing prospectus can be obtained;
  - to set out any material changes made to the information contained in the listing prospectus between the date of its publication and the listing date; or
  - to advise of any supplements to the listing prospectus;
- c* a copy of a current extract from the commercial register of the issuer;
- d* a copy of the valid articles of association of the issuer;
- e* evidence that the auditors of the issuer fulfil the requirements of auditors for public companies;
- f* an original of the duly signed declaration by the lead manager that the free float of relevant equity securities is sufficient;
- g* 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 such securities may obtain proof of their holding; and
- h* a duly signed declaration by the issuer in accordance with Article 45 of the SIX Listing Rules stating, among other things, that its responsible bodies are in agreement with the listing and 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.

### ***Regulatory standards***

In preparing the listing application on the SIX, issuers must indicate which regulatory standard they are applying to and demonstrate their satisfaction of the corresponding requirements. The following main regulatory standards are available for listings on the SIX:

- a* 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.
- b* Swiss Reporting Standard. This is aimed at domestic investors. Issuers may apply Swiss GAAP FER (the generally accepted accounting principles applied in Switzerland), with the other listing requirements remaining consistent with the International Reporting Standard.
- c* Standard for Investment Companies. This is for the listing of equity securities issued by investment companies (i.e., companies that solely invest in collective investment schemes and that do not perform any other commercial activity).
- d* Standard for Real Estate Companies. This is for the listing of equity securities issued by a real estate company (i.e., companies generate at least two-thirds of their revenue from real estate-related activities).

### ***Minimum equity capital requirements***

Pursuant to 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 2.5 million Swiss francs for all the standards listed above.

### ***Financial track record***

Pursuant to the regulatory standards, an issuer must:

- a* have existed as a company for at least three years; and
- b* have 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:

- a* it appears in the interests of the issuer or of the investors, namely in cases where the listed entity:
  - is the result of a corporate reorganisation such as a merger, spin-off or other transaction in which a pre-existing company or portions thereof are continuing as commercial entities; or
  - has not yet been able to present financial statements for the prescribed period of time, but nonetheless wishes to access the capital markets in order to finance its strategy for growth ('young companies'); and
- b* the SIX Regulatory Board has 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 (in connection with young companies) or provide additional financial information, such as *pro forma* financials (in the case of listed entities resulting from corporate reorganisation).<sup>2</sup>

### ***Minimum free float***

At least 20 per cent of all of the issuer's outstanding securities of the same category must be publicly owned with capitalisation of at least 25 million Swiss francs. The definition of free float for purposes of the SIX Listing Rules is set out in the Directive on the Distribution of Equity Securities.<sup>3</sup>

### ***Prospectus***

In connection with initial public offerings (IPOs), issuers are currently required to publish a prospectus pursuant to both Swiss corporate law (the Swiss Code of Obligations of 30 March 1911 (CO)) and the SIX Listing Rules. The requirements of these two regimes are discussed in greater detail below. However, it should be noted that the new proposed prospectus regime under FIDLEG includes certain requirements regarding the content of prospectuses, which 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 Section V, *infra*, for further information.

### ***Issuance or offering prospectus***

Article 652a CO requires an offering prospectus when new shares are offered to the public in Switzerland. The offering prospectus must include information on:

- a* the content of the existing entry in the commercial register, with the exception of details relating to the persons authorised to represent the company;
- b* the 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;
- c* the provisions of the articles of association relating to any authorised or conditional capital increase;
- d* the number of dividend rights certificates and the nature of the associated rights;
- e* the 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;
- f* the dividends distributed in the past five years or since the company was established; and
- g* the resolution concerning the issue of new shares.

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2 For further details, see the SIX Directive on Exemptions regarding Duration of Existence of the Issuer, available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_02-DTR\\_en.pdf](http://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, available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_15-DCFH\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf).

3 Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_03-DDES\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_03-DDES_en.pdf).

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, pursuant to the proposed Swiss financial market reforms under FIDLEG, any prospectus for a public offering will need to be reviewed and approved by a competent authority (see Section V, *infra*). Nevertheless, a breach of the CO prospectus requirements may, in any event, lead to prospectus liability claims.

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, to the extent required, will be included in a Swiss wrapper or in the prospectus.

### *Listing prospectus*

The SIX Listing Rules require that the prospectus be approved and published prior to the shares being admitted to trading on the SIX. 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: 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, specific mention must be made of any special risks. An issuer of equity securities on SIX must prepare a listing prospectus that contains information prescribed in Scheme A.<sup>4</sup> 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 listing prospectuses:

- a* a summary;
- b* general information about the issuer, such as its name, registered office, legal form and purpose;
- c* information on the securities offered, including the rights attached to such securities and on the offering;
- d* risk factors;
- e* use of proceeds;
- f* dividends and other distributions;
- g* capitalisation;
- h* information on the business activities of the issuer, its turnover, assets and investments;
- i* information on the board of directors and the management of the issuer as well as its auditors;
- j* shares, share capital and voting rights;
- k* significant shareholders (for issuers domiciled in Switzerland. This information must be provided in accordance with Article 120 of the Financial Markets Infrastructure Act of 19 June 2015 (FMIA));
- l* offering restrictions;
- m* taxation;
- n* audited annual consolidated financial statements for the past three full financial years prepared in accordance with the applicable financial reporting standard and, if the

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<sup>4</sup> Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/schemes/04\\_03-SCHA\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/schemes/04_03-SCHA_en.pdf).

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, additional interim financial statements; and

- o persons responsible for the content of the listing prospectus.

In addition, an industry overview and market trends section, as well as a management discussion and analysis of financial condition and results of operation section, are typically included in the listing prospectus, but are not technically required. Finally, information contained in previously or simultaneously published documents can be incorporated by reference into the listing prospectus.

In terms of companies applying for the listing of their equity securities on the International Reporting Standard of the SIX, financial statements need to be prepared in accordance with IFRS or 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 according to the Banking Act. Swiss GAAP FER is comparable with IFRS or US GAAP, but is more principle-based and gives a true and fair view of the net assets, financial position and operational results. A working capital statement is required under IFRS and US GAAP as well as under Swiss GAAP FER and the standard according to the Banking Act (for a more detailed discussion regarding SIX regulatory standards, see Section II.ii, 'Regulatory standards', *supra*).

In addition, if an issuer's financial history is rather complex, the SIX may 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.<sup>5</sup> In light of this, it is highly recommended to approach the SIX in advance to discuss any nuances or complexity to an issuer's financial statements.

Issuers that are not incorporated in Switzerland may also apply the accounting standards of their home country (i.e., 'home country standard'), 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 IFRS EU.

## ii Overview of law and regulations

Switzerland is not a member of the EU or the EEA. Accordingly, the EU Prospectus Directive and other EU regulations relating to IPOs are not applicable to IPOs conducted in Switzerland. In Switzerland, various regulatory and self-regulatory bodies are involved in the rule-making and enforcement of such rules in connection with IPOs and equity securities markets and exchanges pursuant to authority vested in them from Swiss legislations. Below is a summary of the applicable legislative framework followed by summaries of the main regulatory and self-regulatory authorities mandated with the implementation, supervision and enforcement of such legislations.

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<sup>5</sup> Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_15-DCFH\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_15-DCFH_en.pdf).



### ***Legislative framework***

Generally, the current legislative framework with respect to IPOs and equity securities markets and exchanges in Switzerland consists of the following:

- a* the CO;<sup>6</sup>
- b* the FMIA;<sup>7</sup>
- c* the Financial Market Infrastructure Ordinance of 25 November 2015;<sup>8</sup> and
- d* additional ordinances issued by Swiss Financial Market Supervisory Authority (FINMA).

### ***Supervisory 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 market 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. Pursuant to 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 FIDLEG and the proposed Financial Institutions Act (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 cooperation and exchanges of information between FINMA and other Swiss and foreign supervisory, regulatory, governmental and judicial authorities (for further information, see Section V, *infra*).

#### *SIX Regulatory Board*

One of the most important self-regulatory bodies under FINMA's supervision with regard to equity markets and exchanges in Switzerland is the SIX Regulatory Board.<sup>9</sup> It is responsible for issuing, supervising and enforcing rules and directives applicable to SIX issuers and participants, such as the SIX Rule Book, the SIX Listing Rules and various participant directives. It should be noted that 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, pursuant to the new proposed prospectus regime under FIDLEG, any prospectus for a public offering would need to be approved by a competent authority, which is anticipated to be the SIX (see Section V, *infra*).

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6 Unofficial English translation at [www.admin.ch/ch/e/rs/2/220.en.pdf](http://www.admin.ch/ch/e/rs/2/220.en.pdf).

7 Unofficial English translation at [www.admin.ch/opc/en/classified-compilation/20141779/201601010000/958.1.pdf](http://www.admin.ch/opc/en/classified-compilation/20141779/201601010000/958.1.pdf).

8 Unofficial English translation at [www.admin.ch/opc/en/classified-compilation/20152105/201601010000/958.11.pdf](http://www.admin.ch/opc/en/classified-compilation/20152105/201601010000/958.11.pdf).

9 [www.six-exchange-regulation.com/en/home/profile/regulatory-board.html](http://www.six-exchange-regulation.com/en/home/profile/regulatory-board.html).

### *SIX Exchange Regulation*

The SIX Exchange Regulation, an independent and autonomous entity within SIX Group Ltd,<sup>10</sup> 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 is, subject to the relevant rules, permitted to prescribe sanctions or submit sanction proposals, as well as 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 the compliance with such disclosure of qualified shareholdings, including disclosure of shareholdings in connection with IPOs, receiving notifications of changes in shareholdings, granting exemptions or relief from certain reporting obligations and delivering decisions on whether a reporting obligation exists.<sup>11</sup>

## **III THE OFFERING PROCESS**

### **i General overview of the IPO process**

The timetable of an equity offering 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 corporate governance and structure, and accounting and reporting requirements. Nevertheless, IPOs in Switzerland generally take between four and six months and an indicative IPO can generally be organised into the following five phases.

### ***IPO planning and preparation phase***

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

- a* discuss and develop the issuer's strategy, business plan, equity story (i.e., investment case) and offering structure;
- b* establish a timetable and hold kick-off meetings;
- c* select the responsible team both internally at the issuer and externally, including the underwriters, bookrunners and any other managers (i.e., the banking syndicate) and legal and financial advisers;
- d* 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);
- e* consider matters concerning capital, financial and accounting or tax structures; and
- f* begin due diligence exercises (which includes business, financial and legal due diligence and will continue throughout the prospectus drafting process).

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10 [www.six-exchange-regulation.com/en/home/profile/six-exchange-regulation.html](http://www.six-exchange-regulation.com/en/home/profile/six-exchange-regulation.html).

11 [www.six-exchange-regulation.com/en/home/investor/obligations/disclosure-of-shareholdings/board.html](http://www.six-exchange-regulation.com/en/home/investor/obligations/disclosure-of-shareholdings/board.html).

### ***Drafting phase***

During the drafting phase, the issuer and its other advisers:

- a* draft the prospectus and other key legal documents;
- b* develop marketing and presentation materials, such as analyst and pilot fishing investor presentations;
- c* engage with the issuer's auditors regarding presentation of financial information in the prospectus and delivery of comfort letters; and
- d* attend courtesy meetings at SIX to discuss the contemplated offering structure and content of the prospectus.

### ***Negotiating and investor education phase***

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

- a* shareholders' resolutions in respect of the offering and capital increase (if applicable);
- b* negotiation of underwriting agreement and any sub-underwriting agreements (if applicable);
- c* delivery of the analyst presentation and review of research reports;
- d* preparation of the SIX listing application;
- e* submission of the listing application together with the preliminary listing prospectus and any additional required documents;
- f* draft of roadshow presentation and other materials for analysts, press and investors;
- g* respond to SIX comments (if applicable);
- h* inclusion of interim financial statements into offering documents and update analysts (if applicable); and
- i* issue a press release regarding the issuer's intention to float, followed by the publication of analysts' research reports.

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

### ***Pre-trading and marketing phase***

During the period from approximately two weeks prior to the first day of trading, the IPO workstreams generally address the following tasks:

- a* approval of the prospectus and underwriting agreement by the board of directors of the issuer;
- b* final price discussions with the board of directors of the issuer and setting of a price range;
- c* execution of the underwriting agreement; and
- d* begin the offer period, publishing the prospectus, starting the price-fixing process (e.g., the book-building process) and beginning roadshow presentations.

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

- a* subscription and payment of the nominal value of the equity securities to be offered;
- b* registration of the capital increase in the commercial register of the issuer (if applicable);

- c* establish the final offer price and executing the pricing agreement to the underwriting agreement and pricing supplement to the offering and listing prospectus (if applicable); and
- d* allocate shares to investors.

### ***First trading day and aftermarket phase***

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

- a* stabilisation of the shares along with the disclosure of stabilisation measures (within five trading days);
- b* settlement and payment of net proceeds (usually within two trading days of the first trading day); and
- c* exercise of the overallotment option (30 calendar days after first trading day) and disclosure of exercise of the overallotment option (within five trading days after the exercise).

### **ii Considerations for foreign issuers**

Foreign issuers of equity securities are subject to certain additional listing requirements as set out in the SIX Directive on the Listing of Foreign Companies.<sup>12</sup> However, generally speaking, these additional requirements are not very onerous and in practice they do not pose particular issues. A particularly attractive aspect of listing in Switzerland is that currently no government agencies are involved in the listing process, which results in a much faster and flexible process. In some respects, the SIX views itself as a market participant, rather than exclusively being a supervisor, and this generally results in more accessibility and flexibility. In addition, the Swiss market has strong representation from certain industries that may attract foreign peer companies, especially with regard to the pharmaceutical, biotech and financial services industries.

It is worth noting that, subject to certain conditions, Swiss law allows Swiss companies to prepare their accounts and to report in a foreign currency. Hence, if an EU or US company decides to list in Switzerland it can either list the shares of the foreign entity on the SIX or change its domicile to Switzerland by setting up a new Swiss holding company and listing the shares of the new holding company on the SIX. In either scenario, the issuer can continue to report in euros or US dollars. In addition, the SIX also permits trading of equity securities in euros or US dollars. Notably, the change of domicile route is often taken for tax or regulatory purposes.

### ***Overview***

As a general matter, 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 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.<sup>13</sup>

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12 Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_05-DFC\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_05-DFC_en.pdf).

13 Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_05-DFC\\_en.pdf](http://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 may 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 pursuant to investor protection legislations. This requirement is usually satisfied by an opinion delivered from an independent law firm or 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 may, however, 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 (a '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, foreign issuers must describe those publications in which announcements required by an issuer under the issuer's home country company law will appear. Furthermore, the foreign issuer must 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 (i.e., by entry in the commercial register).

In addition to IFRS and US GAAP, foreign issuers who wish to list their shares on SIX according to the International Reporting Standard may 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 such purpose is IFRS EU.

### ***Secondary listing requirements***

In connection with secondary listings, the applicable issuer requirements 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 such jurisdiction. Furthermore, 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 (e.g., security number, paying agent, settling agent and trading currency) is added for the Swiss market.

However, if 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 as well as a description of the issuer and a 'no material change clause'. The short-form prospectus must contain a reference to the secondary listing and to the trading currency on the SIX. The short-form prospectus must also contain the audited annual consolidated financial statements for the past three full financial years and, 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, additional interim financial statements. 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.

The free float is considered adequate for a secondary listing if the capitalisation of the shares circulating in Switzerland is at least 10 million Swiss francs or if the applicant can otherwise demonstrate that there is a genuine market for the equity securities concerned.

#### IV POST-IPO REQUIREMENTS

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,<sup>14</sup> 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:

- a* timely disclosure of any price-sensitive facts (*ad hoc* publicity) (SIX Directive on *Ad Hoc* Publicity);<sup>15</sup>
- b* publication of the annual report comprising the audited annual financial statements, in accordance with the applicable financial reporting standard, and the corresponding audit report;
- c* publication of semi-annual financial statements;
- d* 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;
- e* notification of any change in the rights attached to the listed equity securities, in good time before the entry into force of that change;
- f* 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 (e.g., 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;
- g* information on annual and extraordinary general meetings of shareholders;
- h* 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);
- i* publication of information relating to corporate governance (SIX Directive on Information relating to Corporate Governance);<sup>16</sup>
- j* payment of the annual listing fees; and

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14 Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_20-DRRO\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_20-DRRO_en.pdf).

15 Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_17-DAH\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_17-DAH_en.pdf).

16 Available at [www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06\\_16-DCG\\_en.pdf](http://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/directives/06_16-DCG_en.pdf).

- k* disclosure of qualified shareholdings (the thresholds are 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33⅓ per cent, 50 per cent or 66⅔ per cent) (Article 120 FMIA).

## V OUTLOOK AND CONCLUSION

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, and to ensure access of Swiss financial institutions to the European market by fulfilling the equivalence requirements under Directive 2014/65/EU on markets in financial instruments.

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

- a* FMIA, which came into force on 1 January 2016;
- b* proposed FIDLEG; and
- c* proposed 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 other things:

- a* a new prospectus regime for public offerings of securities in Switzerland;
- b* the codification of private placement exemptions; and
- c* revisions of the prospectus liability regime.

The Swiss Federal Council finalised and adopted the draft of FIDLEG and FINIG on 4 November 2015 and submitted it to the Swiss Parliament. In December 2016, the Swiss Council of States, the upper chamber of the Swiss Parliament, approved revised drafts of FIDLEG and FINIG. Currently, the proposed legislation is under review by the National Council, the lower chamber of the Swiss Parliament. It is currently expected that FIDLEG and FINIG will not be enacted before mid 2018 or perhaps even in 2019. However, it is also anticipated that there will be a transition period in relation to full compliance with the final legislation.

### **i 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 EU 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.

**ii 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. The draft of FIDLEG includes express exemptions from the duty to publish a prospectus, which are largely consistent with the exemptions under the current EU Prospectus Directive and existing SIX regulations. The list of exempt transactions includes, among other things, offerings limited to investors classified as professional clients and offerings addressed to less than 150 investors classified as retail clients. 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.

**iii Proposed revisions of the prospectus liability regime**

FIDLEG also includes changes to the current prospectus liability regime. 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, and limitations of liability in connection with required summaries and forward-looking statements included in prospectuses.



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He has devoted a substantial amount of time to advising banks, issuers and sophisticated investors (including private equity and sovereign wealth funds) in high-profile capital markets transactions. Recent instructions include IPOs, SIX listings, rights offerings, PIPE transactions, high-yield bonds and innovative hybrid financing deals.

Mr Weber is distinguished as a leading banking and finance, capital markets and corporate and M&A lawyer by *Chambers*, *IFLR 1000* and *The Legal 500*. He is the co-editor of *CapLaw*, the Swiss Capital Markets Law newsletter. He has authored an award winning PhD study in international law and various publications on Swiss corporate and securities law. He regularly lectures on such issues at professional conferences.

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