The International Capital Markets Review

Fourth Edition

Editor
Jeffrey Golden

Law Business Research

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EDITOR'S PREFACE TO THE FOURTH EDITION

It is good of the publishers to include in this volume the Editor's Preface to each of the previous editions of *The International Capital Markets Review*. Reading through these is like an archaeological dig.

The first begins with a somewhat nervous look-back over the shoulder at the then-recent financial crisis. An expression in that preface of admiration for the 'resilience' of the markets sounded at the time more a hope and expectation than a certainty or done deal.

In the second, further signs that a 'big freeze' on capital market transactional work was 'thawing' were noted; however, the challenge of new and voluminous regulation, as much as the potential for deal flow, made this publication of particular relevance when that edition appeared.

By the time the third preface was written, the major global financial institutions were hiring again, but we were still looking for hard evidence or 'confirmation' that an uptick in deal flow lay ahead and that the extra staffing was in anticipation of opportunity rather than more simply a reaction to a compliance burden.

Now, as I put pen to this Editor's Preface to the fourth edition of the work, we have just witnessed the successful launch of the world's largest-ever stock flotation. Alibaba shares soared 39 per cent on the first day of trading and, after the bankers exercised a greenshoe option, raised US$25 billion. Meanwhile, *The Times* reports a buoyant London braced for a 'listing stampede'. Hong Kong is rivalling New York for the greatest number of cross-border deals. The *Financial Times* also reminds us that in fact, measured by deal value, year-to-date listings in New York have raised twice as much as in London and Hong Kong combined – the fastest pace since 2000. A corner turned? Hopefully, we are seeing real opportunity, at least for the informed ICM lawyer. As in the past, this book seeks to keep at the ready for just such an ICM lawyer relevant analysis as a means for staying on top of an ever-expanding flow of necessary information.

New capital market regulation increases exponentially, and often purports to have extraterritorial reach. More than half of the Dodd-Frank rulemakings have now been finalised but nearly a quarter of the rulemaking requirements are still yet to be proposed. This past year has also been a busy period for regulatory reform at the European level and in other key jurisdictions covered in this volume. Notably as well, courts around the world have been building up a significant jurisprudence in disputes involving complex products and other capital market structures. We have almost certainly seen more ISDA

contract cases since this book first appeared than in all the years that preceded that first edition put together.

Not surprisingly then, this volume keeps getting 'fatter'. Soon the publishers will have to provide wheels for the book! What started as coverage of 19 relevant jurisdictions, now surveys 33 – five of which (Colombia, Kuwait, Norway, Peru and Portugal) are included for the first time.

There has, however, certainly been no dilution in the quality of contributions. Someone clever once said that you are only as good as the company that you keep, on which basis the reader can feel very good indeed when turning to the lawyers and law firms that share their collective experience in the pages that follow. It remains a privilege and an honour to serve these contributors as their editor.

I am confident that the latest surveys that follow will prove useful to our practitioner readers, and I will not be surprised if a few legal archaeologists among those get to excavating beyond the prefaces and examine the strata of the jurisdictional landscapes of earlier editions as they aim to equip themselves for their professional journeys ahead. Who knows? One of you may even be an Indiana Jones, who, armed with the information herein, may be tempted to grab that bullwhip and fedora and undertake a particularly ground-breaking transactional adventure or two. Indeed, it may even be that those adventures form part of the ICM story when it gets told in future editions of *The International Capital Markets Review*!

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2014

EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2013

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 centres 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 US$700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than US$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 28

SWITZERLAND

Christoph Heiz, Wolfgang Müller and Marc Schamaun[1]

I INTRODUCTION

Although geographically located in the heart of Europe, Switzerland is neither a Member State of the European Union (EU) nor of the European Economic Area (EEA). As a consequence, EU legislation does not apply directly in Switzerland; however, as Swiss market participants do largely depend on free and unrestricted access to the European (capital) markets, the Swiss legislature regularly adapts its legislation to EU-equivalent standards so as to avoid any obstacles to such market access and not to adversely affect the local financial industry. An example of such autonomous implementation is the recent major revision of the Federal Act on Collective Investment Schemes.

i Legal framework

Swiss legislation regarding capital markets is set out in several federal statutes and more than 20 ordinances by the Swiss Federal Council or by FINMA (see below), but a comprehensive regulatory framework is currently being discussed. The following includes a list of the most important promulgations with regard to Swiss capital markets law:

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

b Federal Ordinance of 2 December 1996 on Stock Exchanges and Securities Trading (Stock Exchange Ordinance, SESTO);

c Ordinance of 25 October 2008 of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (FINMA Stock Exchange Ordinance);

d Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority;

1 Christoph Heiz and Wolfgang Müller are partners and Marc Schamaun is an associate at Meyerlustenberger Lachenal Attorneys at Law.

e Federal Act of 8 November 1934 on Banks and Savings Banks (Banking Act);
f Federal Ordinance of 17 May 1972 on Banks and Savings Banks;
g Ordinance of 30 August 2012 of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Banks and Securities Dealers;
h Federal Ordinance of 1 June 2012 on Capital Adequacy and Risk Diversification for Banks and Securities Dealers;
i Federal Act of 23 June 2006 on Collective Investment Schemes (Collective Investment Schemes Act, CISA);
j Federal Ordinance of 22 November 2006 on Collective Investment Schemes;
k Ordinance of 21 December 2006 of the Swiss Financial Market Supervisory Authority on Collective Investment Schemes (FINMA Collective Investment Schemes Ordinance);
l Ordinance of 21 August 2008 of the Takeover Board on Public Takeover Offers;
m Regulations of the Takeover Board of 21 August 2008;
n Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing in the Financial Sector;
o Federal Act of 3 October 2008 on Intermediated Securities, governing custody, transfer and related issues of securities held with regulated custodians; and
p Federal Code of Obligations of 30 March 1911, governing, *inter alia*, the public issuance of equity and debt securities.

Furthermore, the listing rules of the SIX Swiss Exchange set out the requirements for the listing of securities. The SIX Swiss Exchange is the most important regulated exchange for the trading of equity and debt securities, derivatives and other securities in Switzerland. It has issued a comprehensive set of directives, circulars and notices. In 2014, the following directives entered into force: the Directive on the Form of Securities, the Directive on the Listing of Foreign Companies, the Directive on the Procedures for Equity Securities, the Directive on Delisting of Equity Securities, the Derivatives and Exchange Traded Products and the Directive on Information relating to Corporate Governance (revised).

ii Judicial organisation

Although the Swiss Federal Statute on Civil Procedure applies to all court proceedings on civil law matters in Switzerland, the 26 Swiss cantons are in general responsible for the organisation of their courts, but federal law requires the cantons to install two instances at a cantonal level. As an exception to this principle, there are a few specific matters that are brought directly before an inferior federal tribunal (for example, the Federal Administrative Tribunal) and others that are to be decided by one single instance at cantonal level only. Furthermore, some pecuniary matters can be judged directly by the superior cantonal instance upon the parties' mutual request. Some cantons have installed a special commercial court that is, as the sole cantonal instance, competent for certain disputes relating to commercial matters. Judgments of an inferior federal tribunal or of the superior or sole cantonal instances are, in general, subject to appeal to the Swiss Federal Tribunal, and judgments of the inferior cantonal instance to the superior cantonal tribunal.

The SIX Swiss Exchange is a self-regulated organisation and not a governmental institution, under the direct institutional supervision by the SNB (see below) in relation to systemically relevant payment and securities settlement systems (SIC, SECOM and SIX x-clear Ltd) or by FINMA (see below) with regard to securities trading and securities settlement. Any disputes between the SIX Swiss Exchange and any listed company in connection with the listing and the trading of the shares are being lodged initially with the Independent Appeals Board or the Sanctions Commission of the SIX Swiss Exchange and can subsequently be submitted to the SIX Swiss Exchange Board of Arbitration, whose decision is final and conclusive.

Swiss National Bank and Swiss Financial Market Supervisory Authority

The Swiss National Bank (SNB) conducts the country's monetary policy as an independent central bank. Its goal is to ensure the stability of the financial system and it is responsible for the supply of liquidity on the money market. It helps to create and implement a regulatory framework for the financial sector (e.g., minimum requirements for the operation of financial market infrastructures which pose risks for the stability of the financial system) and oversees systemically important financial market infrastructure in Switzerland.

While the SNB monitors developments in the banking sector from the perspective of the system as a whole, the Swiss Financial Market Supervisory Authority (FINMA) provides protection for individuals and monitors developments at the financial institutions under its supervision and in the financial markets from the perspective of the individual banks. FINMA has statutory authority over banks, insurance companies, stock exchanges, securities dealers, collective investment schemes, distributors and insurance intermediaries. It authorises their operations and ensures that supervised institutions comply with the applicable regulations and maintain their licensing requirements. FINMA is responsible for combating money laundering and provides administrative assistance, imposes sanctions – where foreseen by law – and, to the extent necessary, conducts restructuring and bankruptcy proceedings. It may also issue ordinances where competent to do so, and circulars to clarify interpretation and application of the financial market legislation. In general, decisions of FINMA may be challenged at the Federal Administrative Tribunal, whose decisions in turn may be appealed against at the Swiss Federal Tribunal.

In Switzerland, there is no regulatory authority for public offerings of securities, exception made for collective investment schemes (see below).

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Revision of the Collective Investment Schemes Act

Since the implementation of Directive 2011/61/EU on Alternative Investment Fund Managers (AIFM Directive) in the EU, asset managers domiciled in the EU have only been able to market collective investment schemes in non-EU countries that have EU-equivalent supervisory rules. In order to ensure such equivalency, a comprehensive revision of CISA was enacted in 2013. This revision has brought Swiss law into line

with the provisions of the AIFM Directive and with those of the UCITS Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, thereby removing potential obstacles for companies based in Switzerland but active in the EU financial market. The revision introduced new requirements for the management, custody and distribution of collective investment schemes as well as general obligations of conduct that apply to authorised institutions and third parties.

Under CISA, any party responsible for the management of a collective investment scheme, the safekeeping of the assets held in it or the distribution of it to non-qualified investors must obtain an authorisation of FINMA. The revision now entailed adjustments to the licensing requirements that apply to asset managers of collective investment schemes, whereby exceptions apply to asset managers of investment schemes aimed exclusively at qualified investors. Since 2013, CISA has set out a *de minimis* threshold that carves asset managers out of its applicability if they:

a manage assets not exceeding 100 million Swiss francs;

b manage assets:
- consisting of non-leveraged collective investments;
- with respect to which no right of redemption applies for a period of at least five years after the initial investment; and
- amounting to a maximum of 500 million Swiss francs; or

c the circle of investors is restricted solely to companies of the same corporate group, whereby the asset manager is itself part of this group.

In 2014, with effect from 1 January, further rules of conduct applying to licensees under CISA were revised and new information disclosure and documentation obligations were introduced. Specifically, all CISA licensees and all their potential agents must inform investors of all managed, deposited and distributed collective investment schemes, the associated direct and indirect costs of these schemes, and their specific purpose. The fund manager and custody bank are responsible for ensuring that their distribution and marketing activities are properly documented. This documentation must now record the investor's requirements that they have ascertained in writing and the reasons for each recommendation for investment in a specific collective investment scheme. The documentation must be handed over to the investor.

Consultation on FINMA Collective Investment Schemes Ordinance

The revisions to CISA will make the issuance of a revised ordinance of FINMA necessary, which will set out the details of the implementation of the CISA revision. The consultation on the draft ordinance ended in May 2014. The aim of this subsequent revision is to modernise and simplify existing regulation through enhanced investor protection, the preservation of EU market access in light of national and foreign legislative developments, and the introduction of an obligation for licence holders to implement an appropriate risk management system.

Entry into force of the Ordinance against Excessive Compensation in Listed Companies

In 2013, the Swiss electorate approved a constitutional initiative to implement stricter rules on compensation paid to directors and officers of listed companies. As a consequence,

the Swiss Federal Council issued the Ordinance against Excessive Compensation in Listed Companies (OaEC) that became effective on 1 January 2014. This ordinance will apply until Parliament incorporates the new constitutional provisions into a formal federal statute (or a formal amendment of the Swiss Code of Obligations). The OaEC applies, in general, to all listed corporations registered in Switzerland, including those whose shares are listed on stock exchanges outside of Switzerland.

The OaEC introduces new election procedures for the members of the board of directors of listed Swiss companies. Starting on 1 January 2014, the shareholders' annual general meeting (AGM) every year has to elect individually the members and the chairman of the board of directors, the members of the compensation committee (who have to be members of the board of directors) and an independent proxy holder for the next general assembly. Proxies granted to any member of a body corporate and to custodian representatives are no longer admissible. Further, the AGM must vote annually, and starting from the 2015 AGM at the latest, separately on the total amount of compensation to be granted to the board of directors, the executive board and the advisery board. The binding vote can be: (1) prospective, determining the remuneration until the next AGM or for the next business year; (2) retrospective for a past reference period; or (3) a combination thereof.[2] The board of directors now also has to prepare a written compensation report that has to be reviewed by the statutory auditors in light of its compliance with the law as well as the OaEC, which must submit a written report on the results of their audit to the next AGM.

The report must provide the separate aggregate amounts of all payments and other remunerations made to the board of directors, the executive board and the advisery board and also list the amount paid to each member of the board of directors and of the advisery board, individually. With regard to the executive board, only the highest amount paid to a single member has to be disclosed. Certain types of compensation – in particular severance payments, advance compensations and commissions for restructurings within the group paid to members of the board of directors, the executive board and the advisery board – are no longer allowed at all, but sign-on bonuses (compensation for claims the employee had against his or her former employer that were forfeited due to the job change) as well as market-value compensation payments for post-contractual non-compete obligations are still permitted.

From 1 January 2015, pension funds governed by the Federal Law on Vested Benefits will be subject to a voting obligation for directly held shares and will, therefore, be obliged to have themselves entered as shareholders entitled to vote in the share registers of any Swiss-listed company with registered shares. For indirectly held shares this voting obligation will, however, only apply if the pension fund has a right to vote or if the direct holder of the shares is controlled by the pension fund (e.g., single-investor fund). The obligation to vote will apply to all announced proposals of the board of directors with regard to specific provisions set out in the OaEC (elections, provisions of the articles of

2 For example, retrospective vote for the variable remuneration and a prospective vote for the fixed remuneration, and may be different for the board of directors and the management.

incorporation and compensation). Abstention is allowed in the event that it occurs in the best interest of the beneficiaries of the pension fund.

The OaEC contains penal provisions with far-reaching consequences. With regard to the arrangement or payment of inadmissible compensations, members of the board of directors, the executive board or the advisery board can be held liable. With respect to other criminal offences, only members of the board of directors can qualify. However, attorneys, fiduciaries and auditors may be held liable as aiders and abettors. Members of the board of directors, executive board and advisery board can be punished for the payment or receiving inadmissible remuneration by a sentence of up to three years' prison and a fine. For the other types of criminal offences, the potential sentences for the members of the board of directors are milder, such as either a prison sentence or fine. For individuals in charge of pension funds, the punishment is a fine of up to 180 daily rates. Furthermore, all offences are only punishable if they were committed with a direct intent ('against better knowledge'). Therefore, conditional intent and negligence are not punishable.

ii Developments affecting derivatives, securitisations and other structured products

New Circular No. 3 of SIX Swiss Exchange regarding the Practice for the Listing of Derivatives

Previously, the practice with respect to the listing of derivatives was governed by a number of notices issued by the SIX Regulatory Board. The new Circular No. 3 is intended to improve clarity and comprehensibility with regard to practice for the listing of derivatives and will be the sole governing central circular. Apart from incorporating all of the Regulatory Board's notices with regard to the listing of derivatives spread across a number of years, the new circular sets amendments to the practice only in two aspects. The first is the integration of the new rule concerning application deadlines for provisional admission on trading on 'triple witching' days, which have been brought forward in the past, and the second is the inclusion of the fulfilment of reporting obligations using CONNEXOR events (Internet Based Events, or IBE). The circular will be updated continually so that it always reflects valid practice for the listing of derivatives at any given time.

New Swiss Financial Market Infrastructure Act in consultation

At the end of 2013, the Swiss Federal Council submitted the draft of a new Financial Market Infrastructure Act (FMIA) for public consultation. On 3 September 2014, the Federal Council adopted and published its explanatory report with its final proposal of the new act for the attention of Parliament. The FMIA will consolidate existing provisions dispersed among various federal acts into one single act to the extent necessary, adjusted in line with changed market conditions and international standards. The principle of self-regulation will be preserved, meaning that trading platforms will continue to profit from being able to provide their own regulatory and monitoring organisation and rules, but still subject to the supervision of FINMA.

The FMIA will introduce new provisions governing the trading of derivatives in line with recently introduced international standards, such as authorisation requirements for central counterparties (CCPs), central depositories and trade repositories. Since the

major part of derivatives trading involving parties in Switzerland is cross-border and a majority of transactions are entered into with counterparties in the EU, the proposed derivatives regulations are based primarily on EU law. They basically follow the principles laid down in the European Market Infrastructure Regulation (EMIR) and, thus, the latter's main obligations for derivative trading (i.e., clearing of derivate transactions via a CCP, reporting of all derivative transactions to a trade repository licensed or recognised by FINMA and risk minimisation) will also apply in Switzerland.

A key point of the proposed FMIA is the obligation to clear derivative trades through CCPs licensed or authorised by FINMA in order to minimise the counterparty risk. This obligation will apply for both financial counterparties and non-financial counterparties and will also apply to exchange-traded derivatives transactions for purposes of FMIA. Different from the regulation under EMIR, the FMIA will provide for exceptions for smaller contracting parties in the financial sector, similar to the regulations in the United States under the Dodd-Frank Act, and for some derivative transactions such as hedging transactions or intragroup trades. The obligation to conduct derivatives transactions via a stock exchange or other trading facility will only come into force once similar obligations will have been introduced by other jurisdictions with important financial markets. Structured products and securities lending do not qualify as derivatives and the clearing obligation will only apply to derivatives not traded via a trading platform. The draft FMIA also foresees a reporting requirement for derivative transactions towards trade repositories licensed or recognised by FINMA in order to improve transparency, also be applicable for intragroup derivative trades. Derivative trades that are not subject to any clearing obligation will have to comply with certain risk mitigation obligations.

New Financial Services Act and new Financial Institutions Act in consultation

While the proposed Financial Services Act (FFSA) is expected to regulate the creation of financial products and related services, including distribution, the Financial Institutions Act (FinIA) makes provision for a differentiated supervisory regime for financial institutions. From a substantive point of view, the rules contained in the FFSA are based on the EU Markets in Financial Instruments Directive (MiFID II) regulations. The consultation period for both laws initiated by the Federal Council runs until 17 October 2014.

The draft FFSA will set rules applicable to all kind of financial products and services, provide for extended investor protection at the point of sale, and enhance the supervision of certain market participants, including legal enforcement. In particular, the FFSA introduces uniform prospectus requirements for all securities that are publicly offered or traded on a trading platform. A basic information sheet ('Key Investor Information Document' or KIID) has to be prepared for each financial instrument.

With the FinIA, supervision of all financial service providers who operate an asset management business in any form whatsoever will be governed in a uniform piece of legislation. Certain licensing requirements are expected to be introduced for external asset managers, individual client advisers and foreign (non-Swiss) financial service providers. Qualified asset managers (managers of collective investment scheme assets and those who manage the assets of Swiss occupational benefits schemes) are to be supervised by FINMA. Regarding the supervision of other asset managers, the options put up for discussion are the supervision by FINMA or by one or several supervisory organisations.

Existing asset managers will benefit from a grandfathering clause and are subject to no prudential supervision if they have sufficient experience gained from many years of working as asset managers provided they confine themselves to serving existing clients.

iii Cases and dispute settlement

In a decision on the disclosure obligations on substantial participations in companies listed at a Swiss stock exchange, the Swiss Federal Tribunal rendered a decision clarifying whether asset managers or nominees fall into the scope of the disclosure obligations set out in the SESTA and SESTO. In the event that an asset manager acts in its own name but for the account of its client who bears the entire risk of the purchase and sale of shares in a listed company, the client is considered the beneficial owner. Therefore, the Swiss Federal Tribunal reasoned that the SESTA does not impose a disclosure obligation upon asset managers or nominees who acquire or sell equity securities of listed companies for the account of one or several beneficial owners, even if the asset manager acts for several, but independent, beneficial owners. In these cases the disclosure obligations apply to the beneficial owners. It can be noted that the draft FMIA would provide for an express legal basis for such disclosure, if enacted. No other relevant decisions were published in 2014 in the area of Swiss capital market law.

iv Relevant tax and insolvency law

Tax law

Corporate Tax Reform III

Switzerland has been criticised by international bodies such as the EU and the OECD with regard to certain privileged tax regimes. The Swiss government has been working on a reform of the corporate tax system to address this international pressure, and it is likely that these privileged tax regimes will expire. Certain grandfathering rules will likely help corporations to adapt to the new rules. The formal consultation process on Corporate Tax Reform III will likely come to an end in late 2014. The proposal will then be sent to the Swiss parliament for discussion and vote. While it is difficult to predict how the new regulations will look in detail, it is expected that features like Intellectual Property (IP) Box regimes and a notional interest deduction will be combined with an overall reduction of corporate income tax rates. With these measures, Switzerland will retain its attractiveness to foreign and domestic investors and entrepreneurs. It is unlikely that the new regulations will enter into force prior to 2019.

New regulations regarding fiscal offences

According to draft legislation published by the Swiss government, tax evasion as defined by the current legislation will continue to be the base offence. Tax evasion is assumed if a taxpayer either intentionally or negligently achieves an unjustifiable low tax burden. Also, the legal consequences of tax evasion remain unchanged: besides the retroactive taxation, a fine – which, in specific cases could be high – may be imposed. The draft legislation proposes two additional (qualified) tax evasion offences, both of which are referred to as tax fraud. The threat of punishment is prison sentence of up to three years if the tax evasion is achieved by using falsified or non-genuine documents or if malicious conduct results in tax evasion. This definition of qualified tax evasion seems to

be congruent with the definition of tax fraud under current law, but actually goes beyond it. The factual elements are not only fulfilled if document fraud is committed; rather, malicious conduct is sufficient. The tax authorities and the courts will have to define what is considered to be malicious conduct in the future. On the basis of Swiss case law relating to fraud as set out in general penal law, malicious conduct may be assumed if the information provided by the taxpayer cannot – or only with special efforts – be verified by the tax authorities. Non-disclosure of a savings account in the tax return could, under the proposed legislation, qualify as malicious conduct, as the verification of the completeness of a tax return is generally not possible, particularly if structures involving trusts or offshore companies are used. Up to five years' imprisonment is threatened if, in addition to malicious conduct, the undeclared tax basis exceeds the amount of 600,000 Swiss francs. In general penal law terms, tax evasion becomes a crime in such cases.

The Swiss government also proposes provisions authorising the tax authorities to request information directly from banks in the future. Bank secrets will thus be revealed towards tax authorities (and only towards tax authorities). As a matter of course, the authorities will not be empowered to request information from banks at their discretion. Rather, clear grounds for suspected tax evasion are required. Besides these enhanced information rights, the authorities may order other measures: it is expressly foreseen that the tax authorities may order seizure of objects, house searches as well as provisional arrest of persons.

Insolvency law

On 1 January 2014, a partial revision of the Swiss Federal Law on Debt Collection and Bankruptcy (DCBA) entered into force bringing several changes to the company reorganisation law. 'Debt restructuring proceedings' aim at the reorganisation of debtors experiencing financial difficulties by enabling them to restructure their business operations in order to facilitate the advancement of their business rather than the liquidation thereof. Such proceedings may also be initiated by creditors, which may be more successful in recovering their claims than through foreclosure proceedings, such as bankruptcy. In Switzerland, debt restructuring proceedings are initiated by an application to the competent bankruptcy court. If a debtor meets the requirements, the competent bankruptcy court will grant a moratorium. During the moratorium, no debt collection orders may be filed or continued against the debtor, interest payments stop on claims that are not secured by a pledge, and the running of the period of limitations and peremptory time limits is interrupted.

Since the revision, all debt restructuring proceedings start with a provisional composition moratorium that gives the debtor a 'period of peace' during which its ability to restructure should be investigated. By introducing this provisional moratorium and making it easier to obtain, Swiss law is coming closer to the US concept of 'Chapter 11', under which a debtor's application for a moratorium already triggers protection from its creditors. If the investigation during this provisional composition period of maximum four months returns a positive result for the debtor and its ability to restructure is confirmed, debt restructuring proceedings continue and the debtor is granted a final composition moratorium, during which it can negotiate a settlement with its creditors with the support and under the supervision of the creditors' trustee. If, however, it is clear that there is no chance of a reorganisation or

a confirmed composition agreement, the debtor is barred from continuing the debt restructuring proceedings, and the court will initiate bankruptcy proceedings against it. The revised reorganisation law allows the debtor and its creditors to choose the method of reorganisation. The bankruptcy court can now also terminate a composition moratorium granted previously in the event that reorganisation is successful. This allows a debtor to use debt restructuring proceedings in order to gain time to implement its reorganisation plans. Under the new reorganisation law, debt restructuring proceedings can now have the following outcomes: (1) conclusion of a composition agreement, (2) other successful restructuring and cancellation of the moratorium or (3) opening of bankruptcy proceedings against the debtor.

While under the old law, a composition moratorium always had to be published, a decision not to publish may now be taken in justified cases. This helps to avoid erosion of the public confidence in the debtor in order not to hamper its future business operations and jeopardise the reorganisation; however, it is limited in time and only applies to provisional composition moratoriums. Another important change of the revision consists in the new possibility for the debtor to potentially, with the consent of the creditors' trustee, give notice of termination, in exchange for compensation, of a continuing obligation (exception made for employment contracts) at any time and for any date if otherwise the reorganisation objective would be jeopardised.

v Role of exchanges, central counterparties and rating agencies

The new FMIA (see also under Section II.ii, *supra*) will provide a comprehensive regulatory framework for financial market infrastructures (FMIs). The draft FMIA distinguishes several types of FMI: trading venues (stock exchanges, multilateral trading platforms and organised trading platforms), CCPs, central securities depositories (CSDs), payments systems and trade repositories.

FMIs will be subject to licensing by FINMA and the licensing requirements will, in principle, mirror the existing provisions of the Banking Act, SESTA and CISA. The draft FMIA consolidates to a large extent the existing rules on stock exchanges and expands their scope to other trading venues. CCPs will be required to limit their risks by requesting collateral from participants and contributions to a default fund. Further, CCPs will have to segregate their assets from those of participants in order to limit credit and liquidity risks. The draft FMIA also regulates CSDs, payment systems and trade repositories. FMIs will be subject to a special insolvency regime applicable to banks and securities dealers.

vi Other strategic considerations

SIX Swiss Exchange shortens settlement cycle to T+2

SIX Swiss Exchange has shortened the time period between the execution of a trade and its settlement. With effect as from 6 October 2014, the settlement cycle in Switzerland will be reduced from three business days (T+3) to two business days (T+2). The shortened settlement cycle covers all securities tradeable on the SIX Swiss Exchange and the SIX Structured Products Exchange and settling through the Swiss securities depository SIX SIS AG. The introduction of the reduced settlement cycle is the result of a consultation process with members and stakeholders of SIX Swiss

Exchange who supported the harmonisation of Switzerland's settlement cycle with other major European markets. Furthermore, it is in line with the Central Securities Depositories Regulation (CSDR) introduced by European regulators, according to which securities transactions in regulated markets and multilateral trading facilities (MTFs) will be required from 1 January 2015 to settle no later than on the second business day after trading takes place.

Revised Circular No. 3 of the Swiss Takeover Board

TOB Circular No. 3 deals with the review of public takeover offers by an auditing company. The revised TOB Circular No. 3 came into force on 1 July 2014 and provides that it is no longer required for the auditor's report to be reproduced in the publication itself; the offeror can indicate in its publication that the amendment has been verified and provide the internet address where the audit report is accessible.

III OUTLOOK AND CONCLUSIONS

Despite the significant administrative burdens involved and the higher costs that most of the ongoing revisions of Swiss legislature entail for the involved parties, such revisions represent an important step in aligning Swiss legislation to EU standards. In order to preserve access to the EU financial market (e.g., for the Swiss fund industry), and to maintain Switzerland's position as an attractive location for international financial market transactions, Swiss legislation will also have to be adjusted alongside international developments in the future. The FMIA, FFSA and FinIA are expected to enter into force in the coming years; they should implement an overall concept for the Swiss financial market framework and initiate a new era of financial market regulation in Switzerland.

Appendix 1

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