CapLaw

SWISS CAPITAL MARKETS LAW

No. 1/2024

Securities

Regulatory

News | Deals & Cases

Events

The First (De-)SPAC in Switzerland: a Case Study

Reference: CapLaw-2024-01

In December 2021, VT5 Acquisition Company AG (VT5), the first Swiss SPAC, was listed on the SIX Swiss Exchange, raising CHF 200 million despite regulatory changes causing a nine-month delay. The subsequent 'SPAC-winter', characterized by regulatory scrutiny and an unfavorable economic climate, posed significant challenges, leading to VT5 disclosing difficulties in proceeding with a de-SPAC transaction. Despite these hurdles, VT5 identified R&S International Holding AG (R&S) as an acquisition target, agreeing on a CHF 274 million purchase price. The transaction process involved navigating legal and financial complexities, including securing investor commitments, adjusting to accounting standards, and coordinating a public offering of VT5 shares alongside share redemptions and a subsequently introduced debt component. This intricate de-SPAC transaction was successfully completed in December 2023, amidst challenging market conditions.

By Matthias Courvoisier / Deirdre Ní Annracháin

On 15 December 2021, the inaugural Swiss SPAC, VT5, was listed on the SIX Swiss Exchange. This listing followed a prolonged and challenging journey, marked notably by a sudden shift in regulatory perspectives. This shift necessitated the establishment of new rules, resulting in a nine-month delay of the SPAC IPO. Despite these hurdles, the VT5 founders raised CHF 200 million in capital as part of the SPAC listing. Additionally, the founders and sponsor collectively contributed CHF 8.1 million in working capital. The ultimate aim, as with all SPAC listings, was to carry out a de-SPAC transaction by 15 December 2023 (date of special meeting).

Following the successful IPO, the global financial industry experienced a period one could describe as the 'SPAC-winter'. This downturn was primarily due to the SEC's intensified focus on certain SPAC-related practices in the United States, an increase in interest rates, and a largely inaccessible PIPE market. Consequently, in the U.S., pursuing a public listing through a de-SPAC process often led to significant investor losses and attracted minimal new investment. The de-SPAC process was also made increasingly challenging for VT5 due to the deteriorating economic climate and declining equity markets prevalent over the course of 2022 and the first half of 2023, which resulted in VT5's sponsor indicating its intention not to participate in a de-SPAC transaction. This ultimately led to an ad hoc announcement from VT5 disclosing its difficulties to the market in early June 2023. Despite these challenges, as part of an 18-month search, VT5 identified R&S as a potentially suitable acquisition target and initiated discussions with its shareholders to explore an acquisition.

As it is standard for any major transaction, VT5's negotiations with the shareholders of R&S (Selling Shareholders) first led to the signing of a non-binding term sheet for VT5's acquisition of the shares of R&S. To bring certainty to the de-SPAC process, both parties agreed upon a fixed purchase price of CHF 274 million, comprising

CHF 213.72 million in cash and CHF 60.28 million in VT5 shares. In order to finance the acquisition, VT5 planned to carry out a concurrent capital raise by way of a public offering of VT5 shares. The quantity of VT5 shares that the Selling Shareholders would receive as consideration was contingent on the offering price in that capital raise, capped at CHF 10.50 per share in order to give the Selling Shareholders comfort on the minimum stake they would hold in the new combined entity. This stipulation effectively established a share price range of CHF 10.00 to CHF 10.50 for the capital raise in the de-SPAC. The floor price of CHF 10.00 was set because SPAC investors opting to remain invested would likely redeem their shares for cheaper ones in the offering, thus potentially decreasing the cash proceeds from the offering and necessitating additional investments. Therefore, there was little incentive to set a lower range.

Establishing the purchase price and the offer price range in this manner introduced certain risks to the transaction and differed markedly from a typical IPO. In a typical IPO, early 'pilot-fishing' meetings support the pricing process, but several factors make such an approach impractical in the context of a de-SPAC. Pilot-fishing meetings generally require significant engagement by the target company with external investors as well as presentation of a detailed and comprehensive "equity story", neither of which may be appropriate or feasible in a de-SPAC transaction, given that discussions between the target and the SPAC may still be at a relatively early stage at the time such meetings would need to be held. Furthermore, given the outcome of negotiations between the target and the SPAC is uncertain until quite a late stage, investment banks may be reluctant to engage their investor base in circumstances where a transaction may never materialize. Additionally, as a SPAC is a listed entity, existing and potential investors that would participate in pilot-fishing efforts would need to agree to non-trading and non-disclosure agreements to protect against insider trading, which is a commitment that few would be willing to make. Approaching a wide number of potential investors would also heighten the risk of information leaks. Therefore, prior to establishing the purchase price for the de-SPAC, it was possible for VT5 to discuss the transaction with only a select number of key investors.

In order to successfully initiate the capital raise, the support of R&S's management was crucial. This primarily involved establishing the necessary financial statements and participating in the drafting of the offer prospectus. The required financial statements needed to be drawn up within a limited amount of time, and – complicating matters – the target company used Swiss GAAP FER for their accounts, a standard not typically recognized for a SPAC. Therefore, it was imperative to confirm with SER the acceptability of Swiss GAAP FER. SER's confirmation was facilitated by VT5's commitment to transition to the Swiss reporting standard immediately after closing of the de-SPAC, rather than the three-month period provided in the relevant rules. The prospectus drafting process required R&S management's active involvement, introducing dynamics distinct from those in standard M&A transactions and due diligence processes. Additionally, the management needed to be prepared for investor meetings and to provide the customary confirmations for prospectuses and auditors' comfort letters.

The term sheet for the acquisition of the shares of R&S was finalized towards the end of July 2023. Being non-binding, it did not necessitate disclosure under ad hoc regulations. Nonetheless, it was critical for VT5 to softly announce the transaction early to begin discussions with as many existing investors as possible. Ultimately, VT5 and the Selling Shareholders agreed to a soft announcement on 2 October 2023, identifying R&S as the target and the anticipated offer price range.

The objective was to secure firm commitments from both existing and new investors, or at the very least, garner their soft support. These firm commitments primarily entailed a pledge to subscribe to additional VT5 shares, not to redeem VT5 shares, and to support the de-SPAC process during investor and shareholder meetings. To mitigate insider trading concerns, the commitment specified that subscribers must be price-takers. In facilitating this process, VT5 received an exemption from the Takeover Board from the mandatory takeover obligation, applicable if those making commitments collectively exceeded the 33 1/3% ownership threshold. Additionally, VT5 secured a waiver from SIX Exchange Regulation's Disclosure Office, ensuring that the prospectus could adequately fulfill the disclosure requirements of those making such commitments. Advisors on future de-SPAC processes could consider articulating the takeover exemptions in the articles of incorporation more broadly, to encompass all potential scenarios of threshold-crossing during the de-SPAC. This might even necessitate considering a straightforward opt-out clause, allowing shareholders of the target company to retain more than a 33 1/3% stake following a de-SPAC.

Understandably, investors wished to review an almost final draft of the prospectus prior to entering into the commitments mentioned above and agreeing not to trade until its publication. This approach proved effective, although the amount of soft support significantly outweighed firm commitments. Additionally, at that time, there was limited visibility regarding the transaction's potential success. While the anticipated redemption estimates proved to be quite accurate, no one could know for sure at that point in time.

Simultaneous to the due diligence and investor discussions, the drafting of the prospectus and the fairness opinion was underway. A comprehensive prospectus, rather than just an informational document as per SIX SPAC rules, was necessary due to the issuance and listing of new VT5 shares as part of the transaction. These new shares surpassed the 20% threshold outlined in art. 38(1) FinSA, and the exemption under art. 38(2) FinSA in conjunction with art. 37(1)(e) FinSO was also inapplicable, as the transaction was not a merger, but rather a reverse merger, which meant that the combined entity had to fulfill all listing requirements applicable to a newly listed entity, such as the free-float requirement. Because of the reverse-merger structure, the financial statements of R&S could be adopted as the primary financials of the combined group, which simplified the financial reporting in the prospectus and eliminated the need for quarterly reporting following the de-SPAC.

A unique aspect of any Swiss de-SPAC process, as per SIX Exchange Regulation's rules, is the need for a fairness opinion. Its primary goal is to evaluate the investor shareholders' options in the SPAC: whether it is more advantageous to redeem their shares in the SPAC or to remain invested. Consequently, the recipients of the fairness opinion were the existing investor shareholders of VT5. By assessing these options, the fairness opinion also implicitly advises on the viability of investing in the offered shares. Ideally, from a prospectus liability perspective, it would have been preferable for the fairness opinion to simply indicate a preference for one option over the other. However, SIX Exchange Regulation mandated a more detailed fairness opinion, akin to those in public takeovers. This requirement raised concerns regarding prospectus liability, underscoring the importance of explicitly stating that the fairness opinion is not part of the prospectus. To further mitigate liability risks, it was crucial to ensure that the information in the fairness opinion was as aligned as possible with the prospectus.

Although the fairness opinion posed certain challenges, it also offered distinct advantages. A key issue was the inability to publish transaction research due to timing constraints. Typically, transaction research is published approximately two weeks before the offer prospectus. However, in this case, publishing the research at this stage would have represented the first major disclosure about the SPAC following the de-SPAC, without assurance that it encompassed all material non-public information. This approach might be viable for IPOs, but it is problematic for de-SPACs, considering the SPAC's status as a listed company. Additionally, releasing the research report after prospectus publication was not feasible due to the mandated quiet period, which extends to forty days following the first day of trading. Therefore, the fairness opinion served to fill the void left by the absence of transaction research. In future de-SPACs, it might be beneficial to tailor the fairness opinion more closely to a research report's style and format to meet investor expectations more effectively.

The prospectus underwent review and approval processes at SIX Exchange Regulation. The prospectus had to comply with the informational document requirements specified in the SIX SPAC rules and the prospectus requirements of FinSA. SIX Exchange Regulation also reviewed the fairness opinion. Under the SIX SPAC rules, VT5 was obligated to offer its investor shareholders the option to redeem their shares, a stipulation also embedded in the articles of incorporation as a prerequisite for the de-SPAC. All necessary approvals and exemptions had been secured from the Takeover Board at the time of the SPAC IPO to allow the redemption offer, which was a critical step as any failure here would have fundamentally undermined the SPAC concept. Ultimately, the prospectus, along with the fairness opinion and the redemption offer, was slated for joint publication on 8 November 2023.

At the time of the publication, neither VT5 nor the Selling Shareholders could ascertain the potential success of the de-SPAC and the associated capital raise. VT5 therefore engaged in contingency planning early on. This involved preparations for a possible debt component to finance the acquisition. This was viable due to the target company's net cash position, enabling the arrangement of a credit facility prior to the special investor and shareholder meetings. A crucial consideration was the impact of the credit facility on the offer: whether to view it as positive or negative, and when to announce the intention to raise debt. After deliberation and an assessment of whether the fairness opinion needed updating, it was concluded that the debt's size and cost were actually advantageous for investors. The decision was made to announce the potential debt component two trading days before the redemption offer's expiration and four trading days prior to the closing of the capital raise. This approach was guided by art. 56(5) FinSA, which stipulates that any additions to an offer must be published at least two days before the offer period ends.

Simultaneously with the drafting of the prospectus and the preparation of the redemption offer, the SPA negotiations were underway. The difficulty lay in coordinating the closing of the SPA with the redemption process, the capital raise, and the payment of consideration out of VT5's escrow account. Synchronizing the entire transaction on the same day was impossible. The solution involved obtaining a confirmation from the sellers for the banks, stating there were no impediments to settling the SPA. This allowed the capital reduction and capital increase required to finance the purchase price to be registered the morning after the VT5 shareholders' meeting, followed by the escrow amount release in the afternoon and the settlement of the repurchase offer overnight, along with closing of the capital raise on the subsequent day. On this subsequent day, the debt was also drawn down, the cash component of the SPA was settled, and the initial contribution of R&S shares to VT5 was completed.

Reflecting on the transaction, what stands out is the recollection of an intensely demanding process which presented a myriad of legal intricacies. The discussion above touches on only a selection of these issues. The transaction's legal complexity stems from the need to harmonize diverse streams and interests. A de-SPAC, by its nature, is far from a straightforward transaction, thus presenting significant challenges. Despite the hurdles posed by a challenging market and the transaction's economic and legal complexities, the successful completion of the de-SPAC is a testament to the commendable efforts of both the Selling Shareholders and VT5's founders.

Matthias Courvoisier (matthias.courvoisier@bakermckenzie.com)
Deirdre Ní Annracháin (deirdre.niannrachain@nkf.ch)

Inclusion of Forward-Looking Statements in Swiss Debt Prospectuses: A Swiss Perspective

Reference: CapLaw-2024-02

This article provides an overview of the legal requirements and practices concerning forward-looking statements in Swiss debt prospectuses, aiming to serve as a guideline for issuers, legal practitioners, and financial professionals navigating public offerings or listings in Switzerland of debt instruments.

By Benjamin Leisinger

1) Introduction

In the realm of Swiss prospectus regulations, the Swiss Financial Services Act (FinSA) and the Swiss Financial Services Ordinance (FinSO) provide a comprehensive framework governing the requirements for and content of prospectuses for the public offering and/or admission to trading on a trading venue in Switzerland. This article delves into the specific requirement for the inclusion of forward-looking statements (*wesentliche Geschäftsaussichten* or *wesentliche Perspektiven*) in such prospectuses for debt offerings, as outlined in article 40(1) lit. a. No. 4 of the FinSA and item 2.4.4 lit. c. of Annex 2 of the FinSO.

2) The Nature and Scope of Forward-Looking Statements

a) Legal Framework

According to the Swiss legal framework, forward-looking statements in debt prospectuses must encompass several key elements:

– ***Timeframe Coverage***: Forward-looking statements to be included in Swiss prospectuses are mandated to also cover a period subsequent to the date of the prospectus. For example, a prospectus for an offering in January of a given year cannot simply include forward-looking statements in half-year financial statements of the preceding year that only cover the period until the end of such year. Ideally the forward-looking statements also cover the period until at least the end of the relevant quarter the instruments are issued in. In the author's view, for debt offerings there is less need for disclosing expectations going beyond that time because, in contrast to equity instruments, the valuation of the debt instruments is less dependent on future developments of the issuer (unless they affect the solvency of the issuer).

– ***Content Requirements***: As per the Swiss Federal Council's message and explanatory reports in the legislative process, forward-looking statements may encompass information about the status of relevant research or development undertakings by the issuer for its business (*Forschungs- und Entwicklungsstand*) and market prospects

(*Marktaussichten*) in relevant business areas. They must, however, reflect not only the market at large but also the specifics of the issuer's business or its group in such market. However, required statements are limited to key prospects of the issuer significant for the investment decisions. When an issuer describes its outlook on the market, *e.g.*, in the next quarter, and continues to say that it expects the issuer to perform in accordance with such market expectations, this should be sufficient.

– ***Existing Practices***: Typically, Swiss issuers already include such statements in the management report of their financial report (*Lagebericht*) as stipulated under article 961c(2) No. 6 of the Swiss Code of Obligations. This was widely considered to be the benchmark for the relevant disclosure of forward-looking statements. Non-Swiss issuers should check whether similar statements are required in their financial statements that could be referred to, and incorporated by reference, and/or reproduced in the Swiss FinSA-prospectus. If issuers of debt instruments do not have existing statements in MD&A sections of the annual report, for example, they may have similar statements in previous non-Swiss prospectuses or base prospectuses that they could possibly use.

– ***Financial Targets and Profit Forecasts***: Information about specific financial targets or profit forecasts is not mandatory in the prospectus. Issuers have the discretion to include or exclude such guidance in debt prospectuses and should carefully consider the implications to make such statements also outside of the Swiss issuance context.

b) Uncertainties and Legal Implications – Reduced Standard of Liability

Forward-looking statements inherently involve significant uncertainties and a high degree of speculation. Recognizing this, Swiss law, under article 69(3) FinSA, stipulates liability for such statements only if they are made "against better knowledge", *i.e.*, are intentionally wrong statements, or without acknowledging their uncertain nature. This aligns with the American "bespeaks caution doctrine". The absence of a statement on the uncertain nature of forward-looking statements alone does not lead to a liability if the statements were made in good faith and based on proper assumptions and facts – but the absence of the disclaimer will certainly lead to comments from the relevant prospectus review body.

c) Practical Aspects

The two Swiss prospectus review bodies specifically scrutinize the inclusion and presentation of forward-looking statements in prospectuses and this aspect is a frequent subject of inquiry. Accordingly, foreign issuers in particular should be vigilant about this aspect early in the deal process to ensure compliance and avoid potential pitfalls. There are also some practical aspects worth noting:

– ***Consistency with existing disclosure***: Issuers are advised to include statements already made in other financial documents or issuance documents in the FinSA-prospectus to maintain consistency and harmonized disclosure.

– ***Method of Inclusion in Prospectuses***: The method of referencing or stating forward-looking statements in prospectuses is not explicitly regulated in the FinSA or FinSO. However, prevailing literature and practice suggest that the requirements should not be excessively stringent. An inclusion in the prospectus in a specific section on "outlook" or "material perspectives" is deemed sufficient, of course. Alternatively, a general reference in other parts of the prospectus with forward-looking statements, *e.g.* in the description of the general business of the issuer (item 2.4.1 of Annex 2 of the FinSO), is also acceptable. Inclusion in a separate section is, however, preferable in the author's view to allow the Swiss review body to easily identify and review the relevant statements and a different approach should only be considered if (i) this is more in line with existing disclosure of the relevant issuer or (ii) the issuer also submits a completed rule check to the Swiss review body to help them identify the relevant statements.

3) Conclusion

The inclusion of forward-looking statements in debt prospectuses is a nuanced aspect of Swiss financial law, requiring careful consideration of various legal and practical elements. Issuers, especially those from abroad, must be cognizant of these requirements to ensure compliance as well as consistent communication with potential investors.

Benjamin Leisinger (benjamin.leisinger@homburger.ch)

The Regulatory Agenda for 2024 in Switzerland

Reference: CapLaw-2024-03

Changes in the Swiss financial market over the last two years continue to have a profound impact on regulatory initiatives and legislation in Switzerland. Most notably, the Swiss government used its emergency powers to force a takeover of Credit Suisse by UBS in March 2023 after Credit Suisse suffered significant deposit outflows and a loss of market confidence. This extraordinary intervention spurred questions on the effectiveness of the Too-big-to-fail regime and triggered calls for measures to reestablish confidence in the Swiss financial market. Separately, events including the abolishment of negative interest rates, the substitution of the Swiss Franc LIBOR by SARON, scandals in the international crypto markets and an increased international focus on sustainable finance also continue to affect the regulatory agenda.

By René Bösch / Thomas Werlen

The state rescue of Credit Suisse by way of a forced takeover by UBS has sent shockwaves through the Swiss and international financial markets. In its wake, legislators and FINMA have been pressing to further expand the regulation and supervision of banks. These calls to revise banking laws have come in addition to existing proposals to amend capital markets rules such as the full implementation of the Basel III framework and efforts to increase sustainability in the Swiss financial sector. We present an overview of the numerous current legislative projects aimed at revamping the Swiss financial sector.

1) Regulatory Consequences to the failure of Credit Suisse

The most significant financial market event last year in Switzerland was the government-supported takeover of Credit Suisse by UBS. After a series of bad financial results and scandals over the last years Credit Suisse progressively lost the confidence of the market and the regulator alike. Credit Suisse attempted to regain trust by announcing a new strategy in October 2022. A CHF 4bn capital increase early December 2022 intended to finance its implementation but brought only short relief as customers continued to withdraw their funds. The situation took a turn for the worse in March 2023, ending in an apparent refusal of a significant number of counterparties to accept funds from Credit Suisse. Swiss government officials appear to have agreed that a resolution of Credit Suisse, as would have been the ordinary course for a bank in crisis under the existing Too-big-to-fail (TBTF) regime, would have been too risky in the current market environment. A takeover deal was therefore brokered between Credit Suisse and UBS in the third week of March 2023. The Federal Council adopted an extraordinary ordinance based on its constitutional emergency powers to facilitate the deal with additional liquidities and exemptions from Swiss law which would otherwise have created obstacles to the takeover. On 19 March 2023 Credit Suisse and UBS announced the takeover. The Swiss Government, the Financial Market Supervisory Authority FINMA (FINMA) and the Swiss National Bank (SNB) declared their support on the same day and disclosed that they had made use of the emergency ordinance to supply Credit Suisse with additional liquidities, including a Public Liquidity Backstop (PLB), and granted UBS state guarantees to cover for the financial risk involved in the transaction. Credit Suisse Group was merged into UBS Group on 12 June 2023. The full integration of Credit Suisse is expected to occur in or towards the end of 2024.

Both the emergency rescue and the apparent difficulty in the years prior to steer Credit Suisse back into safe waters spurred a frenzy of governmental inquiries into lessons learned and measures available to reestablish confidence in the Swiss financial market. Swiss Federal Parliament held a special session in April 2023 to debate the causes for and conclusions to be taken as a result of that Credit Suisse's financial crisis. A few months later, Federal Parliament also established a Parliamentary Investigation Committee (PUK) tasked with investigating the causes and responsibilities for the failure of Credit Suisse. The Swiss Federal Department of Finance (FDF) commissioned a first report from an expert group, which was ultimately published on 1 September 2023 (Banking Stability Report), providing recommendations on how to strengthen the existing TBTF framework. On 19 December 2023 FINMA published its own report on the Credit Suisse-related events and the lessons learned (FINMA Report). As expected, many members of the Federal Parliament submitted motions to the Federal Government with requests to look into particular aspects of the Credit Suisse crisis and the events leading up to it, and come up with legislative proposals preventing another such crisis. In particular, public sentiment is that UBS as the sole globally systemically important bank (G-SIB) remaining in Switzerland could, for obvious reasons, not find itself in a similar situation.

These reports and political initiatives call for a number of regulatory responses, most importantly in the following areas:

– **Strengthening and refining the TBTF regime**: The Federal Government is expected to present proposals on how to improve the current TBTF regime; the goal is to prevent future crises of Switzerland's remaining systemically important banks (SIBs), *i.e.*, UBS, PostFinance, Raiffeisen and Zürcher Kantonalbank (ZKB). A first occasion to do that is in the context of its report on the TBTF Regime that is due pursuant to the Banking Act in the first half of 2024 (TBTF Report). Observers expect the TBTF Report to follow the proposals contained in the Banking Stability Report. We anticipate specific proposals on the framework for crisis management and collaboration among the Federal Government, FINMA and SNB, the tightening of liquidity requirements and the addition of new tools to provide liquidity support in crisis (see below), improvements or extensions on FINMA's powers to intervene in a banking crisis, and the improvement of transparency in certain markets.

– **Public Liquidity Backstop**: Prior even to Credit Suisse's rescue, the Federal Government proposed introducing a PLB regime, which would grant SNB the power to extend significant liquidity support guaranteed by the government to an ailing bank as part of its restructuring. The proposed PLB regime was not implemented in time to assist Credit Suisse during its March 2023 crisis. The PLB thus found its way into the emergency ordinance. Shortly thereafter, the Federal Government accelerated its legislative agenda and announced introducing the PLB into ordinary law via a corresponding amendment of the Banking Act and related Ordinance on 6 September 2023. We expect this proposal to be debated in the Federal Parliament as early as in June 2024.

– **Introduction of Senior Manager Regime**: FINMA alongside many members of the Federal Parliament requested that the Federal Government propose a senior manager regime similar to that in the EU and in UK, making specifically designated senior representatives of banks personally liable for any violations of duties and/or introducing regulatory requirements within their sphere of responsibility, both financially and criminally.

- **Broadened authority of FINMA for issuing penalties**: In its 2023 FINMA Report, FINMA lamented that it did not have enough powers to intervene early in Credit Suisse's downward spiral. It could, notably, not take any strict measures or issue significant sanctions against representatives of the bank and the bank itself to correct Credit Suisse's course. It therefore moves to be vested with broadened powers to issue sanctions against senior bank representatives (see above), to issue penalties (incl. fines) and make enforceability proceedings public ("naming and shaming") as a deterrent measure.

- **Restrictions on the payment of variable compensation**: The Federal Government has been under pressure to introduce significant restrictions on the payment of variable compensation to bank managers in case of financial distress of the bank. This is a direct reaction to the failure of Credit Suisse which has been criticized for having a history of excessive bonuses even in times of financial distress. A first step in that direction is already included in the legislative package relating to the PLB (see above).

The PUK is expected to issue its final report towards the summer of 2024. The report will remain confidential for an extended period of 50 years but is likely to shape the implementation of the regulatory proposals above. While its contents and recommendations are yet unknown, we assume that the pressure on politicians and authorities to move for decisive regulatory and legislative action is significant.

2) Implementation of the Basel III Standards

End of November 2023 the Federal Council adopted a bill implementing the full Basel III Standards into Swiss law. The project had been in the works since the Basel Committee on Banking Supervision (BCBS) adopted the finalized framework in December 2019 and completed it with a revised minimum standard for market risks in February 2019. The Federal Council's bill requires amending the Capital Adequacy Ordinance (CAO) to ensure stronger capital requirements for higher-risk areas of the banking business and more transparent calculations of capital. The Federal Council stated that this amendment would not create any significant change in the total capital requirements for the banking sector on average. It will however likely mean an increase in capital requirements for UBS as it is the only Swiss G-SIB left. The amendment is expected to enter into force in 2025. The banking sector will thus gear up in 2024 to meet the higher capital adequacy requirements.

3) Revision of the Swiss Financial Markets Infrastructure Act

The Swiss Financial Markets Infrastructure Act of 2015 (FMIA) entered into force on 1 January 2016, with certain provisions being phased-in later. In line with general legislative policies in Switzerland the FDF initiated preliminary consultations in 2022 on the need for amendments to improve current regulation, in particular in light of international developments. Improving the transparency in the markets and removing certain loopholes or weaknesses in current regulations are the main goals of the impending amendments.

We expect that a legislative proposal reflecting the gaps identified above will be published in the first half of 2024.

4) Introduction of a Limited Qualified Investor Fund in Switzerland

The revised Collective Investment Schemes Act (CISA) and its implementing provisions are expected to enter into force on 1 March 2024. The revision introduces an innovative fund product called Limited Qualified Investor Fund (L-QIF) onto the Swiss market. The L-QIF is exempt from supervision by FINMA. It must however be managed by an institution approved by FINMA, usually a fund management company, and is only open to qualified investors. The introduction fills a gap in the Swiss market and seeks to increase Switzerland's competitiveness as a fund location.

5) Revision of the Insurance Oversight Act

The revised Insurance Oversight Act (IOA) entered into force in January 2024. The revision allows an insurance company to be restructured rather than left to go bankrupt in the event of insolvency. This measure is intended to strengthen customer protection. Small insurance companies now also benefit from relaxed supervisory rules with the aim of improving competitiveness and innovation in the insurance market.

6) Sustainable Finance

Sustainable finance remains one of the cornerstones of Switzerland's 2022-2025 agenda for the Swiss financial market. Fifteen measures have been approved by the Federal Council as part of this agenda to position Switzerland as a leading sustainable finance market. The primary focus has been on preventing greenwashing and creating transparency about the impact of corporate activities on climate and biodiversity. In that respect, the following regulatory measures apply, respectively are on the agenda in 2024:

– In 2022, Switzerland imposed obligations on certain large companies to disclose their climate and social impact. These measures were sharpened this year with a new Ordinance on Climate Reporting that entered into force on 1 January 2024, requiring disclosure obligations to comply with the internationally recognized Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). Following these recommendations, large companies, including banks and insurance companies, have to report the financial risk they carry due to their climate-related activities, the impact their activity is having on the environment and their quantitative reduction goals concerning direct and indirect greenhouse gas emissions. The reporting obligations are, among other environmental goals, intended to protect investors against climate-related financial risks. The first reports will have to be published for the first time in 2025 on the company's websites.

- These climate disclosure obligations may be sharpened further down the line to meet similar obligations in neighboring countries. A consultation draft is expected mid-2024, proposing among others to require the climate reports to be audited by an external auditor.
- The FDF is also expected to submit a consultation draft of revisions to the Collective Investment Scheme Ordinance (CISO), the Financial Services Ordinance (FinSO) and the Insurance Oversight Ordinance (IOO) to address greenwashing in financial markets by the end of August 2024.
- FINMA has also announced a number of measures aimed at greening the financial market. It is notably drafting a binding FINMA circular laying out nature-related risk management requirements for banks and insurance companies. FINMA will start a public consultation on the circular in the first quarter of 2024.

7) Initiatives in the field of FinTech and Crypto

Developments in the FinTech space have been high on FINMA's agenda for many years. FINMA's focus was on responding to new technological trends in the fields of Decentralized Finance and crypto assets. The Banking Act was therefore amended in 2019 to allow FINMA to issue so-called FinTech licenses to market participants focusing on the usage of new technologies and crypto assets. In 2021, the Federal Government put into force the Distributed Ledger Technology (DLT) Act which reflected the technological development in the field at the time while ensuring legal certainty in cases where these DLT trading systems would go bankrupt. The DLT Act also enabled FINMA to issue licenses for DLT trading systems.

Since then, FINMA has issued a number of permits for crypto market participants and regulated novel issues in the crypto market. In September 2021 it authorized the first Swiss crypto fund (limited to qualified investors) and issued two licenses to financial market infrastructures which base their services on DLT. It also determined the regulatory treatment of crypto assets and the regulatory status of institutions offering related services. We expect that FINMA is currently working on a new license type for

Crypto Asset Service Providers in line with international developments, in particular the Markets in Crypto-Assets Regulation (MiCA) of the EU. We also expect FINMA to issue further clarifications on its regulatory assessment of certain services rendered in connection with crypto assets, as it has recently done with respect to staking.

In 2022, the Federal Council published a report, identifying additional areas of required action in the FinTech space (Digital Finance Report). The Federal Council therefore instructed the FDF and the State Secretariat for International Finance (SIF) to review the existing legal and supervisory framework with regard to, among others, the dispersion of service provision in the digital finance market, the regulation of responsibilities and risks and the need to differentiate existing FinTech license categories.

SIF is currently drafting a legislative proposal to address these gaps. It is notably examining whether the FinTech licenses for payment service providers, including stablecoin, and for providers of crypto assets should be amended. We also expect recent bankruptcies and allegations of fraud on the international crypto market to shape the SIF's proposed risk regulation. The SIF plans to issue its proposal for consultation in the second half of 2024.

8) Other Developments

Further developments marked the Swiss financial market:

- The transition from the CHF LIBOR to SARON was closely monitored by FINMA and took place without significant market disruption, not accounting for potential bilateral disputes such as regarding pricing and unilateral amendment of terms. We have not identified a need for follow-up regulatory action.
- In September 2022 SNB joined other central banks around the world in tightening its monetary policy to curb inflation. It raised its policy interest rate to 0.5 %, ending Switzerland's seven-year run of negative interest rates. While some financial institutions were and are still slow in granting retail clients positive interest rates on their cash and savings accounts, we don't see a need for regulatory action in this field;
- The Federal Council is expected to issue a legislative proposal on the transparency of legal entities and beneficial owners in the first half of 2024. This will mark another step in combatting money laundering and terrorism financing on the Swiss financial market;
- Further action is expected to improve the bilateral and multilateral exchange of information between financial market supervisors and regulators;
- In the area of continuing supervision FINMA announced its plan to focus on monitoring and managing cyber risks and risks emanating from AI technology.

9) Conclusion

We observe a full agenda for regulatory and legislative action for 2024. The focus point will be on the lessons to be learned from the Credit Suisse crisis, but other important topics need attention as well.

As the Swiss finance minister observed, the Credit Suisse crisis was not a crisis of the financial system or existing financial regulation as such but a crisis of confidence in Credit Suisse. While thorough analyses are required as to why the existing regulation was viewed as insufficient to address the Credit Suisse situation – triggering (yet another) instance of the government's use of its extraordinary powers –, we also call for regulatory restraint. The existing TBTF legislation did not fail, it was simply not applied. We don't see a need for a massive overhaul of that legislation, certain individual, principle-based adjustments may suffice.

In this process of measured adjustment, the Credit Suisse situation has shown once more the need for a pragmatic awareness – an understanding that the resilience of financial markets depends not only on the efficacy of regulatory amendments but also on its participants' capacity to navigate the uncertain terrain where crises materialize, typically when least expected.

In turn, relatively new regulatory areas such as in the areas of cryptocurrencies and regulatory efforts pursuing a policy goal such as in the area of sustainability should be pursued cautiously and with a very clear and internationally compatible understanding of the respective regulatory purposes to ensure, as far as possible, that new rules can be effectively applied.

René Bösch (rene.boesch@homburger.ch)
Thomas Werlen (thomaswerlen@quinnemanuel.swiss)

Management Transactions: Revised SIX Rules Enter into Effect

Reference: CapLaw-2024-04

On 1 February 2024 SIX's amended directive on the disclosure of management transactions (DMT) and related changes to the SIX Listing Rules entered into force. Besides a number of procedural and formal changes, the amendments to the DMT focus primarily on related party transactions and introduced a new obligation to report certain follow-on transactions made by related parties. In connection with these amendments to the DMT, SIX Exchange Regulation also published a revised version of its guidelines on management transaction disclosures, setting out its practice and expectations as regards the disclosure of management transactions. SIX listed issuers were only given a short period of time to update their internal regulations and to provide a refresher training to their board members and senior management.

By Daniel Raun / Patrick Schärli

In this article, we will first discuss the changes made to the SIX Listing Rules and the DMT as part of the recent amendments. In the second part, we will dive into implementation-related practical aspects of the obligation to report management transactions.

1) Changes to the rules on disclosure of management transactions

The amended SIX rules on the disclosure of management transactions, as set forth in the SIX Listing Rules (specifically in art. 56 of the SIX Listing Rules) and the DMT, include a variety of amendments that are mostly formal or procedural in nature. On the other hand, the new rules also extended the scope of disclosure obligations, in particular with respect to transactions involving related parties.

a) Changes related to formal or procedural matters

In terms of formal or procedural matters, changes to the listing rules and the DMT include the following:

- **Reporting of transactions in unlisted classes of shares**: Where a company has both listed and unlisted classes of shares (e.g. listed common shares and unlisted voting right shares), management transactions in unlisted classes of shares of such a company are now also subject to reporting obligations.

  Given that many Swiss listed companies nowadays have a single class of shares, this amendment will likely affect only a smaller number of companies. That said, for companies that still have multiple share classes, it will be of particular importance to reflect this change to the DMT in their internal regulations and to properly instruct the persons subject to reporting obligations (see 2c) below).

- **Terms of conditions of unlisted financial instruments**: In terms of content of management transaction reports, the amended DMT now explicitly requires that the principal terms and conditions of unlisted conversion rights, option rights and similar financial instruments will have to be disclosed. As a point of reference, the reportable terms and conditions are similar to what already today has to be reported in the context of the disclosure of significant shareholdings. However, if a conversion right, option right or similar financial instrument has an ISIN assigned to it, it is sufficient to include such ISIN in the management transaction report. The purpose of this rule is to ensure transparency as regards the mechanism of the relevant financial instruments.

– **Obligation to correct reports**: The amended DMT now provides for an obligation to file corrected reports. Accordingly, if a company discovers that a previously submitted report on the electronic reporting platform contains errors, the company must submit a corrected report immediately. The SIX reporting platform will flag a corrected report as such.

  In terms of implementation of the amended DMT, a company will have to make sure that its internal procedures and organization are designed in a way to be able to react quickly and make the necessary corrective filings in due course. Given the requirement of an "immediate filing" of the corrected report, having sufficient company-internal resources is thus becoming even more important (see also 2d) below).

In addition to the above changes, the amended set of rules also clarifies certain other aspects of the reporting obligation, such as calculation of transaction value or timing of reporting obligations in the context of takeover offers.

b) Transactions with related parties

The amendments to the listing rules and the DMT put a particular focus on transactions between persons subject to reporting obligations and their respective related parties. The goal is to further increase transparency as to these types of transactions and to provide market participants with additional context when reading management transaction reports.

– **Transactions with related parties**: Under the amended rules, transactions between members of the board of directors or the executive committee, respectively, and related parties (e.g. spouses, children, controlled legal entities) are now explicitly subject to a disclosure obligation. While one may question if this is in fact a new obligation, as part of the amendments to the listing rules and the DMT, SIX also introduced a requirement to include in the management transaction report a description of the related-party nature of the relevant transaction.

  It is worth noting that transactions with a related party may in a number of instances still be subject to exemptions from the reporting obligations. In particular see the various exemptions in art. 5(3) DMT, of which some (e.g. gift or inheritance) may well apply in the context of transactions with related parties.

– **Follow-on transactions by related parties**: Where a transfer of reportable securities to a related party was originally exempt from the reporting obligations (e.g. in case of gift or inheritance), any further transfer of these securities from such related person to a third party will have to be disclosed under the new rules. Such disclosure will be required irrespective of whether the follow-on transaction affects the assets or was made under the significant influence of a person subject to reporting obligations.

From a practical point of view, two points are worth highlighting in connection with follow-on transactions: First, the reporting for the follow-on transaction will have to be made by the person originally subject to reporting obligations (i.e. the member of the board of directors or executive committee) and not by the related party. Moreover, there is no time limit for reporting of follow-on transactions. The obligation remains in place as long as the person subject to reporting obligations remains a member of the board of directors or executive committee of the listed company. Issuers will have to consider how to ensure compliance with the follow-on reporting obligation, e.g. by requiring that all exempted transactions are nonetheless reported in the first place.

2) Implementation and other practical considerations

a) Introduction

In parallel to the amendments to the DMT, SIX Exchange Regulation (SER) has also revised and updated its guidelines on management transactions (Guideline DMT). The updated Guideline DMT provides further guidance on practical aspects of the reporting obligations, the content of the management transaction reports, implementation of the obligations within a company's organization, as well as the enforcement practice of SIX's sanction bodies.

On the face of it, the revision of the rules on the reporting of management transactions concerns substantive matters rather than procedural aspects. However, given the extended scope of applicability with respect to transactions between persons subject to the reporting obligation and their related parties and, under certain circumstances (see 1b) above), by related parties without any active participation by persons subject to the reporting obligations, it is becoming all the more important for issuers to ensure that members of their board of directors and executive committees are aware of their obligations. Further, the Guideline DMT also expands on topics regarding organizational matters. Against this background, we expect that SER will increasingly focus on whether issuers were properly organized when investigating potential violations. Combined with the expanded scope of the reporting duty in an area where there is already a high inherent risk of inadvertent violations it seems probable that sanctions by SER for breach of these provisions will become more numerous.

b) Internal regulations

The Guideline DMT continues to explicitly recommend that issuers put in place internal regulations or directives to implement art. 56 of the SIX Listing Rules. It is equally important to ensure that such regulations and directives remain up-to-date at all times as SER would likely look unfavorably upon any issuer whose internal documentation turns out to be outdated in case of an investigation for breach of the reporting duty. In particular, issuers who have not yet made the necessary amendments to their internal regulations and directives to reflect the recent changes are well-advised to do so at their earliest convenience and roll out the revised documentation (including any updates to company-internal reporting forms and processes) to the relevant individuals.

c) Instruction of persons subject to the reporting obligation

Issuers are required to provide for appropriate and effective instruction and training of the members of their board of directors and executive committee. As before, the mere distribution of the relevant internal regulations is insufficient and an issuer would not be deemed to have appropriately instructed the relevant individuals. The written documentation therefore has to be complemented by verbal instruction and training. It seems advisable that issuers arrange for a more comprehensive training at the occasion of the entry into force of the new provisions (to the extent they have not already done so) with a specific focus on the changes. This can be done at a regular meeting of the board of directors or the executive committee, respectively, or by way of a separate training session. For evidentiary purposes it is recommended that the instruction and training is minuted or otherwise documented.

Members must be regularly reminded of their duties. While the Guideline DMT does not specify the intervals, we believe an annual reminder is sufficient. This, too, should be properly documented. With respect to any new members it is advisable not to wait until the next regular reminder session but to instruct them (and provide the relevant documentation) latest at the time when they assume their function as a member of the board of directors or executive committee, respectively, to minimize the risk of any violation.

d) Internal organization

The revised Guideline DMT puts an even stronger emphasis on the issuer's obligation to set up and maintain an appropriate internal reporting system, with clearly defined responsibilities. It is therefore advisable to set out such responsibilities in writing in the relevant internal regulations. In particular, there should be no doubt to whom management transactions have to be reported and who to liaise with in case of questions. In case there are any changes to the individuals responsible to receive notifications of management transaction, the relevant documentation should be immediately updated. It may be worthwhile setting up a centralized address or distribution list (e.g. management-transactions@companyname.com) so as not having to amend the documentation each time there is a change among the individuals internally responsible for processing management transaction reports. The Guideline DMT now also explicitly mentions what has already been ruled by the Sanction Commission in 2013 – that a single person is not deemed a sufficient internal organization.

Daniel Raun (daniel.raun@advestra.ch)
Patrick Schärli (patrick.schaerli@lenzstaehelin.com)

USD 1 bn Additional Tier 1 (AT1) Notes with Equity Conversion Feature Issued by UBS Group AG

Reference: CapLaw-2024-05

On 12 February 2024, UBS Group AG successfully completed its offering of USD 1 bn AT1 Notes. The Notes are eligible to fulfill UBS Group AG's Swiss going concern requirements. While the Notes are initially subject to write-down upon occurrence of a "Trigger Event" or a "Viability Event", the terms of the Notes provide that, following approval of a minimum amount of conversion capital by UBS Group AG's shareholders, upon occurrence of such an event, the Notes will be converted into ordinary shares of UBS Group AG rather than be subject to write-down. The Notes are governed by Swiss law and have been provisionally admitted to trading on the SIX Swiss Exchange.

Kinarus Therapeutics Holding AG in Liquidation reverse takeover (RTO) transaction with Curatis AG

Reference: CapLaw-2024-06

On 29 January 2024, Kinarus Therapeutics Holding AG in liquidation (Kinarus) announced that it has entered into a transaction agreement (Transaction Agreement) with Curatis AG (Curatis) regarding a contemplated combination transaction. Curatis is a privately owned specialty pharmaceutical company focusing predominantly on orphan/ultra-orphan diseases and specialty care diseases. Under the terms of the Transaction Agreement, shareholders of Curatis shall exchange each outstanding Curatis share into one newly issued Kinarus share, whereby the consideration consists of approx. 14x the number of outstanding Kinarus shares. It is planned that Kinarus will be renamed to Curatis Holding AG. The transaction is expected to close in Q2 2024. Closing is subject to certain closing conditions, inter alia, confirmation of withdrawal of bankruptcy for Kinarus by the courts of Basel-Stadt, approval of all proposed resolutions by the extraordinary general meeting of Kinarus and approval of the listing of the new shares by SIX Swiss Exchange.

Sale of Operations by Evolva Holding to Lallemand

Reference: CapLaw-2024-07

Following the approval by its shareholders on 28 December 2023, Swiss listed biotech group Evolva sold its operating subsidiary Evolva AG to Danstar Ferment AG, a Swiss affiliate of Lallemand Inc. Evolva Holding SA will seek a delisting of its shares from SIX Swiss Exchange and will commence a dissolution and liquidation of the company.

CHF 600 million Inaugural Bonds Issuance by Barry Callebaut

Reference: CapLaw-2024-08

Barry Callebaut issued CHF 600 million of bonds in two tranches of CHF 225 million with a coupon of 1.95% due in 2028 and CHF 375 million with a coupon of 2.3% maturing in 2032.

CHF 600 million Green Bonds Issued by Volkswagen Financial Services N.V.

Reference: CapLaw-2024-09

Volkswagen Financial Services N.V. (VW) issued two green bonds (CHF 300 million 2.2075% due 2027 and CHF 300 million 2.4925% due 2030) under the lead management of BNP Paribas (Suisse) SA, Commerzbank and Deutsche Bank. This issuance is said to be the largest CHF bond issuance by a foreign corporate issuer since 2021. The net proceeds are to be used to finance and/or refinance eligible "green projects" in connection with vehicles with zero exhaust emissions within the meaning of the "Green Finance Framework" (GFF) of the Volkswagen Financial Services AG Group dated August 2023.

EUR 1.25 bn Callable Senior Notes Issuance under Senior Debt Programme by UBS Group AG

Reference: CapLaw-2024-10

On 8 and 9 January 2024, respectively, UBS Group AG successfully completed its issuance of USD 1.75 bn in aggregate principal amount of Fixed Rate/Fixed Rate

Callable Senior Notes due February 2030 and USD 2.25 bn in aggregate principal amount of Fixed Rate/Fixed Rate Callable Senior Notes due February 2035 as well as EUR 1.25 bn in aggregate principal amount of 4.125 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due June 2033 under its Senior Debt Programme. The Notes are bail-inable (TLAC) bonds that are eligible to count towards UBS Group AG's Swiss gone concern requirement. The Notes are governed by Swiss law and have been provisionally admitted to trading on the SIX Swiss Exchange.

Share Offering by AC Immune

Reference: CapLaw-2024-11

AC Immune SA (Nasdaq: ACIU) completed an underwritten offering of 14.3 million of its common shares at a price of USD 3.50 per share. The gross proceeds from the offering, before deducting the underwriting discounts and commissions and other offering expenses, amounted to approximately USD 50.1 million.

EUR 1.5 bn Bonds Issuance by Roche

Reference: CapLaw-2024-12

On 4 December 2023, Roche Finance Europe B.V. issued EUR 1.5 bn Bonds guaranteed by Roche Holding Ltd. The transaction consists of a EUR 600 m tranche due December 2027 and a EUR 900 m tranche due December 2036. The bonds will be listed on the SIX Swiss Exchange and have been admitted to trading on the Open Market of the Frankfurt Stock Exchange.

GDR Offering and Listing on SIX Swiss Exchange by Shenzhen Senior Technology Material Co., Ltd

Reference: CapLaw-2024-13

Shenzhen Senior Technology Material, whose A Shares are listed on Shenzhen Stock Exchange, sold 12,684,800 GDRs representing five A-Shares each at an offer price of USD 9.46, raising gross proceeds of approximately USD 120.0 million from the offering. Trading in the GDRs on SIX Swiss Exchange commenced on 18 December 2023.

Acquisition of R&S Group by VT5 and Listing on SIX Swiss Exchange

Reference: CapLaw-2024-14

On 13 December 2023, the Swiss SPAC VT5 Acquisition Company AG completed its De-SPAC transaction. On that date, it closed the acquisition of R&S Group, completed an offering of new and redeemed shares, and had its first day of trading on SIX Swiss Exchange as the newly renamed company R&S Group Holding AG.

3rd Conference on Control Systems (3. Tagung zu Kontrollsystemen)

Thursday, 14 March 2024, Paulus Akademie, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Kontrollsystemen2024.aspx

21st Zurich Stock Corporation Law Conference (21. Zürcher Aktienrechtstagung)

Thursday, 21 March 2024, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Aktienrecht2024.aspx

21st Zurich Conference on Developments in Financial Market Law (21. Zürcher Tagung zu Entwicklungen im Finanzmarktrecht)

Tuesday, 21 May 2024, Lake Side, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Finanzmarktrecht2024.aspx

St. Gall Conference on Corporate Law (St. Galler Gesellschaftsrechtstagung 2024)

Tuesday, 4 June 2024, SIX Convention Point, Zurich

https://irphsg.ch/weiterbildung/tagungen/aktuelle-veranstaltungen/gesellschaftsrechtstagung/