

## SWITZERLAND

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### 1. INTRODUCTION

Codified Swiss law only uses the term public placement (*öffentlich zur Zeichnung angeboten*) but not the term private placement (*Privatplatzierung*), and only distinguishes between equity and debt securities, but not between bonds and notes. However, the terms used in commercial practice sometimes differ from the terms used in codified law. For example, on the Swiss capital market the terms bonds and notes are distinguished and the terms "private placement" and notes are often used synonymously even though according to codified Swiss law bonds can also be issued in a non-public placement.<sup>1</sup> This may be the result of the existence of only a few old-fashioned legal rules and definitions on the federal and cantonal (*Kanton*, a Swiss State) level, a strong international influence in recent years, and the fact that in addition to legislative rules self-regulatory restrictions are also applicable to the Swiss securities market.

To gain a better understanding of private versus public

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<sup>1</sup> See PETER MERZ & ALEXANDER I. DE BEER, UMFASSENDERE INFORMATIONSPFLICHTEN BEI NOTES-EMISSIONEN 139 (1987); Christian J. Meier-Schatz & Kim D. Larsen, *Swiss Securities Regulation and Capital Market Law: A Comprehensive Overview*, 18 DENV. J. INT'L L. & POL'Y 417, 433 (1990); CHRISTIAN A. CAMENZIND, PROSPEKTZWANG UND PROSPEKTHAFTUNG BEI ÖFFENTLICHEN ANLEIHENSBLIGATIONEN UND NOTES 26 (1989).

placements in Switzerland, an examination of the regulatory framework with respect to debt and equity securities is necessary.

## 2. THE REGULATORY FRAMEWORK

### 2.1. Classification of Securities in Switzerland

Unlike U.S. securities law, Swiss law does not use a list of categories of instruments subject to, or exempted from, the securities regulations.<sup>2</sup> According to Article 965 of the Swiss Code of Obligations (*Obligationenrecht* or CO), "[a] security is a document to which a right is attached in such a way as to render it impossible to [i] enforce or [ii] transfer it independently of the document."<sup>3</sup> While there are two major types of securities, namely (i) equity and (ii) debt securities, there are also a variety of derivative instruments.<sup>4</sup>

Among equity securities there are different types of voting shares (*Aktien*) and two types of non-voting shares, (i) certificates of participation (*Partizipationsschein*), and (ii) profit sharing certificates (*Genussschein*). Although there are numerous forms of debt securities (*Anleihensobligationen*) on the Swiss market,<sup>5</sup> such securities have no legislative definition other than the catch-all provision of Article 965 CO.<sup>6</sup>

Typically, a debt security is considered to be an instrument giving the holder a right to interest, as well as return of the principal, that can only be (i) enforced or (ii) transferred with the document. The Swiss securities market distinguishes, *inter alia*, between straight or convertible debt securities and debt securities with warrants and between short to medium-term notes and bonds as long-term debt securities.<sup>7</sup> Because mortgage-backed and floating rate debt securities are not

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<sup>2</sup> EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL MARKETS 801-03 (1992).

<sup>3</sup> CO translated in Simon L. Goren, *The Swiss Federal Code of Obligations* 248 (1987).

<sup>4</sup> The following are examples of such derivative security instruments: GROI (Guaranteed Return on Investments), PEP Units (Protected Equity Participation Units) and CMM Units (Convertible Money Market Units).

<sup>5</sup> See, e.g., Meier-Schatz & Larsen, *supra* note 1, at 432-33.

<sup>6</sup> CO art. 8; see also Goren, *supra* note 3.

<sup>7</sup> See ANDREAS ROHR, *GRUNDZÜGE DES EMISSIONSRECHTS* (1990).

common they are not fully addressed in this Article.<sup>8</sup> The distinction between bonds and notes is the most troublesome, not only because there is no statutory threshold or clear case law of what is considered long-term, but because of the confusion that exists in the translation and usage of terms in the German, French and Italian versions of Swiss federal law.<sup>9</sup> For example, *Anleihensobligationen*, the only expression used in the German version of the CO for any type of debt security other than promissory notes or checks, is often translated imprecisely as bonds, even though there can be short, medium or long-term *Anleihensobligationen*, i.e., debt securities. On the other hand, although the English expression "notes" has been assimilated into the Swiss legal vocabulary it does not always hold the same meaning as it does in English-speaking countries. As was mentioned before, the term private placement is often used as a synonym for notes.<sup>10</sup>

For the purpose of this Article international terminology will be used when referring to different types of securities. Accordingly bonds will be distinguished from notes as long-term debt securities and the terms public and private placement will be used to characterize the type of issue.<sup>11</sup>

## 2.2. *The Issue of Securities*

According to Articles 652a CO "[i]f new shares are publicly offered for subscription, the Company shall publish an issue prospectus . . . ." <sup>12</sup> Article 1156 CO provides that debt securi-

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<sup>8</sup> INTERNATIONAL SOCIETY OF SECURITIES ADMINISTRATORS, *ISSA HANDBOOK* chs. 9-11 (3rd ed. 1990); FRANCO TAISCH, *PRIVATPLAZIERUNGEN* 54 (1987); CAMENZIND, *supra* note 1, at 303-04.

<sup>9</sup> Swiss federal law is published in the three national languages: German, French and Italian. Each publication is accorded equal weight.

<sup>10</sup> TAISCH, *supra* note 8, at 54. MERZ & DE BEER, *supra* note 1, at 141, suggest a distinction between listed and unlisted publicly placed debt securities, with the latter called notes. CAMENZIND, *supra* note 1, at n.105, seems to agree with Merz & de Beer.

<sup>11</sup> This approach can be seen in Hans Niederer et al., *Switzerland, in ISSUING SECURITIES: A GUIDE TO SECURITIES REGULATIONS AROUND THE WORLD* 46, 46 (International Financial Law Review, Special Supp. July 1990). The problem is recognized by CAMENZIND, *supra* note 1, at n.126 and TAISCH, *supra* note 8, at 54.

<sup>12</sup> Article 652a CO applies to the issue of additional shares by an existing corporation. CO art. 652a.

ties (*Anleiheobligationen*) may only be (i) submitted for public subscription or (ii) introduced on a stock exchange based upon a prospectus. A debt security may be issued without a prospectus if it is not publicly offered and not intended to be listed on a stock exchange. While Article 652a CO applies only to businesses incorporated in Switzerland, Article 1156 CO applies to domestic and foreign debtors alike.<sup>13</sup>

Article 1156 CO provides that the provisions governing prospectus requirements applicable to issues of new shares (i.e., Article 652a CO) are applicable to the issue of debt securities. Consequently, the same type of prospectus is required for debt and equity securities. When compared to the obligations imposed upon issuers of securities that are to be offered in the United States, the required disclosure in a Swiss prospectus is relatively mild.<sup>14</sup> According to Article 652a CO, a prospectus for equity securities must provide, *inter alia*, information regarding the (1) amount and structure of equity capital, indicating par value of shares, types and classes of shares, as well as preferential rights, (2) the latest annual financial statement and the consolidated statement with the auditors' report and if the closing of the balance sheet dates back more than six months, it must also include interim financial statements, (3) dividends paid during the last five years, (4) the number of profit sharing certificates and the content of rights connected therewith, and (5) the content of the present entry in the Commercial Register and the resolution on the issue of new shares. According to Article 1156 CO, a prospectus for debt securities has to contain additional information on the terms of the loan, interest, redemption and guaranty or collateral to secure the loan, where applicable.<sup>15</sup> The prospectus requirement of Article 1156 CO is applicable to debt securities at large and does not distinguish between short, medium, and long-term instruments. Therefore, a prospectus is required for all publicly placed bonds and notes.

Although it is federal law (Article 1156 CO) that requires a prospectus for debt securities to be introduced on a stock exchange, it is cantonal law and self-regulatory rules that govern

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<sup>13</sup> See Meier-Schatz & Larsen, *supra* note 1, at 436.

<sup>14</sup> *Id.* at 434.

<sup>15</sup> CO art. 1156; see also Goren, *supra* note 3, at 289-90.

the practice on the different Swiss stock exchanges and the requirements for a listing prospectus. The rules of the three major Swiss stock exchanges require that the listing prospectus provide more detailed information than is required under Article 652a CO. Paragraph 8 of the listing regulations of the Zurich Stock Exchange provides that "[t]he listing prospectus shall enable investors to assess the quality of the security proposed for listing."<sup>16</sup> It thus contains the general requirement to disclose all information regarding the issuer and the security that is considered relevant to an investment decision. The disclosed information should enable the investor to accurately evaluate the quality of the securities.<sup>17</sup> Although the CO does not explicitly impose any such obligations upon a listing prospectus, leading commentators are of the opinion that the CO implicitly requires full and true disclosure of all material facts.

Aside from the disclosure requirements in the prospectus, the relevant legal provisions of the CO do not provide for any minimal standards or conditions to be met by issuers of publicly offered securities. However, in the case of securities, including bonds or notes that are listed on a Swiss stock exchange, the listing requirements additionally provide that (1) the issuer shall have submitted an annual report for each of the five preceding full business years, (2) the issuer shall provide public access to its financial statements and publish an annual report, and (3) the paid-in capital shall total not less than 5 million Swiss Francs in the case of a Swiss issuer and 10 million Swiss Francs in the case of a foreign issuer. In addition to meeting the above listed criteria, the securities to be listed must also have an aggregate nominal value of not less than ten million Swiss Francs in the case of Swiss issuers, and of not less than twenty million Swiss Francs in the case of foreign issuers.<sup>18</sup>

To summarize, Swiss federal law requires a prospectus for equity securities and debt securities that are either publicly placed or listed on an exchange. Public or private placement is available both for long and short-term debt securities (notes

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<sup>16</sup> See Listing Regulations of the Zurich Stock Exchange, ¶ 8.

<sup>17</sup> See Meier-Schatz & Larsen, *supra* note 1, at 443.

<sup>18</sup> See Listing Regulations, *supra* note 16, at §§ 2-3.

and bonds). The prospectus requirement for publicly placed debt securities is the same as for publicly placed new shares (equity securities) of a Swiss company. According to cantonal law, which governs Swiss exchanges, a prospectus for listing a security on an exchange must disclose more information than is required by federal law for a prospectus in a public placement.

### 2.3. Trade in Securities

Different forms of trade in securities are distinguished based upon such factors as the needs of the market participants and whether or not the security is listed.<sup>19</sup> The trading of listed securities usually takes place on one of the official Swiss stock exchanges. But since neither Swiss securities law nor the stock exchange regulations require that trading of all listed securities take place on an official stock exchange, the market participants are free to exchange any listed securities without using the official stock exchange mechanisms. This "off-the-floor trading" or "phone-trade" ("*Telephonhandel*") is independent from the trading on the floor and should be distinguished from another form of trade called "unofficial trading" or "pre-bourse" ("*Vorbörse*").<sup>20</sup> Even though it is referred to as "unofficial" trading, pre-bourse exchanges follow similar rules as official stock exchange trades.<sup>21</sup> The "unofficial" trade takes place at the regular ring on each of the three major Swiss stock exchanges either before or after the official trading hours.<sup>22</sup>

The requirements of participation in the unofficial trade are less stringent than the requirements for participation in the official trade.<sup>23</sup> There are several reasons why securities are traded on the unofficial trade. First, publicly placed debt securities are often traded unofficially before all listing requirements are fulfilled. Second, if a corporation does not meet all listing requirements, or wants to avoid the more extensive listing requirements, it can permit the unofficial

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<sup>19</sup> See Meier-Schatz & Larsen, *supra* note 1, at 425-27.

<sup>20</sup> See *id.* at 426-27.

<sup>21</sup> See *id.* at 425.

<sup>22</sup> See ROHR, *supra* note 7, at 6.

<sup>23</sup> See Zurich Stock Exchange, Reglement für die Nebenbörse.

trade of its securities. Finally, the unofficial trade is often viewed as a first step before the official trade.<sup>24</sup>

#### 2.4. Rules Applicable to Foreign Issuers

The primary placement of equity and debt securities (shares, bonds or notes) by foreign issuers in Switzerland is conditioned on capital export approval by the Swiss National Bank, required pursuant to Article 8 of the Federal Law on Banks and Saving Banks of November 8, 1934, as amended.<sup>25</sup> The Swiss National Bank is authorized to intervene in transactions which affect the interest of the national currency, the development of interest rates, or Switzerland's economic welfare.<sup>26</sup> Approval is subject to political and economic considerations. The financial standing of the issuer is not a factor in the approval determination.

According to Sections 2 and 5 of Article 8 of the Federal Law on Banks and Saving Banks of November 8, 1934, as amended, approval is required for any placement of debt securities, whether a private placement or a public offering, by a foreign issuer, in Swiss Francs of ten million or more, having a maturity of more than twelve months.<sup>27</sup> The motive underlying the transaction, i.e., whether the issue is made to refinance another Swiss Franc borrowing or to take up new money, is not an issue. The Swiss National Bank also requires that syndicate members of Swiss Franc securities issues, and Swiss Franc related dual currency issues, must be banks or bank-like finance companies domiciled in Switzerland.<sup>28</sup> Under the Swiss National Bank guidelines of March 1, 1990, general approval is granted for capital market transactions in foreign currencies and for placement of shares of foreign companies where the lead manager is domiciled abroad.<sup>29</sup>

In the past, different rules applied to private placements of

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<sup>24</sup> See CREDIT SUISSE SPECIAL PUBLICATIONS, THE SWISS CAPITAL MARKET 62 (1986).

<sup>25</sup> See Federal Law on Banks and Saving Banks of November 8, 1934, art. 8 (amended); see also Meier-Schatz & Larsen, *supra* note 1, at 442-43.

<sup>26</sup> See Meier-Schatz & Larsen, *supra* note 1, at 442-43.

<sup>27</sup> See Federal Law on Banks and Saving Banks, *supra* note 25, art. 8, §§ 2, 5.

<sup>28</sup> Niederer et al., *supra* note 11, at 47-48.

<sup>29</sup> See The Swiss National Bank Guidelines of March 1, 1990, cl. 2.1.

notes and public placements of bonds by a foreign borrower. Prior to 1986, the Swiss National Bank had imposed a number of restrictions on the private placement of notes concerning maturity, denomination, publicity, and potential purchasers. Despite the repeal of these restrictions in 1986, market participants continued to distinguish between the public placement of bonds and private placement of notes by foreign issuers when making determinations on capital export approval.<sup>30</sup>

While the placement, in Switzerland, of equity and debt securities by a foreign issuer must still be approved by the Swiss National Bank, the capital export regulations provide that the same restrictions apply to publicly and privately placed equity or debt securities (i.e., shares, bonds or notes). The only difference in Swiss codified law between public and private placements of debt securities by a foreign issuer arises from Article 1156 CO which requires a prospectus for debt securities that are intended to be listed on a stock exchange or are publicly placed.

### 2.5. Self-Regulatory Rules

For a long period of time self-regulatory rules had an important impact on the Swiss securities market. First, the Swiss Bankers' Association (*Schweizerische Bankiervereinigung*), of which virtually all Swiss banks are members, passed a series of agreements called "*Konventionen*". From a legal point of view these Conventions or agreements are contracts binding only on the signing parties and are not legislative rules binding on all participants in the securities market. But, because virtually all participants in the Swiss securities market are signatories,<sup>31</sup> the Conventions are de facto binding on all market participants. Second, in 1934 the Convention on the Admission of Foreign Securities for Trading and Listing on the Swiss Stock Exchanges (*Vereinbarung betreffend die Zulassung von ausländischen Wertpapieren zum offiziellen Handel an den schweizerischen Effektenbörsen*) was

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<sup>30</sup> See MERZ & DE BEER, *supra* note 1, at 138.

<sup>31</sup> Peter Widmer & Judith Schmidt, *Switzerland*, in INTERNATIONAL BANKING: A LEGAL GUIDE 183, 190 (International Financial Law Review, Special Supp. Sept. 1991).

adopted by some of the cantonal stock exchanges, the cantonal supervisory authorities, the Swiss National Bank, and the Federal Department of Finance and Customs. The chief achievements of this convention were (i) to establish the Swiss Admission Board (*Schweizerische Zulassungstelle*) and (ii) to impose a quality standard for the listing of foreign securities on the Swiss stock exchanges.<sup>32</sup>

Since their adoption, these Conventions have recently been charged with the promotion of anti-competitive practices and have been subject to investigation by the Swiss Cartel Commission (*Schweizerische Kartellkommission*). Some recommendations made by the Swiss Cartel Commission in an effort to remedy the alleged anti-competitive impact of these agreements were implemented and have led to a change while others were vigorously disputed.<sup>33</sup> As a result of the controversy, the Convention on the Admission of Foreign Securities for Trading and Listing on the Swiss Stock Exchanges was replaced by a new Convention adopted by the members of the Association of Swiss Exchanges.<sup>34</sup> This new Convention imposes the same listing criteria on Swiss and foreign issuers and no longer requires the previous quality standard of "BBB" for foreign issuers.

## 2.6. *Convention XIX on Placements of Notes of Foreign Debtors*

Convention XIX on Placements of Notes of Foreign Debtors (*Konvention XIX über Notes ausländischer Schuldner*), otherwise known as Convention XIX, was agreed to by the Swiss Bankers' Association on May 1, 1987. An amendment dated January 1, 1990, incorporates the Swiss Cartel Commission's response to the anti-competitive impact of the Convention. Convention XIX was originally introduced by the Swiss Bankers' Association to prevent the Swiss Banking Commission (*Schweizerische Bankenkommission*), a governmental agency, from imposing the same or similar restrictions on placements by foreign issuers by way of regulation (*Rund-*

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<sup>32</sup> See Meier-Schatz & Larsen, *supra* note 1, at 421-22.

<sup>33</sup> *Id.* at 422-23.

<sup>34</sup> See *Reglement über die Schweizerische Zulassungsstelle* of Sept. 17, 1990 (amended).

*schreiben*).<sup>35</sup>

Article 1 of Convention XIX requires signatories to prepare a prospectus for placements of "notes" of foreign issuers. According to Article 1, Section 1 of the Convention a placement of "notes" is defined as an issue in denominations or units of 50,000 Swiss Francs<sup>36</sup> or more that is placed by the participating banks directly with their investment clients.<sup>37</sup> According to Article 4 of the Convention the leading bank makes the prospectus available to the other syndicate banks or to interested clients but no part of the prospectus may be published in the media.<sup>38</sup> For issues in denominations of less than 50,000 Swiss Francs Convention XIX does not apply but according to Sections 2 and 3 of Article 1 of Convention XIX, the signatories shall follow the statutory rules applicable to debt securities (*Obligationenanleihen*) i.e., Article 1156 CO.

According to Article 3 of Convention XIX a prospectus has to contain the same information as a prospectus prepared in a public offering under Articles 1156 and 652a CO. In addition, a Convention XIX prospectus has to provide *inter alia* for (i) a summary of the conditions of the issue, (ii) the disclosure of the sources of the information used in the prospectus, (iii) the international rating of the borrower and guarantor, if any, and (iv) the information that the foreign debtor has to disclose annually to the leading bank about the ongoing business. Thus, the signatories of Convention XIX extended and expanded the requirement to publish a prospectus introduced by Articles 1156 and 652a CO to private or direct placements of notes by foreign issuers.

The language of Article 1 is unclear because it neither follows international terminology nor proposes a sufficient

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<sup>35</sup> MERZ & DE BEER, *supra* note 1, at 137, 142.

<sup>36</sup> One may ask the question why Convention XIX applies only to debt securities in denominations of 50,000 Swiss Francs or more. One explanation may be that between 1970 and 1986, private placement of notes of foreign debtors were limited by the Swiss National Bank to denominations of 50,000 Swiss Francs or more. See MERZ & DE BEER, *supra* note 1, at 137-138.

<sup>37</sup> The previous restriction that "notes" of foreign issuers may not be listed on a stock exchange was lifted in accordance with the recommendations of the Swiss Cartel Commission.

<sup>38</sup> Even though the prospectus may not be published in the media, the press and financial service institutions will usually be informed by a press statement issued by the leading bank.

definition of its own to describe the categories of debt securities covered, and the type of issues or placements subject to Convention XIX. Article 1 makes no reference to a threshold date regarding the maturity of the "notes" covered, nor does it provide for any other standard to distinguish "notes" from other debt securities (*Obligationenanleihen*). Moreover, aside from the prohibition against publishing a prospectus as a whole or in part, Article 1 does not contain any restrictions concerning the level of publicity permissible in connection with the issuance of direct placements.

A literal reading of Article 1 of Convention XIX permits the signatories to place foreign-issued bonds or notes in denominations of less than 50,000 Swiss Francs, as long as the following conditions are met. If the debt securities are publicly placed or intended to be listed on an exchange then they must be issued with an Article 1156 CO prospectus. If they are privately placed and not intended to be listed on an exchange then they may be issued without a prospectus. Furthermore, the language of Article 1 appears to permit public placement of notes (as distinguished from a placement with the investment clients of the syndicate banks) in denominations of more than 50,000 Swiss Francs so long as an Article 1156 CO prospectus is published. The Article did not expressly require that a Convention XIX prospectus be issued in such instances.

After the articles of Convention XIX went into effect its drafter became aware of the ambiguities in the interpretation of Article 1. On September 3, 1987, shortly after the acceptance of Convention XIX, the Swiss Bankers' Association issued a circular letter to the signatories attempting to interpret Article 1 of Convention XIX.<sup>39</sup> Essentially, the Swiss Bankers' Association adopted the position that signatories of Convention XIX were obliged to publish a prospectus with every issue of debt securities by foreign debtors that are directly placed with the investment clients of syndicate banks: for issues in denominations of 50,000 Swiss Francs or more a Convention XIX prospectus must be published, and for issues in denominations of less than 50,000 Swiss Francs an Article 1156 CO prospectus was required. Furthermore, the Swiss

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<sup>39</sup> Letter from the Swiss Bankers' Association to its signatories (Sept. 3, 1987).

Bankers' Association emphasized that the term "notes," as used in Convention XIX, referred to an issue of debt securities by foreign debtors placed directly with the investment clients of the syndicate banks.

Even though this circular letter provided some guidance in the interpretation of Article 1 of Convention XIX, it remains to be seen whether the signatories will be bound by this interpretation of the Swiss Bankers' Association. At least one prominent scholar espoused the view that the language of Convention XIX, providing for the applicability of Article 1156 CO in a placement of debt securities in denominations of less than 50,000 Swiss Francs, allows signatories to place privately debt securities of foreign issuers with denominations of less than 50,000 Swiss Francs without a prospectus.<sup>40</sup> This view is persuasive because Article 1156 does not require a prospectus in private placements that are not intended to be listed on an exchange.

The language of Convention XIX and the Swiss Bankers' Association understanding of the term "notes," do not comply with international terminology because they do not sufficiently distinguish between the form of an issue and the type of debt securities. The inconsistent use of the terms "notes" and "private placement" in the Swiss market is also noteworthy in another respect. The Convention permits interested buyers and holders of foreign-issued notes to obtain suitable and uniform information concerning the issuer. Similar to prospecti for listed securities, the information to be included in the Convention XIX prospectus exceeds what is required by Articles 1156 and 652a CO. Although the criteria set by the listing regulations to provide suitable and uniform information and the aims of Convention XIX to prepare a prospectus enabling investors to assess the quality of debt securities (e.g., bonds or notes) might appear to set the same standards for a listing prospectus and a Convention XIX prospectus, the substance and appearance often differ considerably.

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<sup>40</sup> MERZ & DE BEER, *supra* note 1, at 142-43. Merz and de Beer cannot agree on this point.

### 3. PUBLIC PLACEMENTS VERSUS PRIVATE PLACEMENTS

Current Swiss law requires that a public offering of debt and equity securities be made on the basis of a prospectus. Article 652a defines the term "public offering" for the issue of new shares. According to Article 652a CO "any invitation for subscription is public *unless* addressed to a limited group of persons." Given the language of Article 652a CO, the distinction between public and private placements is determinative upon the interpretation of the threshold "limited group of persons." According to the Governmental Report to Article 652a CO, which became effective on July 1, 1992, an invitation for subscription is always private if addressed only to the stockholders of the issuing company (regardless of the number of offerees). If one considers the fact that publicly traded stock may belong to a vast number of different stockholders it seems remarkable that the number of offerees is not taken into account. Thus, not the number of persons invited to subscribe, but the issue of the limitation becomes important. Nonetheless, it remains to be seen, how a limited group of persons will be defined by the courts.<sup>41</sup>

Under the old regime, which was effective until June 30, 1992, no definition of "public offering" could be found in the Swiss Code of Obligations or in publicized cases from the Federal Tribunal or cantonal courts.<sup>42</sup> Important authors in the field of securities and capital markets suggested different criteria that might be used to define "public offerings" and serve as additional guidance for the interpretation of the new rule of Article 652a CO.<sup>43</sup> It has been suggested that for a definition of "public offering" reference should be made to the definition of "public solicitation of customer deposits" which appears in Article 3 of the Ordinance to the Federal Law on Banks and Saving Banks, of May 17, 1972, as amended. Solicitation "is considered public if it is addressed in any form whatsoever to persons that are not customers, e.g., the public at large, by means of newspaper ads, distribution of a prospec-

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<sup>41</sup> "Limited group" may mean a group already known to the issuer, or existing clients of the syndicate banks, or a group subscribing to the internal newspaper or to the electronic services of Reuters or Telekurs.

<sup>42</sup> See Meier-Schatz & Larsen, *supra* note 1, at 439.

<sup>43</sup> For a thorough discussion see MERZ & DE BEER, *supra* note 1, at 140.

tus, circular letters or electronic media, or if deposits from more than 20 creditors of the public are accepted on a consistent basis."<sup>44</sup>

When defining private placements, some authors, refer to the use of "public solicitation" in Article 1 of the Ordinance to the Federal Law on Mutual Funds of January 20, 1967, which provides for such criteria as "a small number of investors." Others focus on the intent of the borrower to contact clients only on a private and individual basis and even propose that an offering should not be considered public within the meaning of the prospectus requirements of the CO if addressed to the employees of an issuer and its affiliated companies, disregarding the number of employees contacted.<sup>45</sup> Another view defines private offerings as an oral or written offer to a limited number of persons supported by in-house flyers and press releases but without advertisements.<sup>46</sup>

The various opinions discussed above indicate that an offering should be qualified "public" if addressed to the public at large or to a circle of investors that is not closed or limited (i.e., investors who are not known on an individual basis to the issuer).<sup>47</sup> This is also the approach taken by the new Article 652a CO. Typically, an offering of securities should be regarded as being made to a "limited group of persons" if it is made to institutional, sophisticated or closed circles of investors. However, as we have seen, even though neither the CO nor cantonal law requires a prospectus in the case of a genuine private placement that is not intended to be listed on an exchange, a prospectus must be published by the signatories of Convention XIX and under those conditions if a foreign debtor issues debt securities in Switzerland.

In the past, participants in the Swiss capital market did not always adhere to the distinctions between private and public placements. In the 1980's, after the Swiss National Bank significantly liberalized the market for foreign issuers by allowing a broader circle of investors and by dropping the ban on any publicity for "private placements," Swiss banks

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<sup>44</sup> See ROHR, *supra* note 7, at 116 et seq. n.155 and 180-82.

<sup>45</sup> See *Botschaft über die Revision des Aktienrechts, Sonderdruck* (1983), at 120.

<sup>46</sup> See CAMENZIND, *supra* note 1, at 21-23; TAISCH, *supra* note 8, at 21-22.

<sup>47</sup> See Meier-Schatz & Larsen, *supra* note 1, at 439.

participated in the public placement of debt securities by foreign debtors with an incomplete prospectus or without a prospectus and called the issue a "private placement." In 1987, as a result of these practices, Swiss Banks were forced to enter into Convention XIX by the Swiss Banking Commission, the Swiss National Bank and the Department of Finance and Customs.<sup>48</sup>

Customarily, when an underwriter of a Swiss "private placement" of a foreign issuer wished to reach the investor, he did not usually depend only on existing personal contacts, but also relied on circular letters, press releases, advertisements in daily newspapers and listings on the two computer systems, "Reuters" and "Telekurs." Even today information about newly issued "private placements" appear on a regular basis in a separate column in Swiss financial newspapers.<sup>49</sup> Because such placements were usually not made to a closed circle of clients or a "limited group of persons" one must conclude that there were in the past, and there are probably today, only a few genuine private placements in Switzerland.<sup>50</sup> Consequently, Article 1156 CO requires a prospectus to be issued for each of these so called "private placements" of foreign issuers.

#### 4. SUPERVISION AND ENFORCEMENT

When examining the supervision and enforcement of the rules of the Swiss securities market it is necessary to distinguish between the requirements for public offerings and the requirements for listing on an exchange, even though in both situations a prospectus is required.

In order for a security to be listed on a Swiss stock exchange an application including a prospectus must be filed with the Swiss Admission Board (*Schweizerische Zulassungsstelle*). The role of the Swiss Admission Board is to review the

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<sup>48</sup> See MERZ & DE BEER, *supra* note 1, at 142; Meier-Schatz & Larsen *supra* note 1, at 441.

<sup>49</sup> See CAMENZIND, *supra* note 1, at 26.

<sup>50</sup> See MERZ & DE BEER, *supra* note 1, at 138-40; Niederer et al., *supra* note 11, at 46, prefer to use the term private placement in only those rare instances where notes of an extremely high denomination (for example 500,000 Swiss Francs) are placed with only 10-20 investors and without any publicity. Only in these circumstances would they eliminate the prospectus requirement.

applications and prospecti of foreign and Swiss issuers to ensure formal compliance with the listing requirements and fair disclosure of the provided information.<sup>51</sup> However, no examination is made regarding the correctness of the information given or the inclusion or omission of relevant information. A decision by the Swiss Admission Board that a security is unsuitable for listing bars the security from being listed on any Swiss Stock Exchange.<sup>52</sup> But the rules do not provide for an individual right of action or statutory liability for damages that may result from disclosure of misleading or inaccurate information.<sup>53</sup> Even though required by Articles 1156 and 652a CO, a prospectus of unlisted publicly offered debt (a very rare situation on the Swiss capital market), or equity securities, or a prospectus of privately placed debt securities of foreign issuers need not be filed with, or examined by, a private or governmental agency. No authority in Switzerland has the jurisdiction to prohibit the placement of securities issued without a prospectus or to grant an exemption from the requirement to publish a prospectus even though, technically, a public placement of securities without a prospectus violates existing federal law and the private placement of debt securities of a foreign issuer without a prospectus is a breach of contract.<sup>54</sup> However, because the issuance of debt securities is part of the licensed banking business under the supervision of the Swiss Banking Commission (*Schweizerische Bankenkommision*) there is at least de facto control. The Swiss Banking Commission has considerable influence and control over the business practices of individual banks by way of specific orders (*Verfügung*). It also has substantial control over the banking business at large by way of regulations (*Rundschreiben*). According to Article 23 of the Federal Law on Banks and Saving Banks of November 8, 1934, as amended, a prerequisite for a bank licensing is that the bank follows sound business practices.<sup>55</sup> In addition, according to Article

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<sup>51</sup> Widmer & Schmidt, *supra* note 31, at 190. Since July 1991, following the recommendations of the Swiss Cartel Commission, the Swiss Admission Board decides on the admission of both foreign as well as Swiss securities.

<sup>52</sup> See Niederer et al., *supra* note 11, at 50.

<sup>53</sup> See Meier-Schatz & Larsen, *supra* note 1, at 449.

<sup>54</sup> See MERZ & DE BEER, *supra* note 1, at 142.

<sup>55</sup> See Federal Law on Banks and Saving Banks, *supra* note 25, art. 23.

3 of the Federal Law on Banks and Saving Banks of November 8, 1934, as amended, bank officers and directors must assure proper conduct of a bank's business.<sup>56</sup> It would probably not be considered sound business practice if a bank deliberately breached Convention XIX, a contract, or violated federal laws such as Article 652a or 1156 CO, by issuing a so-called "private" placement without a prospectus when the offering was in fact a genuine public placement.<sup>57</sup> After serious violations, the Swiss Banking Commission would have the authority to impose sanctions and could withdraw the bank's license, thereby revoking the bank's authority to conduct business.

The remedies available for the investing "public" in a so-called "private" placement are civil actions for damages.<sup>58</sup> There are two rights of action. The first is based both on prospectus liability according to Article 752 CO for debt and equity securities of Swiss companies and Article 1156 CO for debt securities, and the second is a civil tort according to Article 41 CO.<sup>59</sup> According to Article 752 CO anyone who intentionally, wilfully, or negligently contributes to a statement appearing in a prospectus or disseminates a prospectus that is incorrect, misleading, or not in compliance with the appropriate legal requirements, is liable to the acquirers of the security for any consequent damages. This is a departure from the old regime which was in effect until June 30, 1992, where it was debatable whether only the subscriber of the security or also any subsequent purchaser had standing to sue. The plaintiff must prove that damages suffered were caused by the intent or negligence of the defendant. Essentially, a causal connection must be drawn between plaintiff's damages and the insufficiency of the prospectus.<sup>60</sup> As already mentioned, Convention XIX establishes a contractual duty for the signato-

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<sup>56</sup> *Id.* art. 3; see Meier-Schatz & Larsen, *supra* note 1, at 453.

<sup>57</sup> See MERZ & DE BEER, *supra* note 1, at 142.

<sup>58</sup> See Meier-Schatz & Larsen, *supra* note 1, at 448-49.

<sup>59</sup> Article 39 of the Federal Law on Banks and Saving Banks of November 8, 1934, as amended, provides for specific prospectus liability concerning bank securities. Federal Law on Banks and Saving Banks, *supra* note 25, art. 39; see also Meier-Schatz & Larsen, *supra* note 1, at 452.

<sup>60</sup> See Niederer et al., *supra* note 11, at 51; Meier-Schatz & Larsen, *supra* note 1, at 449-50.

ries to publish a prospectus in private placements of debt securities by foreign issuers, but it does not establish an individual right of action for the investor.<sup>61</sup>

## 5. RECENT DEVELOPMENTS

On October 4, 1991, after a lengthy discussion, the Swiss Parliament amended Title 26 of the CO addressing stock corporations (*Aktiengesellschaft*).<sup>62</sup> The amendment has been in effect since July 1, 1992. A new Article 652a CO regarding prospectus requirements for the public issuance of new shares, applicable through Article 1156 CO to the issue of debt securities, defines public placement as an "invitation to subscribe not addressed to a limited group of persons." Furthermore, the new Article 752 CO now clearly provides for liability of the issuer, underwriter, or any other person engaged in preparing the prospectus "to the purchasers" of debt and equity securities of Swiss companies. Because the language of Article 1156 CO remains unchanged, this broader standing to sue is likely to be applied to issues of debt securities by foreign companies.

In the summer of 1991, the Swiss Federal Council presented a preliminary draft of a Federal Law on Stock Exchanges and Trading in Securities.<sup>63</sup> In the fall of 1991, after receiving comments from interested parties, the Swiss Federal Council decided to draft a Federal Law on Stock Exchanges and Trading in Securities. The introduction to the Federal parliament is planned for the summer of 1993.

## 6. TAXES

The Federal Law on Stamp Duties of June 27, 1973, as amended, provides that the transfer of securities is in general subject to stamp duties of 0.15% for securities of Swiss companies, and a 0.3% duty for foreign companies.<sup>64</sup> If the entire issue is documented by not more than ten securities,

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<sup>61</sup> See Meier-Schatz & Larsen, *supra* note 1, at 451.

<sup>62</sup> The draft to the amended Title 26 of the CO was dated February 23, 1983.

<sup>63</sup> This draft covers stock exchanges and trading in securities; it does not address primary market activities.

<sup>64</sup> Federal Law on Stamp Duties of June 27, 1973 (amended 1992).

(e.g., in certain cases of a genuine private placement), than there are no stamp duties imposed.

The recent amendments to the Federal Law on Stamp Duties, ratified by a public referendum held in Switzerland in September 1992, provide for a change in stamp duty with respect to market-making activities and certain issues of debt securities.<sup>65</sup> The amended Act will take effect in April 1993.

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<sup>65</sup> *Id.*