The International Capital Markets Review

Second Edition

Editor

Jeffrey Golden

Law Business Research

The International Capital Markets Review

Second Edition

This article was first published in
The International Capital Markets Review, 2nd edition
(published in November 2012 – editor Jeffrey Golden).

For further information please email
Adam.Sargent@lbresearch.com

The International Capital Markets Review

SECOND EDITION

Editor
Jeffrey Golden

Law Business Research Ltd

The Law Reviews

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Alexandra Wan

PUBLISHING ASSISTANT
Lucy Brewer

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITORS
Anne Borthwick, Joanne Morley

SUBEDITOR
Charlotte Stretch

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

ISBN 978-1-907606-48-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLEN & OVERY, A PĘDZICH SPK

ALLEN & OVERY LLP

ALLEN & OVERY LUXEMBOURG

BBH, ADVOKÁTNÍ KANCELÁŘ, V.O.S.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

DE PARDIEU BROCAS MAFFEI

ENS (EDWARD NATHAN SONNENBERGS)

FENXUN PARTNERS

FRESHFIELDS BRUCKHAUS DERINGER LLP

GAIKOKUHO KYODO-JIGYO HORITSU
JIMUSHO LINKLATERS

GARRIGUES

JURIS CORP

KIM & CHANG

KING & WOOD MALLESONS

MAPLES AND CALDER

MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS

PAKSOY

PLESNER

RUSSELL McVEAGH

SIDLEY AUSTIN LLP

ULHÔA CANTO, REZENDE E GUERRA ADVOGADOS

WENGER & VIELI AG

CONTENTS

Editor's Prefaces vii
Jeffrey Golden

Chapter 1 AUSTRALIA..1
Greg Hammond and Rowan Russell

Chapter 2 BELGIUM..18
Sylvia Kierszenbaum and Willem Van de Wiele

Chapter 3 BRAZIL..31
Adriana Baroni Santi and Denis Morelli

Chapter 4 CHINA..42
Xusheng Yang

Chapter 5 CZECH REPUBLIC..56
Tomáš Sedláček and Zdeněk Husták

Chapter 6 DENMARK..63
Vibeke Borberg, Emil Deleuran, Henrik Laursen and Catherine Tholstrup

Chapter 7 FRANCE..77
Antoine Maffei and Olivier Hubert

Chapter 8 GERMANY..93
Kai A Schaffelhuber

Chapter 9 HUNGARY..103
Ágnes Bódi, Gergely Szarka and Norbert Hete

Chapter 10 INDIA 112
H Jayesh, Sonali Sharma and Veena Sivaramakrishnan

Chapter 11 IRELAND..121
Nollaig Murphy

Chapter 12 ITALY 135
Claudio Di Falco and Fabio Saccone

Chapter 13 JAPAN 147
Akihiro Wani, Reiko Omachi and Tomoko Okazaki

Chapter 14 KOREA..160
Bo Yong Ahn, Hyun Soo Doh and Wooyoung Cho

Chapter 15 LUXEMBOURG..172
Frank Mausen and Henri Wagner

Chapter 16 NEW ZEALAND..190
Deemple Budhia and John-Paul Rice

Chapter 17 POLAND 203
Piotr Lesiński

Chapter 18 RUSSIA..213
Vladimir Khrenov

Chapter 19 SOUTH AFRICA..227
Clinton van Loggerenberg and Stephen von Schirnding

Chapter 20 SPAIN..237
José Luis Palao Iturzaeta and Ignacio Corujo del Valle

Chapter 21 SWITZERLAND 250
Wolfgang Zürcher

Chapter 22 TURKEY 262
Ömer Çollak and Erkan Tercan

Chapter 23 UNITED KINGDOM..273
Stephen Revell and Eric Phillips

Chapter 24 UNITED STATES 287
Bart Capeci

Appendix 1 ABOUT THE AUTHORS.. 300

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....314

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centers has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and 'cherry-pick' best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets ('ICM') law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements ('BIS') as exceeding $700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than $180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011

Chapter 21

SWITZERLAND

Wolfgang Zürcher[1]

I INTRODUCTION

Switzerland is neither a member of the European Union nor a member of the European Economic Area. Thus, the European legislation does not apply to Switzerland. However, the Swiss capital marked is highly dependent on a free and unrestricted interaction with other European markets. As a consequence, Switzerland has to make sure that Swiss market participants fulfil the minimal regulatory requirements as requested by the European Union. Otherwise, they may be restricted or prohibited to market their products or render their services to customers domiciled in the European Union. Hence, Switzerland has to adapt (in formal terms autonomously) its capital market legislation to the standards of the European Union. In 2012 and 2013, major tasks in this context are and will be the implementation of the Alternative Investment Fund Managers ('AIFM') Directive as well as MiFID II, which will have a significant effect on the risk management and compliance obligations of Swiss market participants.

i Legal framework

Switzerland does not have a coherent set of capital market rules. The relevant Swiss capital market legislation includes:

a Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority (the Financial Market Supervision Act, 'FINMASA');

b Federal Act of 24 March 1995 on Stock Exchanges and Securities Trading (the Stock Exchange Act, 'SESTA');

c Federal Ordinance of 2 December 1996 on Stock Exchanges and Securities Trading;

1 Wolfgang Zürcher is a partner at Wenger & Vieli AG. The author also would like to thank Martin Hess, a partner at the firm, for his invaluable contributions.

d Ordinance of the Swiss Financial Market Supervisory Authority of 25 October 2008 on Stock Exchanges and Securities Trading Trading (the FINMA Stock Exchange Ordinance, 'SESTO-FINMA');
e Ordinance of the Takeover Board on Public Takeover Offers of 21 August 2008;
f Regulations of the Takeover Board of 21 August 2008;
g Ordinance of the Swiss Financial Market Supervisory Authority of 30 June 2005 on the Bankruptcy of Banks and Securities Dealers;
h Federal Act of 23 June 2006 on Collective Investment Schemes (the Collective Investment Schemes Act, 'CISA');
i Swiss Federal Ordinance of 22 November 2006 on Collective Investment Schemes;
j Federal Law of 8 November 1934 on Banks and Savings Banks;
k Federal Ordinance of 17 May 1972 on Banks and Savings Banks;
l Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing in the Financial Sector;
m Federal Ordinance of 29 September 2006 on Capital Adequacy and Risk Diversification for Banks and Securities Dealers; and
n Federal Intermediated Securites Act of 3 October 2008, which regulates the custody, transfer and related issues regarding securities held with regulated custodians.

In addition, the Swiss Code of Obligations ('the CO') regulates the issuance of bonds (Article 1156 ff) and the public issuance of shares (Article 652a).

ii The Swiss Financial Market Supervisory Authority

As a state regulatory body, the Swiss Financial Market Supervisory Authority ('FINMA') is endowed with supreme authority over banks, insurance companies, stock exchanges, securities dealers and collective investment schemes. It is responsible for combating money laundering and, where necessary, conducts financial restructuring and bankruptcy proceedings. FINMA grants operating licences for companies and organisations subject to its supervision, monitors the supervised institutions with respect to their compliance with the requisite laws, ordinances, directives and regulations, as well as with the conditions for granting licences that must be complied with at all times. Where necessary, and to the extent permissible by law, FINMA imposes sanctions, provides administrative assistance and issues ordinances and circulars.

As a general rule, decisions of FINMA may be appealed at the Federal Administrative Court, the decisions of which may be appealed at the Swiss Federal Court.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Of the numerous developments, the following are of particular interest.

Ad hoc publicity

On 1 December 2011 SIX Swiss Exchange published a new commentary on the Directive on *Ad hoc* Publicity. This commentary reflects the developments of the practice of the enforcement authorities, and is a valuable tool for any company that deals with questions concerning *ad hoc* publicity.[2]

Revision of CISA

On 2 March 2012 the Swiss Federal Council published a dispatch on the revision of CISA. An amendment of CISA is necessary in order to bring it in line with the EU Directive on Alternative Investment Funds Managers ('AIFMD') adopted by the EU in November 2010, which governs the management, custody and distribution of collective capital investments that are not covered by the UCITS Directive, the existing set of EU regulations for investment funds. The planned amendment of CISA will have the effect that all asset managers of Swiss and foreign collective investment schemes are supervised. The requirements for depositories and the rules concerning marketing to qualified investors will become more restrictive. The purpose of the amendment of CISA is therefore to ensure that Swiss financial service providers and their products will continue to be able to access the European market. The dispatch proposed by the Swiss Federal Council contained numerous regulations, which are more restrictive than those in AIFMD. As a consequence, there was severe criticism from market participants. It was feared that Switzerland's attractiveness would be severely reduced if the new CISA came into force as proposed by the Council.

In summer 2012 the Swiss parliament discussed the Council's proposal. During this session, the small chamber of the parliament (cantonal representatives) mitigated several over-restrictive provisions to some extent. For example, according to the small chamber of the Swiss parliament, foreign collective investment schemes that are offered out of Switzerland to qualified investors abroad will no longer be regulated. Furthermore, offers to regulated financial intermediaries are not regulated. Finally, the small chamber introduced various facilitations with respect to control and information duties of Swiss representatives of foreign collective investment schemes. On 18 September 2012, the large chamber (national representatives) of the Swiss parliament confirmed all the changes proposed of the small chamber. Swiss market participants are generally relieved that the Swiss parliament reduced the overregulated 'Swiss Finish' proposed by the Federal Council and has adopted a version that complies with but does not significantly exceed the requirements set by AIFMD.

Taking into account that the new Swiss law must be in force by mid-2013 and that at this moment in time, Swiss managers of collective investment schemes must have adopted and implemented these new rules, the time frame to implement the new law is dangerously narrow.

2 www.six-exchange-regulation.com/download/admission/regulation/guidelines/rlahp_commentary_20111201_en.pdf.

SIX Swiss Exchange reporting obligations

In March 2012 the SIX Swiss Exchange published a new circular concerning reporting obligations regarding the maintenance of listings. The circular has been completely renewed, and now reflects the current status of the law and the actual practice of the authorities. The exhibits to the circular contain specific explanations with respect to certain obligations to notify. The new circular may constitute a helpful guide line for any company with ongoing reporting obligations at the SIX Swiss Exchange.[3]

ii Developments affecting derivatives, securitisations and other structured products

Simplication of prospectuses

On 9 December 2011 FINMA published a press release stating that according to a spot check review, numerous simplified prospectuses and sales documentations for structured products do not adequately protect investors.[4] FINMA came to the conclusion that most of the prospectuses and the sales documentation are not easy to understand, too long and not structured in a uniform manner.

Swiss law prescribes the provision of simplified prospectuses for structured products which the average investor can easily understand, describe profit and loss prospects in a standard format, and explicitly point out that structured products are neither a collective investment scheme, nor do they require authorisation by FINMA. The spot checks conducted by FINMA found that while the content of the majority of the prospectuses are complete, key legislative requirements are not satisfactorily fulfilled. Most of the prospectuses checked are not easy to understand, too long and too technical. They lack explanatory scenarios and charts and are not structured in a uniform manner, which makes it difficult to compare the different products. Moreover, the prospectuses are often only written in English. None of FINMA's checks revealed any evidence of violations of the prospectus rules subject to sanctions, but did, in FINMA's opinion, show that investors are not adequately informed.

However, this survey and its result are of significant relevance for issuers of structured products. In order to avoid potential prospectus liability claims, they will have to immediately review their general standards for their simplified prospectuses.

Protection of clients

On 24 February 2012 FINMA published its position paper on distribution rules.[5] FINMA takes the view that Swiss financial market legislation needs to be improved as regards client protection. To reduce the asymmetrical power relationship between financial services providers and clients, and strengthen the market, FINMA proposes as key measures clearer rules of business conduct for financial services providers and better product documentation. It also sees the strategic extension of supervisory powers as a necessity.

3 www.six-exchange-regulation.com/admission_manual/07_02-CIR1_en.pdf.

4 www.finma.ch/e/aktuell/pages/mm-stukturierte-produkte-20111209.aspx.

5 www.finma.ch/e/aktuell/pages/mm-vertriebsbericht-20120224.aspx.

At the core of the proposed package of measures are standardised, cross-sector rules of business for banks, insurers and portfolio managers with which they must comply in their contact with clients. The focus is on the obligation to inform all clients about the content of a service and the characteristics of financial products, and to warn them about the risks involved. Clients should in future be more clearly informed about all the costs associated with a service or the purchase of a product. FINMA demands that financial services providers furnish clients with more detailed product documentation. In particular, providers of standardised financial products such as shares, bonds and structured products should be obliged to draw up a prospectus.

FINMA considers a strategic extension of its supervisory powers as essential to ensuring that the proposed conduct and information requirements are put into practice. Portfolio managers, for example, should in future be allowed to exercise their powers of decision with regard to the investment of client assets only if they have been authorised by FINMA. In addition, all client advisers should prove that they know the applicable rules of business conduct and have the necessary specialist knowledge by taking a compulsory test and regular further training. According to FINMA, the coherent implementation of the proposed measures requires a financial services act covering all the relevant sectors. In addition to these changes to supervisory law, FINMA also regards measures at the level of civil law as expedient.

Swiss market participants are concerned that this new FINMA initiative may lead to additional regulatory restrictions and hurdles, which may significantly reduce the attractiveness of Switzerland as a market place for financial services. While it is commonly understood and accepted that Swiss capital market regulations should be in line with EU standards, the approach of FINMA is criticised with respect to all aspects that exceed the level of comparable EU rules and regulations.

OTC derivatives

On 29 August 2012 the Federal Council decided to introduce new legal provisions for OTC derivatives trading. At the same time, the regulations in the area of financial market infrastructure are to be amended. The Federal Department of Finance has been instructed to prepare a draft consultation paper by spring 2013. This is an example of how Switzerland is under pressure to enact legislation equivalent to the European legislation, in this case equivalent to the European Market Infrastructure Regulation (EMIR).

iii Cases and dispute settlement

Regulated services provided by a group of companies

On 12 January 2012, the Swiss Federal Court had to assess certain activities that were rendered by a coordinated group of companies.

The court came to the conclusion that several companies may become subject to regulatory supervision if they act in concert and market themselves as a unified group that performs activities that are regulated by Swiss law, even if one company – assessed on a stand-alone basis – would not be deemed to render such services. The elements that caused the Federal Court to make the group subject to supervision included:

a the group presented itself as a coordinated unit;

b unclear internal organisation and structures;
c no clear separation of the group entities in the books and records;
d complicated group structure;
e absence of clear legal separation of the group entities; and
f all group entities had their registered domicile at the same address.

The Swiss Federal Court held that it is not necessary that the participants intentionally circumvented regulatory provisions; the fact that the group as such is (as a group) engaged in activities that are subject to FINMA supervision is sufficient.[6] Consequently, the group members are subject to supervision and sanctions by FINMA even if they individually did not fulfil all the requirements necessary to be regulated.[7] The Swiss Federal Court held that the decision to liquidate the group, and the publication of the prohibition for the members of the board and the management to market their services for a period of five years, is an adequate sanction.

Obligation of securities dealer to inform its clients

In August 2011 the Swiss Federal Court had to rule on the scope of the obligation of a securities dealer (i.e., a bank) to inform its client about the risks of specific transactions. A client opened a securities account with a Swiss securities dealer. The securities dealer had neither an asset management mandate nor an advisory agreement with the client. The client used the securities dealer's e-banking services and suffered damages caused by transactions it executed through this system. It was claimed that the securities dealer should have realised that the transactions could be highly disadvantageous to the customer and it should have warned its client about the risks of such transactions. The Federal Court held that a bank that does not have an advisory agreement with a client and that only sporadically executes capital market transactions for such client is not subject to a general duty to protect the interests of such client. In such a case, the bank only has to inform a client upon a specific request. If a client unconditionally instructs a bank to execute certain transactions, it demonstrates to the bank that it does not require advice with respect to such transactions. Thus, an obligation to warn a client only exists in exceptional cases. The court also clarified the scope of Article 11 of SESTA, which expressly provides for an obligation of a securities dealer to inform its customers. The court held that while a securities dealer is obliged to inform about the risks that are generally inherent to certain types of transactions, it is under no general obligation to publicise the risks of a specific transaction. In particular, a securities dealer is not obliged to check whether a specific transaction is suitable for a specific customer and whether such transaction is compatible with such client's financial situation.[8]

6 2C 30/2011; BGer 12.1.2012, E. 3.1.2.
7 2C 30/2011; BGer 12.1.2012, E. 3.1.3.
8 4A 271/2011; BGer, 16.8.2011, E. 4.

Legal nature of intermediated securities

On 10 January 2012, the Swiss Federal Court clarified certain legal aspects concerning intermediated securities (*Bucheffekten*). It confirmed that intermediated securities are transferrable personal or corporate rights against an issuer, which are credited to a securities account and which are transferrable according to the rules of SESTA (Article 3, Paragraph 1); they are assets of their own legal nature (*sui generis*). Ownership with respect to intermediated securities is not the same as ownership with respect to moveables. Consequently, any claims of the owner for delivery of intermediated securities are mere contractual claims. The owner does not have the same right to require physical delivery of such assets as it would have with 'real' moveables.[9] In other words, Article 641, Paragraph 2 of the Swiss Civil Code does not apply to intermediated securities.[10]

Naming and shaming

In January 2012 the Federal Court ruled on the possibility of publishing sanctions of the supervisory authorities, including personal details of the addressees ('naming and shaming'). Article 34 of FINMASA entitles FINMA to publish its final decisions once they have become final and binding, and the publication must be ordered in the FINMA decision itself. Such publication serves two purposes. First, it constitutes an individual sanction against the addressee, who is publicly exposed; this sanction may therefore be described as a reputational penalty. Second, it is intended to deter the public from committing similar violations.[11] Since such publication severely affects the personal status of the addressee, it should only be declared in case of severe violations of capital market rules. One-time violations that are not of major significance are not sufficient to justify such sanction.[12]

The specific case dealt with companies who raised 12.8 million Swiss francs from about 800 investors without FINMA approval. The Swiss Federal Court qualified this as a severe, continuous violation of financial market rules, which justified the publications of the concerning sanctions.[13]

Financial restructuring and the exception from duty to make public tender offer

According to Article 32, Paragraph 1 of SESTA, a party acquiring more than one-third of the voting rights of a target company is obliged to make a public tender offer (subject to an opting up or opting out of the target company). The Swiss Take Over Board may

9 4A 155/2011; BGer 10.1.2012; E. 5.2.2.

10 Article 641 of the Swiss Civil Code:
(1) The owner of an object is free to dispose of it as he or she sees fit within the limits of the law.
(2) He or she has the right to reclaim it from anyone withholding it from him or her and to protect it against any unwarranted interference.

11 Christophe Raimondi, '*Praxis zum Finanzmarktaufsichtsrecht*', *GesKR – Gesellschafts- und Kapitalmarktrecht*, 1/2012, p. 95.

12 2C 71/2011; BGer 26.1.2012; E. 5.3.1.

13 2C 71/2011; BGer 26.1.2012; E. 5.3.2.

grant exceptions, for example, if the takeover is a means of financially restructuring the target company.[14]

On 2 April 2012, the Swiss Take Over Board granted such exception, arguing that investors who are willing to support a company in a crisis must be treated more favourably; acquisitions that are intended to financially restructure a target company have therefore to be facilitated. The term 'financial restructuring' has to be construed in terms of the specific business economics. Consequently, Article 33, Paragraph 2(e) of SESTA addresses all measures that remedy the financial situation and the earning power of a company. Such measures must be necessary and reasonably adequate to secure the survival of a company, but there can be no guarantee for a long-term success. The offeror has to demonstrate that it was under no legal obligation to make such contribution.[15]

Discretion of special auditors

In 2011, the Swiss Take Over Board had to rule on the minimal offer price with respect to illiquid shares.

In the case of a public takeover offer, the minimal price offered must be 'at least as high as the stock exchange price' and shall be no lower than 25 per cent of the highest price paid by the offeror for equity securities of the target company in the preceding 12 months.[16] The stock exchange price equals the volume weighted average price ('VWAP') of the stock exchange trades of the last 60 business days preceeding the publication of the offer.[17] The problem in the case at hand was that the securities in question were illiquid meaning that the trading volumes were constantly low. The target company did not fulfil the liquidity requirements as stated by the Take Over Board.[18] Therefore, there was a risk that the VWAP did not adequately reflect the stock's value.

In order to determine the minimal offer price, the offeror mandated BDO as an auditing company licensed by FINMA in the sense of Article 25 of SESTA. BDO prepared a valuation opinion using four valuation principles: discounted cash flow method; comparable trading multiples; comparable transaction multiples and public assessments of analysts. Based on these assessments BDO determined and confirmed the relevant VWAP.

The Swiss Take Over Board held that it is within the auditing company's discretion to determine an adequate valuation method. The Take Over Board did not reassess whether the valuation method used by BDO was the best method for this specific case.[19]

Therefore, one may conclude that in a case where the liquidity of the target securities is low the auditing company that has to assess and confirm the minimal offer

14 Article 32, Paragraph 2(e) of SESTA.

15 Decision Nr. 501/01 of 2 April 2012 of the Swiss Take Over Board (N.4).

16 Article 31, Section 4 of SESTA.

17 Article 40, Section 2 of SESTO-FINMA.

18 TOB Circular No. 2: Liquidity in the context of takeover law of 26 February 2010.

19 Decision 0467/01 – Feintool International Holding AG. The Take Over Board referred to a decision of the Swiss Federal Administration Court of 30 November 2010 (B-5272/2009, E. 7.3; Quadrant).

price does indeed have some discretion. Since it is usually the offeror who chooses the special auditing company, this decision may be of relevance for future unfriendly takeover bids on companies with low trading volumes.

Squeeze-out procedures

According to the standing practice of the Zurich Commercial Court, the costs in the squeeze-out procedures are to be borne by the plaintiff (i.e., the majority shareholder) requesting the cancellation of the shares of the minority shareholders against payment of the offer price. The court stated in a judgment issued in January 2012 that the intervening minority shareholder may bear the risk of court costs if the intervener is not successful with his petitions made independently of the target company. In this case the intervener is at least partly liable for the court fees and for paying compensation to the plaintiff.

iv Relevant tax and insolvency law

Tax law

Corporate Tax Reform III

In 2008 the Swiss Federal Council initiated the Swiss Corporate Tax Reform III ('the CTR III'). The purpose of this reform is to improve the tax situation for international groups that are tax-resident in Switzerland. For this purpose, the issuance stamp tax on equity and debt will be abolished. Furthermore, certain taxes on intra-group financing will be removed and an option to waive capital tax at a cantonal level will also be introduced. Finally, certain cantonal tax privileges will be mitigated in order to resolve the current tax dispute between the European Commission and Switzerland. On 1 December 2011 the Swiss Federal Council confirmed that it will treat the CTR III with high priority.

Swiss market representatives are in favour of this initiative and are urging the Federal Council and the Federal Parliament to push it forward without delay.[20]

Amendment of the Withholding Tax and Stamp Duty Ordinance

Due to the relatively moderate progress of the CTR III, some of the measurements were separated from the CTR III and have already been implemented.

One aspect is the improvement of the tax framework in connection with intra-group financing. The respective revision of the Withholding Tax and Stamp Duty Ordinance became effective on 1 August 2010. Based on this revision, all intra-group liabilities are no longer subject to issuance stamp tax on constitution and the interest payments are no longer subject to withholding tax, independent of their terms, the number of their accounts and their currencies.

For the sake of completeness it must be mentioned that, for tax evasion reasons, these rules are not applicable to Swiss group companies that guarantee a bond issued by a foreign group company.

20 www.economiesuisse.ch/de/PDF per cent20Download per cent20Files/03_c_USTRIII_d_23-10-11.pdf.

In addition, the Banking Act Reform Bill, originally a pure banking law revision, also includes some tax provisions to limit the 'too-big-to-fail' risk in Switzerland (i.e., the dealing with the systemic risks of big banks in Switzerland).

Therefore, as immediate action, another part of the CTR III measurements were prioritised and, as of January 2012, the general abolition of issuance stamp tax on debt and the separate exemption of ownership rights constituted or increased out of so-called contingent convertible bonds ('CoCos') by banks came into force.

The former regulation foresaw the applicable issuance stamp tax rates on the issuance of certain forms of debt (issue of bonds and money market paper) of between 0.06 per cent and 0.12 per cent of the par value for each year of the maximum term of the loan. With the abolition of the issuance stamp tax on debts, the Banking Act Reform Bill will thus enable all kinds of Swiss companies to finance themselves on the bond markets at much lower costs than is currently the case.

Relief from the '20 non-bank lender rule' for withholding tax purposes

On 26 July 2011, the Swiss Federal Tax Administration issued circular letter No. 34 on customer credit balances, which replaces the respective leaflet of April 1999 and introduced a new '100 non-bank lender' rule for customer credit balances.

While interest payments on loans payable by a Swiss debtor are not usually subject to Swiss withholding tax, the Swiss debtor may nevertheless become subject to withholding tax if it accepts loans (by way of loan agreement or by accepting money in current accounts) essentially from more than 20 debtors. Exceeding this threshold triggers withholding tax on all interest paid on such loans or current accounts since the Swiss entity would – for withholding tax purposes – be qualified as a bank.

The new circular letter now increases the respective thresholds: it states that a qualification as a bank for the purposes of the Swiss withholding tax law requires that the enterprise has interest-bearing debt exceeding 5 million Swiss francs towards more than 100 non-bank creditors. These changes are effective immediately.

It should be noted that the '10 non-bank lender rule' for bonds and the '20 non-bank lender rule' for medium-term bonds remain unchanged. Further, according to Swiss Withholding Tax Ordinance, enacted as per 1 August 2010 (see above), debt between group companies does not count towards the foregoing thresholds, provided that the group of companies has not issued a bond abroad, which is guaranteed by a Swiss group company.

Insolvency law

On 8 September 2010 the Swiss Federal Council has issued its dispatch for an amendment of the Swiss Debt Enforcement and Insolvency Law. The purpose of the amendment is to facilitate the financial restructuring of companies. For example, the general requirements of a creditor relief agreement will be less stringent.

On 15 November 2011, the secretary for legal matters of the cantonal representatives confirmed that Swiss Insolvency Law will be implemented. It remains to be seen whether, and if so, how the Swiss parliament amends the Swiss Federal Council's proposal.

v Rating agencies

On 1 January 2012, the new FINMA Circular 12/1 on Credit Rating Agencies came into force, replacing Circular 08/26. The requirements on credit rating agencies specified in the circular are intended to provide minimum qualitative rating standards. The circular governs the recognition of institutions that assess creditworthiness (credit rating agencies) whose credit ratings are used within the context of financial market regulation by FINMA-supervised institutions. The provisions for recognising credit rating agencies set out in this circular are intended to ensure that the prerequisites for minimum qualitative credit rating standards for regulatory use are fulfilled. The circular is directed at all institutions supervised by FINMA that use credit ratings. The use of credit ratings for purposes other than regulatory purposes (e.g., for information purposes or to support the risk management of supervised institutions) is not restricted irrespective of whether the credit rating agency is recognised by FINMA, and is not covered in the circular. Besides governing the regulatory use of ratings by banks and securities dealers, particularly when calculating required equity capital, the Circular on Credit Rating Agencies also redefines their use by insurance companies (e.g., investment requirements for tied assets) and by collective investment funds (investment techniques and derivatives). Other changes to the former FINMA Circular 08/26 are based on current guidelines of international standard setters.[21]

vi Other strategic considerations

Banking regulation

On 1 June 2012 the Federal Council adopted a package of measures designed to strengthen Switzerland's banking centre. As a result of the total revision of the Capital Adequacy Ordinance, banks will have to comply with the new rules (Basel III) of the Basel Committee on Banking Supervision from 1 January 2013. Furthermore, big banks whose failure would do considerable harm to the Swiss economy will have to comply with supplementary capital and risk diversification requirements in the future, as well as present an effective emergency plan to the supervisory authority. The package also contains two immediate measures that will introduce a mechanism for activating a countercyclical buffer and impose more risk-oriented requirements for the capital underpinning mortgage lending.

The regulatory framework referred to as 'Basel III', which was developed by the Basel Committee on Banking Supervision, will be implemented into Swiss law by the total revision of the Capital Adequacy Ordinance. Banks will have to hold better quality capital. They will have to hold minimum capital representing 8 per cent of risk-weighted assets ('RWA') as well as an additional capital buffer of 2.5 per cent of RWA, whereby 7 per cent must be comprised of common equity Tier 1 (essentially share capital and reserves). This will improve their ability to bear losses during difficult times. Moreover, the new risk diversification rules should limit interconnectedness within the banking sector and reduce dependence among banks, particularly systemically important banks.

21 www.finma.ch/e/regulierung/Documents/finma-rs-2012-01-e.pdf.

At the same time, the total revision implements the supplementary requirements for systemically important banks resulting from the amendment of the Banking Act of 30 September 2011 ('too big to fail'). The higher capital requirements apply in parallel with the Basel III requirements. There is a phase-in period of five years. Finally, systemically important banks also have to use an emergency plan to demonstrate to FINMA how they can ensure that functions that are systemically important for Switzerland are maintained in the event of threatened insolvency. These rules are set out in the amended Banking Ordinance, which should enter into force together with the new Capital Adequacy Ordinance on 1 January 2013. The ordinance provisions for systemically important banks still have to be approved by parliament beforehand.[22]

III OUTLOOK AND CONCLUSIONS

Being a non-EU island in the middle of Europe, Switzerland faces specific chances and risks. An ongoing challenge is to comply with regulatory EU standards and, at the same time, not to become an overregulated environment that deters investors and market participants.

The implementation of Switzerland's 'too-big-to-fail' projects continues to be a major issue and of significant importance for the Swiss financial sector.

The continuously strong Swiss franc constitutes another challenge to the Swiss export and tourism industry. The minimal exchange rate of 1.20 Swiss franc: €1, which has been consequently defended by the Swiss National Bank ('SNB') since September 2011 has led to a dramatic increase of SNB's foreign currencies balances. While at the end of 2011 SNB held foreign currencies in the amount of about 257 billion Swiss francs, it is thought that this amount will reach 450 billion Swiss francs by the end of 2012.[23] If SNB is not able to defend the Swiss franc exchange rate and if, for example, the exchange drops back to 1:1, it is generally thought that SNB would suffer a loss of around 50 billion Swiss francs. Thus, SNB's currency policy has reached very impressive dimensions. While it was thought in September 2011 that SNB's intervention is only temporarily required, it now seems that the euro is not likely to significantly recover in the near future. This raises the question of how long SNB will be able and willing to continue on its course.

22 www.efd.admin.ch/themen/wirtschaft_waehrung/02315/index.html?lang=en.

23 By way of comparison, the estimated GDP of Switzerland for 2012 will be in the region of 550 billion Swiss francs. Switzerland's budget for 2012 foresees earnings and expenditures of 64.1 billion Swiss francs, which amounts to a neutral result.

Appendix 1

ABOUT THE AUTHORS

WOLFGANG ZÜRCHER
Wenger & Vieli AG
Wolfgang Zürcher is an attorney at law and a notary public of the canton of Zug. His areas of specialisation are mergers and acquisitions, private equity and capital markets.

He initially joined Wenger & Vieli AG in 1991. He has since worked for Kean, Miller LLP in Louisiana (United States), but subsequently returned to Wenger & Vieli AG, where he became a partner in 1999.

Dr Zürcher is qualified as a capital market specialist by SIX Swiss Stock Exchange, and he advises various SIX-listed companies on SIX matters. He has also represented several issuers in IPOs in Switzerland.

He received his law degree and his PhD from the University of Zurich, and an LLM from the University of London. He has also served as assistant at the Chair of Commercial and Banking Law of the University of Zurich. He has been involved in various publications and lectures in his areas of specialisation.

WENGER & VIELI AG
Dufourstrasse 56
8034 Zurich
Switzerland;
Tel: +41 58 958 58 58
Fax: +41 58 958 59 59
w.zuercher@wengervieli.ch
www.wengervieli.ch