Underwriting Agreement and Offering/Listing Prospectus

There are various documents that need to be produced as part of the IPO process. The two most important documents for issuers are the underwriting agreement and the offering and listing prospectus.

Underwriting Agreement

Significance of the Underwriting Agreement and Contracting Parties

The issuer in an IPO receives support from various different parties including banks, who assist the issuer throughout the process and handle the placement of the shares. In the case of smaller IPOs this can be just one bank (the "lead bank"), while for bigger IPOs a syndicate of banks led by the lead bank or banks is used. Unlike in other jurisdictions, in Switzerland the lead bank usually also acts as the IPO consultant, which makes the selection of a lead bank and the negotiation of contracts with the lead bank crucially important.

The issuer concludes two agreements with the banks: an engagement letter at the start of the process and the underwriting agreement the day before the offer period begins. The underwriting agreement is therefore only concluded at the end of the process once all parameters – apart from the offer price and potentially also the volume – have been set. The offer price is normally not set until the end of the offer period, and is set out in a supplement to the underwriting agreement (the pricing supplement). If shareholders would like to sell shares in connection with the IPO then they are also party to the underwriting agreement. The underwriting agreement governs the parties' rights and obligations, and allocates risk between the parties with respect to their liability for the information contained in the prospectus in particular (please refer to the "Liability for the prospectus" section).

Offered and Placed Shares

In the underwriting agreement, the parties first agree on the number of shares to be placed. Some of these are new shares issued by the company (primary offering), and the proceeds from placing them flows into the company and is used to develop its business (key points are the use of the issue proceeds and the equity story, please refer to "Contents of the offering and listing prospectus" section). Existing shareholders may also want to sell shares as part of the IPO in order to exit from their investment (secondary offering).

The offer may either comprise a fixed number of shares to be placed or a maximum number ("up to" offer). The issuer and/or any selling shareholders usually grant the banks a greenshoe or over-allotment option. This allows the banks to place more shares than there are available and to potentially cover their resulting short position by exercising the over-allotment option.

Offer Price and Share Allocation

The offer price is usually determined by means of a book building process. During the "pre-marketing" period, the banks obtain information from potential investors regarding the issuer and its valuation. This information is used to set the price range for the book building that takes place in the offer period. During this time, offers are collected from investors in order to be able to determine an offer price at the end of the offer period. For the issuer it is not simply a question of achieving the highest price possible, but rather laying the foundation for the sustainable growth of the share price if possible. This is also the goal of the allocation of shares. The allocation criteria are based on objective criteria and should be defined based on the allocation directives for the new issue market published by the Swiss Bankers Association.

Other Provisions

In addition to provisions regarding the offer and the timeline and processing of the IPO, the underwriting agreement also contains provisions regarding the compensation paid to banks, the guarantees offered by the issuer (and potentially also the selling shareholders to a lesser extent) to the banks in case the offer fails, and liability (including indemnification), particularly for the information contained in the prospectus (please refer to the "Liability for the prospectus" section). The banks usually receive various commissions for their services, which are usually structured as a performance fee and can also include a discretionary component for the issuer. The banks' obligations depend on the fulfillment of certain conditions by the issuer, but also on certain market conditions that make it possible to place the shares in the first place.

Offering and Listing Prospectus

Obligation to Issue a Prospectus

Anyone who wants to publicly place shares in Switzerland and have shares listed and admitted to trading on the Swiss stock exchange must prepare an offering prospectus in accordance with the requirements of the Swiss Code of Obligations (OR) and a listing prospectus in accordance with the Listing Rules of SIX Exchange Regulation.

The requirements imposed on an offering prospectus by the OR are much less strict than the requirements for a listing prospectus. The OR also does not require a prospectus to be registered or assessed by a regulator, although this will change with the introduction of the new Financial Services Act (FIDLEG, please also refer to the "New Financial Services Act" section). The contents of the listing prospectus, on the other hand, are similar in the European Union even though the EU's Prospectus Directive does not apply in Switzerland.

Contents of the Offering and Listing Prospectus

The requirements applying to the listing prospectus originate from the Listing Rules and the various different schemes (such as Scheme A for shares) as well as the pertinent directives issued by SIX Exchange Regulation (for example the Complex Financial History Directive, DCFH). An offering and listing prospectus typically contains the following sections:

- Summary (offer, business activities, financial performance indicators)
- Risk factors (description of risks applying to the issuer and its sector as well as the shares)
- Offer (details of the offer, the shares being offered, the listing and processing)
- The volume and use of the proceeds from the issue
- Dividends and dividend policy
- Business activities (description of the business including strategy and strengths)
- Information regarding the issuer (details of the company and group, the company's management bodies, shareholders and articles of association)
- Information on the capital structure and the shares (capital and voting rights)
- Responsibility for the prospectus
- Financial arrangements, and potentially capitalization and MD&A (Management Discussion and Analysis)

The aim is to give potential investors an overview of the issuer's net assets, results of operations and financial position so that they can make an informed decision about whether to subscribe or purchase shares.

Formal Requirements

The prospectus may be written in English, German, French or Italian, and must be submitted to SIX Exchange Regulation at least 20 trading days prior to the listing or the start of the book building process as part of the listing application. The prospectus is always a single, self-contained document, but some information may be integrated in the form of references. Depending on the structure of the offer, the price and/or volume of the offer are published in a supplement to the listing prospectus once the offer period is over.

New Financial Services Act

FIDLEG will enter into force in 2020 at the earliest, and will also overhaul the law applying to prospectuses, among other things. A comprehensive prospectus obligation is to be introduced along the lines of the EU's Prospectus Directive, completing a paradigm shift with respect to Swiss prospectus law. This obligation to issue a prospectus will apply to anyone who intends to launch a public offering for the acquisition of securities (including any secondary offering) or apply for the admittance of securities to trading on a trading venue. There will, however, still be certain exceptions from the prospectus obligation for public offerings, but not for admittance to trading.

The obligation to register and obtain prior approval of the prospectus from a government authority is new. The formal assessment and approval of the prospectuses is to be carried out by FINMA-approved entities, although they will not assess their material accuracy. In the future it will therefore no longer be possible for SIX Exchange Regulation to check the prospectuses itself unless SIX Exchange Regulation obtains approval from FINMA.

Liability for the Prospectus

All parties involved in preparing the prospectus are liable to the purchasers of shares for any losses they incur as a result of information in the prospectus or in similar notifications that is erroneous, misleading or fails to meet statutory requirements. Liability for the prospectus in Switzerland is therefore very extensive. Not only does it cover the prospectus, but also similar notifications. It applies to errors in the prospectus that are both intended and the result of negligence.

While banks may use the "due diligence defense" in the case of errors in the prospectus as a result of negligence, this defense is ruled out for intentional errors in the prospectus. Due diligence defense means that the banks can show that they exercised the necessary care when selecting consultants, investigating the facts and verifying the confirmation received (such as legal opinions and comfort letters).

Liability for the prospectus is why consultants (are required to) conduct commercial, financial and legal due diligence in connection with an IPO. This circles back to the underwriting agreement mentioned at the beginning, in which the banks among other things demand extensive warranties from issuers and indemnification in the event of claims based on liability for the prospectus.

Dr. Wolfgang Müller MBA, Partner
Meyerlustenberger Lachenal AG