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SIX overhauls regulatory standards for listing

Reference: CapLaw-2015-1

SIX Exchange Regulation, the regulatory body of the main Swiss stock exchange, has confirmed plans to overhaul its regulatory listing standards. The sub-division into Main Standard and Domestic Standard will be abolished and issuers may choose between an International and a National or Swiss Standard. The only major difference between the two new regimes will be the applicable financial reporting standard. IFRS or US GAAP must be used on the International Standard. Issuers who do not wish to report under either of these two standards, but opt for Swiss GAAP FER instead, will be listed on the National Standard. The changes are planned to become effective on 1 July 2015.

By Thomas U. Reutter

SIX Exchange Regulation, the regulatory body of the main SIX Swiss Exchange Ltd. (SIX), will overhaul its regulatory listing standards. The changes contemplated by SIX are not a response to a revised regulatory framework. Although Swiss primary market regulation is poised for fundamental change of paradigm in light of the planned Financial Services Act (FinSA), the amendments discussed herein have been prompted by pressure on the part of issuers. In fact, many issuers listed on the Main Standard have come to perceive their reporting under IFRS as too costly and burdensome. As a result, some of them have decided to opt for a standard that is perceived less stringent – Swiss GAAP FER. These companies not only include local firms but also the big and international watch manufacturer Swatch.

Swiss GAAP FER is not Swiss GAAP. Swiss GAAP is a set of mandatory minimum rules for accounting of Swiss corporates set forth in the Swiss Code of Obligations. It does not aim to provide a "true and fair view", but advocates a prudent accounting favoring creditor protection. Swiss GAAP FER, by contrast, is a set of accounting and reporting recommendations promulgated by a committee of experts with a view to providing a "true and fair view" of the financial situation and the results of operations. In this respect, Swiss GAAP FER is comparable to IFRS or US GAAP, but remains more principle based and much less detailed and prescriptive. Issuers listed on the current Domestic Standard may report under Swiss GAAP FER. By contrast, issuers listed on the Main Standard are precluded from doing so, but have to use IFRS or US GAAP instead.

Currently, an issuer listed on the Main Standard who wishes to report according to Swiss GAAP FER instead of IFRS would have to change to the Domestic Standard. Such a change would obviously come with a price, be it only the likely perception among the investor community of having downsized from a global to a local player. It is no surprise, therefore, that issuers tried and try to challenge such a "relegation". SIX has come up with a proposal to solve the problem in October 2014. It proposed a new

conceptual framework for listing standards and conducted a hearing with interested parties. According to a report published on 11 December 2014, the hearing showed largely positive feedback to the proposed changes.

The new concept is based on two new distinct listing standards whose main differentiator is the issuer's reporting standard. There will be an international reporting standard (comparable to the current Main Standard) and a national or "Swiss" reporting standard. The latter, however, is much different from the current Domestic Standard. In fact, the minimum equity and minimum free float requirements of the National Standard will be the same as for the International Standard. Issuers wishing to list on the National Standard will therefore have to satisfy significantly higher thresholds than the issuers on the current Domestic Standard.

The following table gives on overview of the requirements in the two new standards compared to the status quo (source SIX Swiss Regulation: http://www.six-exchange-regulation.com/download/regulation/vernehmlassung/presentation_consultation_20141009_en.pdf (visited on 19 February 2015)):

New concept: Equity Securities

	Standard for Equity Securities					
	Sub-Standard for International Reporting	Sub-Standard for National Reporting	Sub-Standard for Investment Companies	Sub-Standard for Real Estate Companies	Sub-Standard for Depository Receipts	Sub-Standard for Collective Investment Schemes
Track Record	3 years	3 years	n/a	n/a	3 years	No changes
Capital Requirements	2.5 m	2.5 m	2.5 m	2.5 m	2.5 m	
Free Float	20%	20%	20%	20%	20%	
Free Float (Market Capitalization)	25 m	25 m	25 m	25 m	25 m	
Financial Reporting	IFRS, US GAAP	Swiss GAAP FER, Standard according to Banking Act	IFRS, US GAAP	Swiss GAAP FER, IFRS	IFRS, US GAAP	
Maintenance	No changes					

Regulation of exceptions: Exceptions can be granted in accordance with Art. 7 Listing Rules (LR) and the Directive Track Record (DTR).

In addition, SIX will also overhaul the regulatory listing standards regarding debt securities. Currently, debt securities have an own listing regime, but are listed according to the Main Standard. The new concept will consider the different listing requirements and will provide three standards (Standard for Bonds, Standard for Derivatives

and Standard for Exchange Traded Products). However, the changes are of formal nature and the listing requirements for debt securities remain the same.

SIX is currently adapting the various levels of the regulation framework to reflect the proposed new concept. The changes are planned to come into force on 1 July 2015.

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Growing Appetite for Dim Sum Bonds – The Global Rise of the Renminbi

Reference: CapLaw-2015-2

As the free flow of funds in and out of China is still regulated by the Chinese government, the Chinese financial market is basically closed to foreign investors. Although there are visible steps towards opening China's tightly controlled capital markets, the length of time it will take for China to fully open up its financial system can only be estimated. In the meantime, participants in global financial markets will increasingly focus on the development of the country's offshore renminbi market. This article gives an overview of the offshore renminbi denominated bonds at the center of China's master plan to internationalize its currency.

By Daniel Heiniger

1) Introduction

By the end of 2013, the Chinese currency, officially called renminbi (literally 'the people's currency'; RMB) had risen to become the second most-used trade financing currency in the world. In November 2014, the RMB entered the top five of world payment currencies, and now takes position behind the Japanese Yen, British pound, Euro and US dollar. These developments are results of the long-awaited steps taken by the Chinese government and domestic regulators in the last few years to liberalize the RMB. Consequently, different offshore RMB currency trading centers have emerged across the globe in financial centers such as Hong Kong, Tokyo, London, and New York. As outlined in a separate chapter of the twelfth five-year plan of the Chinese Government (China's Twelfth Five-Year Plan 2011-2015, Chapter 57), Hong Kong is playing an especially crucial part in supporting and assisting the rapid global development of the "redback", particularly through the development of an offshore RMB market.

As part of a multilayered strategy being employed by the Chinese government, the offshore RMB market has been established to (i) internationalize the RMB such that it can become a global reserve currency, (ii) smoothly control the cross-border capital

flow while keeping the inflation in mainland China in check and (iii) develop an offshore RMB bond market.

2) The Young History of the Dim Sum Bond Market

In July 2007, after the publication of the 'Interim Measures for the Administration of the Issuance of RMB Bonds in Hong Kong by Onshore Financial Institutions' by the National Development and Reform Committee (NDRC), China Development Bank, one of the three policy banks in China, issued the first dim sum bond in Hong Kong.

In 2010, NDRC issued the 'Elucidation of Supervisory Principles and Operational Agreements Regarding Renminbi Business in Hong Kong' and signed a 'Supplemental Memorandum of Cooperation' with the Monetary Authority of Hong Kong. As a consequence of this expansion of the dim sum bond issuer pool by the Chinese government, multinational corporations such as McDonald's (RMB 200mn issuance) and Caterpillar (RMB 1 billion issuance) entered the market.

In October 2011, market restrictions were once again relaxed when the People's Bank of China (PBoC) and the Ministry of Commerce (MOFCOM) issued new rules governing the investment in China with offshore RMB funds (MOFCOM Announcement No. 87 of 2013 on Issues Concerning Cross-border RMB Direct Investment, http://english.mofcom.gov.cn). The new regulations have facilitated the repatriation of proceeds to the mainland.

During the last two years, there has been evidence that more diversified issuers entered the market and that locations other than Hong Kong, such as Singapore and London, became more active in the market (see also section 5 below). The issuance of dim sum bonds reached new record highs with a total issuance amount of RMB 371 billion in 2013 and RMB 587 billion in 2014 (HSBC, 'The A to Z of the RMB', Week in China 2014, data includes both RMB bonds and certificates of deposit).

3) Dim Sum Bond Characteristics

Although the conventional terms are not used in a consistent way in the dim sum bond market, a distinction should be made between **certificates of deposit** (CD) and bonds. CDs normally have a shorter tenor than bonds, with maturities ranging from one month to five years. The short duration makes them popular with issuers like Chinese banks. In 2013, approximately 70% of the total issuance of dim sum bonds was CDs. However, according to HSBC, it is likely that the share of bonds will increase up to 40% in the near future, but CDs will remain the favorite type (ZHAO, 'The A to Z of the RMB', Week in China, 2014).

Dim sum bonds with **fixed-rate coupons** are the overwhelming majority, accounting for over 95% of all issuances and the total amount issued between 2007 and 2014. The average coupon of the dim sum bonds issuances between 2011 and 2014 amounts to 4.1%. A major part of the investor base of the nascent dim sum market are buy-and-hold investors, who welcome the fixed-rate bonds to exclude interest rate risk if they hold the bonds to maturity. Less than 5% of dim sum bond issuances between 2007 and 2012 have been bonds with floating interest rate or zero-coupon bonds (FUNG, KO, YAU, 'The Offshore Renminbi (RMB) Denominated Bonds', 2014).

Over 90% of the dim sum bonds have a **short tenor** of one to three years (ASIFMA RMB Roadmap 2014). The prevalence of shorter maturities can be explained so far by the risk-averse investors who invest in dim sum bonds as a one-way bet on the RMB appreciation against the U.S. Dollar. This mindset guiding investor demand has hindered the development of a nascent fixed-income market so far because the yield curve is only represented by bond issues with short maturities.

However, the model in which new dim sum bond issuances will falter when the Chinese currency falls appears to have been broken: during the first four months of 2014, companies raised approximately USD 10 billion in dim sum bonds in Hong Kong and Taiwan even though the RMB was falling to its lowest point against the dollar in more than one year. This is double the amount during the same period in 2013. Some of these activities have been driven by refinancing needs when a spate of two- and three-years bonds raised in 2011 and 2012 came to maturity, but the broader market has been solid.

Prior to 2012, with the high expectation of RMB appreciation and a less diversified investor base, dim sum bonds were issued unrated and '**covenant-lite**' and were less investor-friendly compared to other debt instruments, *e.g.* synthetic bonds. Since more institutional investors have entered the market and RMB appreciation has lost its allure, investors are now focused more on bond protection and credit risk.

While covenants of dim sum bonds have been changing to align with those of synthetic bonds, *e.g.* (i) negative pledges preventing the issuer from using any of its assets for other debt obligations, (ii) more restrictions on future borrowings, (iii) cross-default clauses tying the issuing offshore subsidiary back to the cash-flow generating entity and (iv) fixed-charge coverage becoming more standard, dim sum bond documents still have limited operational disclosure beyond the financial statements of the issuing entity (FITCH, Dim Sum Bonds Pose a Paradox for Investors, 13 March 2012).

In terms of independent **credit rating**, less than 20% of the issued dim sum bonds between 2007 and 2012 had an international rating. However, issuers are increasingly aware that independent credit ratings by one of the three big rating agencies may help

allay investor concerns. Since the investors are more focused on credit risks, rated dim sum bonds are becoming more and more standard.

Although dim sum bond investors normally hold their bonds until maturity and trading on the secondary market is rare, some dim sum bonds (130 out of 800 issues between 2007 and 2012) are **listed on exchanges globally** to attract investors who prefer disclosure requirements and monitoring from exchanges. While Singapore and Hong Kong have the most listings of dim sum bonds, Luxembourg, London and Frankfurt are also popular with issuers to attract more European investors. At the end of June 2014, SIX Swiss Exchange Ltd. became another platform for dim sum bonds when it announced the listing of its first RMB denominated bond issued by China Construction Bank.

4) Motivation for Issuers and Investors

There are several reasons for issuers raising funds in the dim sum bond market. Since Chinese companies can get access to both offshore RMB denominated (CNH exchange rate) and mainland (CNY exchange rate) market by issuing dim sum bonds and 'panda bonds' (bonds issued in mainland china) respectively, they can take advantage of the resulting opportunities for cross-border arbitrage.

Further reasons to raise funds in the dim sum bond market could include hedging RMB operating expenses as well as lowering the cost of borrowing compared to the higher cost on the Chinese mainland market. Finally, RMB appreciation potential and increasing demand of global investors who look for diversification of their investment portfolio can further encourage issuers to tap into the dim sum bond market.

Order books indicate that more than 50% of the investors in dim sum bonds were either commercial banks or private banks between 2007 and 2012. Another third are funds and asset managers. In terms of geography, the major holders of dim sum bonds are investors based in Asia, since Hong Kong and Singapore are the key CNH markets and major sources of offshore RMB liquidity.

In a recent survey by the Economist, 200 senior executives at institutional investors (split equally between firms headquartered in mainland China and those based elsewhere) were asked why they were gaining exposure in the dim sum bond market; the main reasons mentioned were currency appreciation and yields (The Economist, 'Renminbi rising, Onshore and offshore perspectives on Chinese financial liberalization', 2014). A 2.7% appreciation between end of 2012 and the start of 2014 and yields around 4% make the product an attractive proposition. Although investors realized in the first months of 2014 that RMB appreciation is not only a one-way story, participants expect that the trend of further RMB strength will continue over the next several years.

Additional reasons for investors to tap into the dim sum bond market are cross border arbitrage, market positioning and portfolio diversification.

5) The rise of RMB Offshore Centers Globally

With the appointments of the clearing banks for Frankfurt (Bank of China), London (China Construction Bank), Seoul (Bank of Communications), Paris (Bank of China) and Luxembourg (Industrial and Commercial Bank of China) by PBoC in the second half of 2014, it is becoming increasingly apparent that PBoC is seeking to accelerate the RMB internationalization process through the creation of a global network of offshore RMB clearing banks, currency swap agreements and related regulatory underpinnings that handle RMB transactions.

With regards to Europe, the continent is well positioned to play a major role for offshore RMB activities and in particular in the dim sum bond market. In terms of geography, Europe has a time zone advantage as a mid-point between Asia and North America and could act as connection point e.g. to the African market. With its highly developed financial centres, its investor pool and its historical trade ties with China, Europe has good arguments for becoming a center for RMB.

Further, new dim sum bond listings on exchanges in Luxembourg, London and Frankfurt earlier this year spurred competition between financial centers to be the Chinese currency's European hub. Thereby, each centre is playing to its strengths in the development of RMB hubs.

The Swiss financial market, too, is well positioned to eat into the market share of RMB activities. After the signing of the free trade agreement between Switzerland and China in 2013 and its bilateral swap agreement of up to CHF 21 billion entered into by the countries in June 2014, state-owned China Construction Bank is expected to open a Swiss branch during 2015, following a deal to establish clearing arrangements in Switzerland for trading in RMB.

6) Opportunities and Challenges for the Dim Sum Bond Market

The recent development of the dim sum bond market offers new opportunities to domestic firms and foreign investors. Avoiding the regulatory red tape in mainland China by investing directly in offshore RMB bonds facilitates entrance into the RMB market. Further, the increase of CNH sources globally will further increase the demand for dim sum bonds. Based on the response to the recent issuances with dim sum bonds, most of which are highly oversubscribed, considerable interest is being shown in these products, especially from European investors. While the dim sum bond market has yet to mature and reach the critical mass to become an asset class in most international port-

folios, it is already evident that portfolios including dim sum bonds benefit in terms of diversification.

However, the dim sum bond market will have to compete with the wider range of RMB investment options in the future. New offshore RMB channels for foreign investors sped up by the Chinese government such as the Renminbi Qualified Foreign Institutional Investor Program (RQFII) and the recent launch of the Shanghai Hong Kong Stock Connect will provide new access to Chinese stock and funds. The RQFII program enables funds from the offshore RMB markets to be invested in the domestic A-shares (shares listed on the mainland stock exchanges and available so far only for Chinese mainland investors), whereas the Shanghai Hong Kong Stock Connect will give foreign investors access to A-shares listed on Shanghai Stock Exchange through Hong Kong Stock Exchange as well as mainland Chinese investors access to H-shares listed on Hong Kong Stock Exchange.

7) Conclusion

The dim sum bond market, as the first offshore market for RMB-denominated capital assets, has experienced rapid growth during the last three years and will continue to play an essential role in the internationalization of the Chinese currency. The increasing use of RMB globally as trade and investment currency has made dim sum bonds an attractive option for investors as a way to profit, in particular from future appreciation and diversification. With the announcement of the individual swap agreements and clearing banks in European RMB offshore centers, Europe can play the lead role in accelerating the internationalization process of the currency. Given the efforts of the Chinese government to liberalize cross-border transactions and create the conditions for the RMB to become an international currency, it is reasonable to expect that the dim sum bond market will develop into a mature debt market with its primary focus in Asia.

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Switzerland plans to adopt new Prospectus Regime

Reference: CapLaw-2015-3

The Swiss Federal Government proposes to implement a new documentation concept for public offerings of securities. Modelled after the EU Prospectus Directive, in the near future prospectuses for Swiss public offerings shall be set up to meet information requirements comparative with international standards and shall be approved *ex ante*. An important exemption from the *ex ante* approval requirement is foreseen for issuances of fixed income products.

By René Bösch

While the Swiss capital markets have been rather active during the last few years, with the Swiss Franc bond market in particular (the latest evidence having been provided by AT&T CHF 1,05 bn bond issue and Google's CHF 1,25 bn bond issue), the legislative framework for primary market activities in Switzerland was and still is lagging behind internationally comparative standards. Last year, the Swiss Federal Government announced its plan to change this and to adopt a new architecture of financial market laws. In addition to a new regulation on financial market infrastructure (modelled after the corresponding provisions in EMIR and Dodd-Frank) and the regulation of financial services, in particular at the point of sale (modelled after MiFID II and MiFIR), the legislative proposals also contain proposals for a new documentation concept for the public offering of securities in Switzerland.

Until today, Swiss laws provide only for civil law-based responsibility to draw up an issuance prospectus in case of a public offering in Switzerland, including extensions of international offerings to the public in Switzerland. However, the requirements for the contents for Swiss issuance prospectuses are rather marginal and do not live up to comparative international standards such as in the EU Prospectus Directive or the United States disclosure requirements. To change this, the Government's proposal for the new documentation concept in the preliminary draft of the Financial Services Act (FinSA) provides for prospectus requirements and *ex ante* prospectus approval requirements substantially modelled after the EU's Prospectus Directive. The contents of prospectuses shall in the future be prescribed in Swiss regulations that intend to establish a level playing field with internationally comparative standards, focussing on establishing substantive equivalence with the standard set out in the EU Prospectus Directive.

The concept of an *ex ante* prospectus approval requirement is a novelty in Switzerland, both in respect of the authoritative approval of a prospectus in itself as well as in terms of listing. One of the particularities of the Swiss fixed income and structured products markets was that issuers could swiftly access markets and could seek listing following the launch of a transaction. The listing requirements of the SIX Swiss Exchange Ltd. (SIX) allow for a provisional admission to trading before formal listing approval, but only for fixed income and structured products. For equity securities, listing needed to be obtained prior to the first trading day.

In order to safeguard the competitive advantage of a very swift time to market for debt securities in particular, the Swiss Government was willing to consider an exemption from the *ex ante* prospectus approval requirement for debt securities. The proposed new law prescribes that debt securities issues can be launched in the market without a pre-approved prospectus, provided that the information generally required for a prospectus is available to the market in some form or fashion.

The new FinSA will provide for the creation of a new regulatory body competent to approve prospectuses, the so-called "approval authority" or "reviewing body". Because up until today, Switzerland did not have such a body for issuance prospectuses, and because the SIX has already been entrusted with the review and acceptance of listing prospectuses for all equity, fixed income and structured products issuances in the Swiss markets with a listing at SIX, it is expected that SIX will be given the mandate to act as approval authority as well.

Furthermore, similar to the Key Information Document (KID) under the PRIPPs regulation, FinSA provides for the requirement to establish a basic information sheet in respect of public offerings to private customers. While the Government's legislative proposals exempted only equity offerings from this duty to establish a basic information sheet, it is still debatable whether the same exception should also apply to straight bonds. Also, it needs to be discussed whether the current plan that each prospectus must have a summary of the essential terms of a transaction shall continue to apply to if at the same time a basic information sheet shall be established. In any event, the basic information sheet will replace the simplified prospectus that is currently required under the Swiss Collective Investment Schemes Act in respect of offerings of structured products to the public.

The proposals of the Government for the new documentation concept for public offerings of securities in Switzerland has been widely applauded by the industry. Moreover, all major constituencies, being the most important underwriters, issuers, the Swiss Bankers Association, the SIX, etc. have joined forces with the Government to collectively work out the details of the new documentation concept in order to assure its swift and smooth introduction into the Swiss financial market laws without creating disruptions in the Swiss markets. It is expected that the Government will send its legislative proposals to the Parliament in the Summer 2015 and that the Parliament will start debating these proposals either late this year or early next year. Entry into force of the new FinSA can thus be expected to occur in 2017 or 2018.

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Corporate Law Reform

Reference: CapLaw-2015-4

On 28 November 2014 the Federal Council presented a preliminary draft (*Vorentwurf*) of the corporate law reform and started the consultation procedure which runs until 15 March 2015. The main proposals are:

– Implementation of the Ordinance against Excessive Compensation in Public Companies into the Code of Obligations (with tighter rules on certain points, *e.g.* a prohibition of prospective say-on-pay votes and of compensation for non-compete covenants over 12 months).

– A target gender quota of 30% for the board of directors and the executive committee of listed companies based on a *comply or explain* approach.

– A duty for major companies in the exploitation of natural resources to disclose payments to public authorities.

– Numerous changes in traditional corporate law, such as the permissibility of a share capital in foreign currency, a minimum par value below one cent, a *capital band* allowing more flexibility to increase and reduce the share capital, clarification of the requirements for distributions from capital reserves and interim dividends, and the enhancement of shareholders' rights and remedies.

By Matthias Wolf

After the Federal Council had issued a draft bill for a reform of corporate and accounting law already in 2007, the accounting law part of the bill was carved out and entered into force in 2013. The discussion of the corporate law part, in contrast, was delayed, and with the adoption of the popular initiative against *excessive compensation* (*Minder Initiative*) on 3 March 2013 the issue of executive compensation became the focus of the legislative process. The Ordinance against Excessive Compensation in Public Companies (Excessive Compensation Ordinance), which was adopted to implement the Minder Initiative and has been in force since 1 January 2014, must now be transformed into a formal law. This is the background of the submitted preliminary draft (*Vorentwurf*) for a reform of corporate law (Draft). The Draft was submitted together with an explanatory report.

The Draft covers three broad topics: first, compensation rules, *i.e.* the implementation of the Excessive Compensation Ordinance into the Code of Obligations (and other laws); second, new proposals for a gender quota and disclosure obligations for companies in the natural resources sector (which are not really part of corporate law, but nonetheless included in the Draft); and third, changes in traditional corporate law, which in part had already been included in the draft of 2007 and which primarily relate to the areas of capital and legal reserves, corporate governance and corporate restructurings.

1) Say on pay and other compensation rules

The Draft is to replace the Excessive Compensation Ordinance, which was enacted as an interim solution. In substance, the provisions of the Excessive Compensation Or-

dinance have by and large remained the same. However, the Draft provides for some stricter rules. The main differences are the following:

- ***Prospective shareholder say-on-pay votes*** (so-called *budget* votes) ***on variable compensation*** are ***no longer permissible***. Shareholders are to vote on variable compensation only after the annual accounts have become available. Whether or not an additional advisory vote on the compensation report is held is irrelevant. Should this proposal become law, the many companies that have introduced a prospective model of say-on-pay approval votes would have to amend their approval procedures and articles of incorporation.

- The articles of incorporation must include a ***maximum ratio of variable to total compensation*** for the members of the board and the executive committee.

- ***Sign-on bonuses*** are only permissible if they are to compensate *clearly demonstrated financial disadvantages* incurred in connection with a change of employment.

- Compensation for ***non-compete covenants*** may only be paid if the non-compete obligation is commercially justified and the consideration is in line with market standards. Non-compete covenants exceeding 12 months are not considered to be commercially justified and may not be compensated.

- As regards the ***maximum number of external mandates*** permitted to be held by members of the board and the executive committee, all mandates *in comparable functions in enterprises with commercial objectives* must be covered in the future. This means that also external management functions (which are currently not subject to the maximum under the Excessive Compensation Ordinance) are covered. With respect to mandates in foundations and associations, the determinant factor will likely be whether these qualify as *enterprises with a commercial objective*, which would typically not be the case. External mandates must be disclosed in the compensation report.

- The ***compensation report*** must individually specify the compensation received by each member of the board and the executive committee (the Excessive Compensation Ordinance requires for the executive committee only the disclosure of the aggregate amount and the highest amount paid to an individual member).

2) Gender quotas and disclosure obligations for companies exploiting natural resources

The Draft provides for a ***target quota of 30%*** for the representation of each gender in the board and in the executive committee of major public companies. It is applicable to public companies exceeding the thresholds relevant for an ordinary audit (which

is almost always the case for public companies). If they do not achieve the target quota of a 30% representation of each gender after a ***transition period of five years***, they must explain in the compensation report the reasons for the underrepresentation and the actions undertaken to promote gender diversity. Thus, the Draft goes beyond the revised Swiss Code of Best Practice for Corporate Governance, which recommends a representation of both genders in the board but does not require a specific quota.

In accordance with the EU Directives 2013/34 and 2013/50, which also provide for ***transparency obligations*** for ***companies exploiting natural resources***, the Draft requires companies active in such business and being subject to an ordinary audit to disclose payments exceeding CHF 120,000 to public authorities. Companies solely active in commodity trading are not subject to this requirement yet, but the Federal Council may broaden its scope to also encompass commodity traders in the event of concerted international efforts.

3) True corporate law changes

The changes proposed in the area of traditional corporate law primarily relate to the capital structure, measures for the improvement of corporate governance, including the strengthening of shareholder rights and remedies and shareholders' meetings, and to corporate restructurings and insolvency.

a) Capital, capital changes, legal reserves, and distributions

The proposed changes include in particular:

- The ***share capital may also be denominated in foreign currency***, which resolves a number of inconsistencies between the accounting rules, which already now allow accounting in (convertible) foreign currency, and corporate law.

- The ***minimum par value of one cent is abolished***; shares may have any lower par value above zero. This would facilitate share splits. Shares that are only paid-up in part are no longer permissible.

- The ***rules regarding (intended) acquisitions of assets***, which currently necessitate a somewhat cumbersome *qualified* procedure for incorporations and capital increases with a number of potential legal pitfalls, are to be abolished.

- Introduction of a ***capital band***, *i.e.* an authorization of the board for a maximum of five years to increase and reduce the share capital within an upper and lower limit (+/- 50%). This would allow more flexible and faster capital changes.

- The rules on ***legal reserves*** are aligned with the respective accounting rules, and the creation and dissolution of legal reserves is clarified. Specifically, the ***distribu-***

tion of capital reserves (*i.e.* paid-in capital surplus and other contributions in excess of the par value) is to be permissible within certain limits and if an audit report is obtained.

– ***Interim dividends*** are to become permissible for audited companies provided that the articles of incorporation permit them and audited interim financial statements are available.

– Companies may provide for an up to 20% higher dividend for shareholders who exercise their voting rights in the shareholders' meetings. This rule aims at mitigating the problem of shares which are not registered in the company's share register (so-called ***dispo shares***) and incentivizing active participation in shareholder meetings. A nominee model as a possible solution to the problem of dispo shares is not proposed.

– The treatment of ***treasury shares*** is aligned with the accounting rules (deduction from equity of an amount corresponding to the acquisition price).

b) Shareholder rights and remedies

According to the Draft shareholder rights and remedies are to be strengthened, which includes the following proposed changes:

– Shareholders in private (unlisted) companies are to have the ***right to ask questions*** outside shareholders' meetings; the board is required to respond to questions of the shareholders twice a year and to report at the annual shareholders' meeting on board and management compensation.

– The requirements for the right to request a ***special investigation*** are to be relaxed in that the necessary threshold of shares is reduced to 3% in public companies and the circumstances for which *prima facie* evidence is to be furnished are somewhat eased.

– Certain ***shareholder (derivative) lawsuits*** for the benefit of the company may, upon request of the plaintiff, be litigated ***at the expense of the company*** provided that the claiming shareholder(s) have an existing participation of at least 3% (in public companies) or 10% (in unlisted companies) and can provide *prima facie* evidence of the elements of the claim.

– The requirements for ***actions against shareholders, directors and managers for repayment of unduly received benefits*** are to be relaxed. In the future, claims may also be brought against related persons of shareholders and members of corporate bodies, and the financial situation of the company is irrelevant for the outcome.

– The articles of incorporation may include binding ***arbitration clauses*** for disputes relating to corporate law matters.

c) Shareholders' meetings

The Draft provides for more flexibility in the organization of shareholders' meetings, reduces the hurdles for shareholder rights, and attempts to foster participation in the shareholder democracy process:

– Shareholders' meetings held (exclusively) by electronic means and shareholders' meetings taking place abroad or in several locations at the same time are expressly to be allowed.

– Reduction of the threshold for shareholders in public companies to ***request the convening of a shareholders' meeting*** to 3% and reduction of the threshold to propose agenda items and motions to 0.25% (10% and 2.5%, respectively, in private companies).

– Public companies are to set up an ***online platform*** for discussions before shareholders' meeting.

d) Corporate restructuring and insolvency

With regard to the *early warning systems* in case of impending insolvency, the Draft shifts the focus to the aspect of illiquidity and provides more specific rules for the board's duty to take action:

– If there is well-founded concern about ***impending illiquidity in the next 12 months***, a liquidity plan and an assessment of the company's economic situation must be prepared. If the board concludes based thereon that there is no threat of imminent illiquidity, the liquidity plan must be submitted to an auditor to ascertain its plausibility. If, however, the board finds that there *is* a threat of imminent illiquidity, or if the auditor does not confirm its plausibility, a shareholders' meeting must be convened and restructuring measures proposed.

– The same duties apply for additional warning indicators, *e.g.* if net assets cover less than one third of the sum of the share capital and the legal reserves (***capital loss***), in case of a ***rapid decrease of equity***, and if there has been a ***loss in three consecutive years***.

– If there is well-founded ***concern about over-indebtedness***, the board generally still has a duty to notify the insolvency court; such notification can be deferred by obtaining a subordination by creditors of their claims and, which is new, in case of a reasonable ***prospect of restructuring*** within 90 days.

4) Outlook

Following the consultation period running until 15 March 2015 a draft of the revised law will be prepared and submitted to the Parliament. In view of the significant scope of the Draft and the number of issues that will likely give rise to discussions, the new law is not expected to enter into force before 2017.

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Withholding Tax on Interest to be Replaced by Paying Agent Tax System

Reference: CapLaw-2015-5

The Swiss Federal Council issued a proposal on 17 December 2014 to replace the current withholding tax on interest payments by a new paying agent tax system. The new system would be applicable to both domestic and foreign issued bonds and debentures. A Swiss paying agent would have to withhold the Swiss withholding tax, if the payment would be made to a domestic individual. Payments to domestic entities as well as payments to foreign persons would be out of scope of the Swiss withholding tax system.

By Stefan Oesterhelt

1) Current law

Under the current law interest paid by a Swiss resident borrower is not in principle subject to Swiss withholding tax (*Verrechnungssteuer*) of 35%, unless the instrument under which interest is paid is classified as a "bond" (*Anleihensobligation*), a "debenture" (*Kassenobligation*) or a "deposit" (*Kundenguthaben*) for Swiss withholding tax purposes.

The Swiss withholding tax has to be paid by the issuer of such bond, debenture or deposit to the Swiss Federal Tax Administration. The bondholder or creditor has the possibility to reclaim the Swiss withholding tax based on internal law (if it is a Swiss resident person) or based on a double taxation treaty.

The interest component of structured products issued by a domestic entity as well as retained profits and distributions of domestic mutual funds (unless they derive from capital gains) are also subject to 35% Swiss withholding tax.

2) The Proposal of 17 December 2014

The new withholding tax law proposed by the Swiss federal council on 17 December 2014 will replace the current withholding obligation of the issuer (or the Swiss guarantor, as the case may be) for a withholding obligation of Swiss paying agents. Swiss paying agents will have to remit 35% withholding tax to the Swiss federal tax administration if the interest is paid to a Swiss resident individual in the following cases:

- Bonds and debentures issued by a Swiss or foreign resident entity (irrespective whether the proceeds of a foreign issued bond will be used in Switzerland or not);
- Interest component of structured products issued by Swiss or foreign resident entity;
- Interest component of distributions and retained profits by Swiss and foreign mutual funds;
- Interest payments on bank deposits.

The new paying agent tax will also apply to bonds which are currently exempt from Swiss withholding tax such as CoCo-Bonds and Write-Down-Bonds.

No distinction will be made between Swiss and foreign issued bonds, debentures, structured products and mutual funds.

3) Function of Swiss Paying Agent

The paying agent, *i.e.*, any person who within the conduct of its business regularly or occasionally remits, transfers or credits interest in connection with bonds and debentures (as defined), or collects such interest for third parties, will be responsible for determination whether a payment constitutes a taxable interest payment and be liable for the tax to be deducted, in the worst case for the grossed-up tax amount. In addition, the paying agent will have to deduct withholding tax on the accrued interest also in the case of a sale of such bond. This is fundamentally new, as accrued interest components are currently generally not subject to the withholding tax.

The paying agent will also be responsible for determining whether the exemption for foreign investors applies, *i.e.*, whether the beneficial owner is resident outside Switzerland. If the paying agent has any doubt about the identity of the beneficial owner he will be required to withhold.

Accordingly, the tasks of Swiss paying agents are sensible and demanding. If the Swiss federal tax administration in an audit concludes that the Swiss paying agent did not withhold tax as required, the paying agent will be liable for tax not withheld, as mentioned earlier, in the worst case on the grossed-up amount.

4) Comparison of Current Law and Proposed New Law

The diagram below compares the basic Swiss withholding tax situation under the current and the new law and includes the EU Savings Tax:

Issuer	***Investor (beneficial owner)***	***Current Law***		***New Law***	
			withheld by		withheld by
Domestic issuer	Domestic individual	WHT	Issuer	WHT	Swiss Paying Agent
	Domestic company	WHT		-	
	EU individual	WHT		Savings Tax	
	Foreign investor	WHT		-	
Foreign issuer	Domestic individual	-	Swiss Paying Agent	WHT	Swiss Paying Agent
	EU individual	Savings Tax		Savings Tax	
	Other	-		-	
Foreign Issuer with guarantee of Swiss parent company (assuming proceeds not used in Switzerland under current issuances)	Domestic individual	-	Swiss Paying Agent	WHT	Swiss Paying Agent
	Domestic company	-		-	
	EU individual	Savings Tax		Savings Tax	
	Foreign investor	-		-	

WHT: 35% Swiss Withholding Tax
Savings Tax: Savings Tax based on Swiss-EU Savings Tax Agreement

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IPO of Sunrise Communications SA

Reference: CapLaw-2015-6

On 6 February 2015, the shares of Sunrise Communications SA, Switzerland's second largest telecom's operator, started trading on SIX Swiss Exchange Ltd. The total base offering comprised both newly issued shares and existing shares and amounted to CHF 1.99 billion, making this the largest IPO in Switzerland since 2006 and the largest telecom IPO in EMEA since 2004. The offer price was fixed at CHF 68 per share resulting in an implied market capitalization of Sunrise in excess of CHF 3 billion.

Sale of Orange Communications SA

Reference: CapLaw-2015-7

On 18 December 2014, Apax and NJJ Capital SAS, Xavier Niel's private holding company, agreed to sell Orange Communications SA, Switzerland's third largest telecom operator, for a total transaction value of CHF 2.8 billion. The transaction is subject to customary regulatory approval and expected to complete by the end of Q1 2015.

Sale of Swisscanto to Zürcher Kantonalbank

Reference: CapLaw-2015-8

On 10 December 2014, Zürcher Kantonalbank reached an agreement with the other 23 Swiss Cantonal Banks to acquire all their shares in Swisscanto Group ("Swisscanto"). Swisscanto is one of Switzerland's leading investment fund providers, asset managers and occupational and private pension service providers. It also runs the largest investment foundation for pension funds in Switzerland. The transaction is subject to customary regulatory approvals.

Public Takeover of Nobel Biocare by Danaher

Reference: CapLaw-2015-9

On 11 December 2014, Danaher Corporation, a US-based leading global science and technology innovator successfully completed its public tender offer for all shares in SIX Swiss Exchange Ltd. listed Nobel Biocare Holding AG, a Swiss-based leader in the field of innovative implant-based dental restorations. The tender offer had been launched on 15 September 2014 at an offer price of CHF 17.10 per share.

Luzerner Kantonalbank issued AT1 Bonds

Reference: CapLaw-2015-10

In February 2015, Luzerner Kantonalbank AG launched its issue of CHF 100,000,000 2.25% subordinated perpetual Bonds which constitute Additional Tier 1 Capital of Luzerner Kantonalbank AG. Zürcher Kantonalbank and Luzerner Kantonalbank AG acted as Joint-lead Managers. The Bonds will be listed on the SIX Swiss Exchange Ltd.

Zürcher Kantonalbank issued T2 Bonds

Reference: CapLaw-2015-11

In February 2015, Zürcher Kantonalbank launched its issue of CHF 185,000,000 1.00 % subordinated Bonds due 2025 which constitute Tier 2 Capital of Zürcher Kantonalbank. The Bonds were placed directly by Zürcher Kantonalbank. The Bonds will be listed on the SIX Swiss Exchange Ltd.

12th Stock Corporation Law Conference of Zurich (12. Zürcher Aktienrechtstagung)

Wednesday, 18 March 2015, 9.15 h – 17.00 h, Park Hyatt, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

12th Financial Markets Law Conference (12. Tagung zu Entwicklungen im Finanzmarktrecht)

Tuesday, 12 May 2015, 09.15 h – 16.20 h, Lake Side Casino Zürichhorn, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

Update on Collective Investment Laws II (Aktuelles zum Kollektivanlagenrecht II)

Wednesday, 20 May 2015, 13.30 h – 17.30 h, Kongresshaus, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/