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Position Paper on Legends and Selling Restrictions for Cross-Border Offerings of Securities (excluding Collective Investment Schemes and Structured Products) into Switzerland under the Prospectus Regime of the Swiss Financial Services Act

Reference: CapLaw-2020-13

1) Introduction – Overview of New Swiss Prospectus Regime

On January 1, 2020, the new Financial Services Act (**FinSA**) and its implementing ordinance, the Financial Services Ordinance (the **FinSO**), which govern the prerequisites for providing financial services and offering financial instruments in Switzerland, entered into force. As part of this new legal framework, the FinSA introduces for the first time in Switzerland a comprehensive prospectus regime for the public offering of securities. This new prospectus regime establishes, among other things, uniform rules on what constitutes a public offering, when a prospectus will be required, the exemptions to the requirement to prepare a prospectus and have it approved, and the requirements as to form and publication of prospectuses.

Also a first for the Swiss capital market, the FinSA establishes certain supervisory and administrative roles as part of the prospectus regime, which will be carried out by one or more new Swiss bodies (the **Review Bodies**) licensed by the Swiss Financial Market Supervisory Authority FINMA. As a result, although the FinSA and the FinSO have entered into force, a grace period for compliance with the prospectus regime is currently in effect that will expire the later of (i) six months from the date on which the first Review Body receives its license and (ii) October 1, 2020.

The FinSA prohibits the public offering[1], or application for admission to trading on a trading venue in Switzerland, of shares, bonds, structured products and other financial instruments (as defined therein) in the form of securities, unless:

– a prospectus has been prepared, approved by a Review Body and published in accordance with the requirements of the FinSA prior to commencement of such offering or admission to trading; or

– a prospectus has been (i) prepared in accordance with the laws of a non-Swiss jurisdiction (such prospectus, a **Foreign Prospectus**), (ii) previously approved by a non-Swiss authority that is recognized for such purposes under the FinSA (any such authority, a **Recognized Foreign Authority**), (iii) filed with a Review Body for automatic acceptance in accordance with article 54(2) of the FinSA, and (iv)

1 An "offering" is an invitation to purchase a financial instrument that includes the essential information relating to the security in question and its terms and conditions (article 3(g) FinSA). The offering is "public" if it is directed at an audience that is not limited (article 3(7) FinSO).

published in accordance with the rules of the FinSA prior to commencement of such offering or admission to trading; or

- the securities being offered or admitted to trading are bonds or structured products that meet certain requirements, and a Swiss bank or a Swiss securities house has confirmed before the commencement of the public offering or application for admission to trading that all "relevant information" is available in relation to the issuer (and, if applicable, the guarantor) and the securities. In such case, the final prospectus must be prepared and filed with a Review Body for approval during the two-month period after the commencement of the public offering or application for admission to trading (with shorter periods applying to securities with a term of 180 days or less);[2] or

- there is an available exemption from the requirement to prepare a prospectus and have it approved.

In addition, in the case of offerings of securities that constitute debt instruments with a "derivative character" (as such expression is understood under the FinSA and the FinSO[3]) that will be made to private clients in Switzerland, a so-called key information document (a **Swiss KID**) must be prepared by the manufacturer (usually the issuer) of the security. For any such debt instruments that do not constitute structured products, compliance with this requirement is subject to a grace period that will expire on December 31, 2021. If a Swiss KID is required, a key information document (**KID**) that has been prepared in accordance with Regulation (EU) No 1286/2014 of the European Parliament and of the Council of November 26, 2014 on key information documents for packaged retail and insurance-based investment products (**PRIIPs**) may be used instead.

In light of the foregoing, as described in more detail under Checklists 1, 2 and 3 in Section II. below, three basic questions should be answered by non-Swiss issuers and their advisers if they plan to extend an offering of securities cross-border into Switzerland in order to determine what, if any, Swiss legends and selling restrictions must or should be included in the offering documents. This paper discusses only the circumstances under which Swiss legends and selling restrictions must or should be included in offering documents, but does not describe the new prospectus regime itself in further detail. In addition, this paper does not address the requirements in relation

2 This *ex post* approval process is an alternative to the requirement to have a pre-approved prospectus (*i.e.*, either a FinSA-compliant prospectus approved by a Review Body or a Foreign Prospectus approved by a Recognized Foreign Authority as described in the two bullet points above).

3 Debt instruments with a "derivative character" are debt instruments with a redemption profile that is structured like a derivative (*i.e.*, the redemption amount is dependent upon the performance of one or more underlyings). The FinSO includes a non-exhaustive list of debt instruments that do not have a derivative character; namely, bonds that are convertible into equity securities issued by the same issuer or any of its group companies, bonds with interest rates linked to reference rates, bonds with inflation protection, bonds with early redemption or call rights and zero coupon bonds.

to the cross-border offering of financial instruments that qualify as collective investment schemes or structured products, each as defined under Swiss law, and references below to securities and debt instruments should be construed accordingly.

Important note

The following checklists and legends assume a cross-border offering into Switzerland whereby the offered securities will not be admitted to trading on any trading venue (exchange or multilateral trading facility) in Switzerland. Any application for such an admission to trading would in and of itself trigger prospectus requirements under the FinSA, and the exemptions from such requirements are not identical to those that are available for public offerings in Switzerland.

2) Checklists for determining Prospectus Requirements under the FinSA and Applicable Legends and Selling Restrictions

Checklist 1: Is a prospectus required under the FinSA for the particular offering?

Under the new prospectus regime, the following questions need to be answered in order to determine whether a cross-border offering into Switzerland is considered public and, consequently, whether a prospectus must be prepared, approved by a Review Body, and published in accordance with the requirements of the FinSA (subject to the questions under Checklist 2 below):

1. Is the offering addressed to the public in Switzerland?

   a) If **no**: the offering qualifies as a private placement in Switzerland and no prospectus is required to be prepared under the FinSA.

   b) If **yes**: do any of the specific exemptions mentioned in articles 36 and 37 of the FinSA (herein referred to as *per se* exemptions[4]) apply? We expect the following *per se* exemptions to be particularly relevant: (x) the securities being offered have a minimum denomination of CHF 100,000 (or its equivalent in another currency) or higher, or (y) the offering in Switzerland is limited to professional clients (as defined in the FinSA) only.

4 The FinSA contemplates *per se* exemptions in addition to those described in sub-clauses (x) and (y). For example, the *per se* exemption for the offering of securities to less than 500 retail clients in Switzerland. However, the conditions for ensuring compliance with such other *per se* exemptions are oftentimes difficult to manage/control and, therefore, reliance on any such exemption may be less practicable.

i. If **no**: a prospectus is required to be prepared and approved by a Review Body under the FinSA.

ii. If **yes**: no prospectus is required to be prepared under the FinSA.

Checklist 2: What kind of prospectus may be used under the FinSA?

If a prospectus is required under the FinSA for the particular offering, then the following questions should be answered to determine what kind of prospectus must (or may) be used for purposes of satisfying such requirement:

1. Does the issuer have a Foreign Prospectus that either (x) can be filed with a Review Body for approval because it meets IOSCO standards and contains information equivalent to the information required under the FinSA, or (y) has been approved by a Recognized Foreign Authority and can be filed with a Review Body for automatic acceptance in accordance with article 54(2) of the FinSA?

   a) If **no**: a FinSA-compliant prospectus must be prepared and approved by a Review Body prior to commencement of the public offering into Switzerland (subject to reliance on the exemption described in sub-clause b. below).

   b) If **yes** (and, in the case of sub-clause (x) of this question 1, assuming approval by a Review Body): such Foreign Prospectus may be used in place of a FinSA-compliant prospectus for purposes of the public offering into Switzerland.

2. In the case of debt instruments: if no prospectus of the type described in question 1 above is available, can the issuer rely (and does the issuer want to rely) on the exemption from the *ex ante* prospectus approval requirement under article 51(2) of the FinSA?

   a) If **no**: a FinSA-compliant prospectus must be prepared and approved by a Review Body prior to commencement of the public offering into Switzerland.

   b) If **yes**: see Section I., third bullet, above.

Checklist 3: Is a Swiss Key Information Document required?

As previously noted (see Section I. above), in certain circumstances, a Swiss KID must be prepared and made available to retail investors (which are referred to under the FinSA as "private clients"). The applicability of such requirement must be assessed independently of whether there is a duty to prepare and publish a prospectus in accordance with the FinSA (see Checklist 1 above). In order to determine whether or not this requirement applies to a particular cross-border offering of securities into Switzerland, the following questions should be answered:

1. Do the securities being offered constitute debt instruments with a "derivative character"?

   a) If **no**: no Swiss KID is required under the FinSA.

   b) If **yes**: go to next question.

2. Is the offering in Switzerland being extended to private clients as defined under the FinSA?

   a) If **no**: no Swiss KID is required under the FinSA.

   b) If **yes**: a Swiss KID is required to be prepared by the manufacturer under the FinSA.

3) Selling Restrictions

Depending on the answers to the questions set out in Section II. above, the following legends | selling restrictions may be considered for inclusion in offering documents.

a) Regarding Prospectus Requirements under the FinSA

Option 1: No Public Offering into Switzerland

If no *per se* exemption from the obligation to publish an approved prospectus under the FinSA applies (see Checklist 1 at 1. b. in Section II. above), then the issuer has the option to structure the offering as a private placement (*i.e.*, an offering that is not directed to the public – see Checklist 1 at 1. a. in Section II above) in Switzerland. In such case, the following legend should be included in the offering materials:

> [This [*document*] is not intended to constitute an offer or solicitation to purchase or invest in the [*securities*].][5] The [*securities*] may not be publicly offered, directly or indirectly, in Switzerland within the meaning of the Swiss Financial Services Act ("FinSA") and no application has or will be made to admit the [*securities*] to trading on any trading venue (exchange or multilateral trading facility) in Switzerland. Neither this [*document*] nor any other offering or marketing material relating to the [*securities*] constitutes a prospectus pursuant to the FinSA, and neither this [*document*] nor any other offering or marketing material relating to the [*securities*] may be publicly distributed or otherwise made publicly available in Switzerland.

5 If this legend is included in an offering document that already includes this general statement elsewhere therein, it may be deleted.

Option 2: *Per Se* Exemption from Swiss Prospectus Requirement

If there is a public offering into Switzerland, but a *per se* exemption from the obligation to prepare a prospectus under FinSA applies (see Checklist 1 at 1. b. in Section II. above), then the following legend should be included in the offering materials:

> The offering of the [*securities*] in Switzerland is exempt from the requirement to prepare and publish a prospectus under the Swiss Financial Services Act ("FinSA") [*because such offering is made to professional clients within the meaning of the FinSA only*] [*because the [securities] have a minimum denomination of CHF 100,000 (or equivalent in another currency) or more*] [*because (add description of other exemption pursuant to articles 36 and 37 FinSA)*][*and the [securities] will not be admitted to trading on any trading venue (exchange or multilateral trading facility) in Switzerland*]*. This [*document*] does not constitute a prospectus pursuant to the FinSA, and no such prospectus has been or will be prepared for or in connection with the offering of the [*securities*].

* Insertion of this language in italics is optional

Option 3: Prospectus Filed with Review Body for Automatic Approval

If the cross-border offering into Switzerland will be public, but the issuer has a Foreign Prospectus available that was approved by a Recognized Foreign Authority and can be (and has been) filed with a Review Body for automatic acceptance in accordance with article 54(2) of the FinSA, then it is recommended that the following legend be included in either the prospectus itself or a wrapper or cover page or e-disclaimer thereto (or such other document that will accompany the prospectus for purposes of distribution in Switzerland):

> [This][The attached] prospectus has been filed as of [*date*] with [*Review Body*] pursuant to article 54(2) of the Swiss Financial Services Act, and may be obtained in electronic or printed form, free of charge, upon request from [*address, phone, fax, e-mail, website*].

Option 4: Public Offering of Debt Instruments in Switzerland in Reliance on Article 51(2) of the FinSA

In the case of certain types of debt instruments, if the issuer has no Foreign Prospectus available that was approved by a Recognized Foreign Authority and can be (and has been) filed with a Review Body for automatic acceptance prior to the public offering, the issuer and lead manager(s) could agree to rely on article 51(2) of the FinSA, in which case the prospectus is only required to be approved by a Review Body subsequent to the commencement of the public offer in Switzerland. In such case, the following legends must be included in the preliminary prospectus or other offering document that forms the basis of the public offer in Switzerland:

The offering document used for the launch must contain a "red herring" language on the cover page as follows:

> ***SUBJECT TO COMPLETION AND AMENDMENT | [Preliminary Prospectus] [■] dated [■]***
>
> *The information contained in this [document | Preliminary Prospectus] is not complete and is subject to completion and amendment.* ***This [document | Preliminary Prospectus] has not been reviewed or approved by a Swiss review body pursuant to article 52 of the Swiss Financial Services Act.*** *This [document | Preliminary Prospectus] does not, and is not intended to, constitute or contain an offer or invitation to sell, and it is not soliciting offers to buy, [Bonds | Notes] in any jurisdiction where such offer or sale is not permitted.*

The offering document used for the launch must also contain an additional legend as follows:

> **The [*Issuer* | *offeror*] is relying on an exemption pursuant to article 51(2) of the Swiss Financial Services Act (the "FinSA"). Accordingly, in accordance with article 40(5) of the FinSA, potential investors in the [*Bonds* | *Notes*] are hereby notified that this [*document* | *Preliminary Prospectus*] has not yet been reviewed or approved by a Swiss review body pursuant to article 52 of the FinSA. The [*Bonds* | *Notes*], if issued, will be issued on the basis of [the final prospectus relating to the [*Bonds* | *Notes*] (the "Final Prospectus")][this [*document* | *Preliminary Prospectus*], together with the [*pricing supplement*] (together, the "Final Prospectus")], which will only be submitted to a Swiss review body pursuant to article 52 of the FinSA for review after completion of the offering of the *[Bonds* | *Notes].*** Potential investors should be aware that the [*Terms of the Bonds* | *Terms and Conditions of the Notes*] set out in this [*document* | *Preliminary Prospectus*] are incomplete and subject to amendment and completion in the Final Prospectus. Accordingly, the rights of [*Holders*] under the [*Bonds* | *Notes*] will be determined exclusively by the [*Terms of the Bonds* | *Terms and Conditions of the Notes*] set out in the Final Prospectus.

> **This [*document* | *Preliminary Prospectus*] will not be updated for any developments that occur after its date. In particular, this [*document* | *Preliminary Prospectus*] is not required to be updated as per the date of any approval by any Swiss review body pursuant to article 52 of the FinSA.** Consequently, neither the delivery of this [*document* | *Preliminary Prospectus*] nor the offering, sale or delivery of any [*Bonds* | *Notes*] shall in any circumstances imply that the information contained herein concerning the Issuer is correct at any time subsequent to the date hereof or that any other information supplied in connection with the issue of the [*Bonds* | *Notes*] is correct as of any time subsequent the date indicated in the document containing the same.

For the avoidance of doubt, in addition to the legends set out above, any such offering document that forms the basis of the public offer in Switzerland must comply with other requirements as to form and substance as set out in the FinSA and the FinSO.

Option 5: Public Offering in Switzerland during the Grace Period with a Code of Obligations-Compliant Prospectus

In the case of a public offering in Switzerland during the transition period applicable to compliance with the new prospectus regime under the FinSA (see Section I. above), an issuer may elect to (or, if no Review Body has yet been licensed, will be required to) comply with the prospectus disclosure requirements set out under article 652a and, if applicable, article 1156 of the Swiss Code of Obligations (which articles have been repealed and replaced by the FinSA), instead of the prospectus disclosure and Review Body approval requirements under the FinSA. Although no legend is required in this regard, we recommend that the following legend be included in the prospectus:

> In accordance with article 109 of the Swiss Financial Services Ordinance, this [*document* | *Prospectus*] has been prepared in compliance with article[s] 652a [and 1156] of the Swiss Code of Obligations, as such [article was | articles were] in effect immediately prior to the entry into effect of the Swiss Financial Services Act (the "FinSA")[, and the Listing Rules of the SIX Swiss Exchange in their version in force as of January 1, 2020][6]. Consequently, this [*document* | *Prospectus*] has not been and will not be reviewed or approved by a Swiss review body pursuant to article 51 of the FinSA, and does not comply with the disclosure requirements applicable to a prospectus approved by such a review body under the FinSA.

b) Swiss Key Information Document

Irrespective of whether a Swiss KID (or equivalent document, *i.e.*, a PRIIPs KID) must be prepared by the manufacturer and made available to investors (see Checklist 3 in Section II. above), if the securities being offered constitute debt instruments with a

6 In the case of admission to trading | listing on the SIX Swiss Exchange.

"derivative character", an additional legend relating to Swiss KIDs must be included in the offering documentation. We suggest including such legend in the section of the offering document that contains the legends on U.S. securities laws, MiFID II, the PRIIPs Regulation, etc., or, if there is no such section, immediately following the applicable Swiss selling restriction that has been included in the offering document as set out in Section III.A. above.

Add the following legend in the case of an offering of securities that constitute debt instruments with a "derivative character", if the securities may be offered to private clients as defined under the FinSA (which means that a Swiss KID (or equivalent) must be prepared):

> A [*Swiss key information document | PRIIPs KID*] has been prepared in relation to the [*securities*] and may be obtained, free of charge, upon request from [*address, phone, fax, e-mail, website*].

Add the following legend in the case of an offering of securities that constitute debt instruments with a "derivative character", if no Swiss KID (or equivalent document under the FinSA) has been or will be prepared, with the effect that the securities may not be (i) offered to private clients in Switzerland, or (ii) recommended at the point-of-sale to private clients in Switzerland:

> No key information document according to the Swiss Financial Services Act (the "FinSA") or any equivalent document under the FinSA has been prepared in relation to the [*securities*], and, therefore, the [*securities*] may not be offered or recommended to private clients within the meaning of the FinSA in Switzerland.

Credit Suisse
UBS
Zürcher Kantonalbank
Baker McKenzie
Bär & Karrer AG
Homburger AG
Lenz & Staehelin
Niederer Kraft Frey AG
Pestalozzi Rechtsanwälte AG
Schellenberg Wittmer AG
Walder Wyss AG

"What are you, and if so, how many?" - Considerations on Compliance with the new 500-Investor Rule in Practice

Reference: CapLaw-2020-14

Under the newly enacted Financial Services Act (FinSA), a prospectus is not required if a public offer of securities is directed at less than 500 investors. This article considers the new 500-investor rule from a practical perspective and proposes guidelines for potential offerors who wish to rely on it.

By David Weber

The Financial Services Act (FinSA) together with the Financial Services Ordinance (FinSO) completely overhauled the disclosure requirements for capital market transactions in Switzerland. As a rule, any person (whether the issuer or a third party) who makes a public offer of securities (whether newly issued or existing) must first publish a prospectus (art. 35(1) FinSA), which is subject to prior review by an authorized review body (art. 51 FinSA). FinSA and FinSO impose detailed requirements regarding the design, substance and publication of the prospectus (see CapLaw-2019-51). Accordingly, whether a prospectus is required for a particular offer generally has a significant impact on the time to market and the ancillary costs associated with making the offer.

Among the numerous new exemptions from the prospectus requirement is one which is expected to be particularly relevant for the Swiss market: a prospectus is not required if the public offer is directed at less than 500 investors (art. 36(1)(b) FinSA). This article considers what this exemption means from a practical perspective, in particular how offerors can ensure compliance with the 500-investor rule and its potential impact on the process of marketing and launching the offer.

1) Does "500 investors" really mean "500 investors"?

Financial intermediaries must allocate their clients to one of three segments, *i.e.* private clients, professional clients and institutional clients (the latter being a subset of the professional client segment) (art. 4(1) FinSA). The distinction between private and professional clients is also relevant for the prospectus requirement. In particular, public offers directed only at investors who qualify as professional clients (*i.e.* professional investors) do not require a prospectus (art. 36(1)(a) FinSA). This raises the question whether the professional-investor exemption and the 500-investor rule apply cumulatively, *i.e.* whether a public offer may be directed at an unlimited number of professional investors ***and*** up to 499 other investors.

On the face of it, the wording of the FinSA seems clear: a public offer is exempted if it is directed ***only*** at professional investors or if it is directed at less than 500 ***investors***. However, the wording may not reflect the true intention of the legislator.

The new prospectus requirement was modeled on the EU prospectus directive (now replaced by the EU prospectus regulation). Under EU legislation, offers addressed to fewer than 150 persons per member state ***other than qualified investors*** are exempted from the prospectus requirement. Similarly, the Federal Council's draft of the FinSA sought to exempt public offers directed at less than 150 investors who qualify as private clients. The Federal Assembly increased the threshold to 500, but the parliamentary debate does not indicate that any other deviation from the Federal Council's proposal was intended.

Furthermore, the two exemptions are motivated by different rationales. In the case of an offer directed at a limited number of investors, the legislator assumed (whether rightly or wrongly) that the investors have a sufficiently close relationship to the offeror to limit the risk of abusive practices. With respect to professional investors, the assumption was that these types of investors have sufficient economic means to protect themselves. Since the legislator apparently considered either one of these circumstances (closeness of relationship ***or*** economic means) as sufficient to make a statutory disclosure requirement unnecessary, the two exemptions based on the (presumed) existence of such circumstances should be available cumulatively. To be clear, the offeror does not actually need to have a close relationship to any particular investor to be able to rely on the 500-investor rule, only the number of investors is decisive.

That this issue is even open to debate is regrettable, in particular considering that existing EU legislation provided a good model for clear rules. As things stand, the author's view is that professional investors should not count towards the 500-investor threshold. That said, until there is a reliable precedent, offerors might want to consider directing the offer at only 499 investors overall or, where this is not feasible, relying on another exemption.

2) What needs to be restricted to less than 500 investors?

In order for the public offer to not require a prospectus, the ***offer*** must be ***directed at*** less than 500 (non-professional) investors. The prospectus requirements (and certain other rules) under the FinSA are based on the idea that an offer is a type of communication which meets specific criteria. Accordingly, the author suggests that what needs to be restricted to less than 500 (non-professional) investors is any communication which meets such criteria. Consequently, an offeror is not relieved from the prospectus requirement if it makes a general offer, but ultimately only permits less than 500 investors to participate.

An offer is defined as a communication of any nature, which contains sufficient information on the terms of the offer and the financial instrument, and is customarily aimed at calling attention to and disposing of a particular financial instrument (and therefore is, or may in good faith be understood as, an invitation to acquire that particular financial instrument) (art. 3(g) FinSA and art. 3(5) FinSO). In other words, not the number of addressees or the form, but the purpose and the level of detail of the communication are decisive.

The level of detail is the more helpful criteria in differentiating between restricted and unrestricted communications by an offeror. Strictly speaking, a communication only contains sufficient information to qualify as an offer if it specifies the material terms of the offer and therefore is specific enough to be capable of acceptance by the investor (or, in the case of a solicitation of offers, to lead to an offer from the investor which is capable of acceptance by the offeror). In other words, the legislator intended to only restrict communications at the very end of the solicitation process, in the immediate run-up to the acceptance of an offer when evaluations and negotiations are essentially over. Consequently, interactions with investors at the very beginning of the process with the purpose of gauging general market sentiment (such as *pilot fishing*, *pre-sounding*, or *testing-the-waters*) generally do not have to be restricted. As an example, in the author's view no prospectus is required if an offeror conducts a general evaluation of market interest in a novel investment product on a broad investor basis (*i.e.* more than 500 persons), but ultimately offers the securities to less than 500 investors.

In practice, it may be difficult to determine from exactly which point communications must be restricted, in particular since the material terms (namely volume and price) of an offer are often defined in an iterative process of interactions between the offeror and investors (or selected lead investors and/or investment banks) against the background of potentially changing market conditions. Until there is a reliable precedent or clear official guidance, offerors might want to consider restricting communications earlier rather than later in the solicitation process.

Communications from an offeror to investors which are unrelated to a specific immediate transaction (*i.e.* which are not solicitation materials) generally do not have to be restricted, even if they occur during the marketing and solicitation process of an offer. For instance, general advertising with respect to the offeror is normally not specific enough to qualify as an offer. Similarly, general investor and analyst meetings in the ordinary course of business or *non-deal road shows* are not intended as an invitation to acquire specific securities and generally do not have to be restricted either. Nevertheless, offerors should ensure that these interactions with investors are limited to ordinary-course matters (*e.g.* financial results, strategic outlook, *etc.*) and that offer-related matters are reserved for other, restricted forums.

3) Equal provision of material information

In the case of a public offer which complies with the 500-investor rule (or is otherwise not subject to the prospectus requirement), the offeror must treat investors equally when providing them with material information on the public offer (art. 39 FinSA).

The practical implications of this new equal treatment requirement are largely untested. The provision requires the offeror to make any material information on the offer provided to some investors also accessible to all other investors at whom the offer is directed. In the author's view, this not only applies to formal solicitation materials (*e.g.* an information memorandum), but also to due diligence information made available in the context of the offer. As a rule, material information on the offer should be made available to all potential investors at the same time. Where this is not possible (*e.g.* if a particular investor is approached at a later stage of the solicitation process), the information should be made available without delay and in any event sufficiently prior to the end of the deadline for accepting the offer.

With respect to general oral communication with investors (*e.g.* road shows or investor presentations), it should be sufficient if the offeror affords investors equivalent access to participate. Bilateral oral communications with individual investors are typically limited to summarizing or elaborating on existing solicitation materials and should therefore not convey further material information on the offer. Nevertheless, an offeror should consider making its responses to investor queries available to all investors (*e.g.* in a Q&A or similar document) in due course.

4) Proposed guidelines for offerors

While the 500-investor rule is a novelty under Swiss law, the concept of an offer directed at a limited number of investors (private placement) is not. Accordingly, best practices developed for private placements under the old regime continue to be relevant under the FinSA. The author proposes that offerors who wish to rely on the 500-investor rule observe the following general guidelines:

– To ensure that restricted communications are not made to more than 499 (non-professional) investors, offerors should keep a continuously updated record of any investor to whom a restricted communication is made (including when a financial intermediary is acting on behalf of one or several investors). Such records should include whether the investors are classified as private or professional clients.

– To ensure that any material information on the offer provided to any investor is also made accessible to all other investors at whom the offer is directed, offerors should keep a continuously updated record of all restricted communications made (available) to each investor.

– Any written documentation relating to the offer which might be considered a restricted communication should include appropriate selling restrictions and specify that the communication is personal to the recipient only and not to be distributed to any other person.

- Offerors must not make restricted communications (including written documentation relating to the offer) publicly accessible. As a rule, any website through which restricted communications are made available to the investors at whom the offer is directed (*e.g.* a data room) should only be accessible with personal login details and include the same legend (selling restrictions *etc.*) as written documentation relating to the offer.

- Materials relating to the offer must not be labeled as "prospectus pursuant to FinSA" or with any similar labelling.

5) Conclusion

Complying with the 500-investor rule to avoid having to draw up and submit for review a formal prospectus comes with its own challenges and requires some operational efforts. Relying on other general exemptions, *e.g.* by directing the offer only at professional investors (art. 36(1)(a) FinSA), requiring a minimum investment per investor of CHF 100,000 (art. 36(1)(c) and (d) FinSA) or, especially in a crowd-investing context, limiting the volume of the offer to CHF 8 million (art. 36(1)(e) FinSA), may sometimes be the path of least resistance for an offeror. It remains to be hoped for the Swiss market that the 500-investor rule will nevertheless also facilitate the availability of high-profile offers to retail investors.

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Sustainability Considerations in Debt Finance Transactions

Reference: CapLaw-2020-15

The financial sector plays an important role in addressing climate change issues. While it is recognized that climate change can have an impact on financial stability, the financial sector can contribute to a reduction in greenhouse gas emissions. This article provides an overview of the various green / sustainable financing methods and their main characteristics, and summarizes recent developments in financial law and regulation to strengthen credibility of and faith in sustainable financial products.

By Charlotte Rüegg

1) Introduction

In connection with the 2015 Paris Climate Convention, Switzerland has committed to reduce its greenhouse gas emissions by 50 per cent. until 2030 (compared with the greenhouse gas level in 1990).

Due to increased climate awareness following climate strikes (#WeekForClimate) all over the world with more than 6 million participants, governments and companies alike have revised and tightened their climate goals. By way of examples, Amazon committed itself to climate-neutrality by 2040 and Microsoft made a pledge to be carbon negative by 2030. The revised goal defined by the Federal Council is to achieve CO2 neutrality by 2050. This means that from 2050 onwards Switzerland's CO2 emissions shall not be greater than what can be absorbed by way of natural (e.g. conversion of CO2 to O2 by plants) or technical means (e.g. equipment that removes CO2 from the atmosphere).

Pursuant to OECD's estimates, sustainable investments in the amount of USD 7 trillion are required by 2030 in order to achieve these goals. Such amounts can be absorbed by the loan, bond and other securities markets around the world. In addition, it is important that governments and regulators define and implement uniform rules to encourage and support green and sustainable investments and to avoid greenwashing (greenwashing is considered to give a false impression or misleading information about how a company's products / services are more environmentally sound).

2) Green, Social and Sustainable Finance – an Overview

Since 2007, when the European Investment Bank issued the first green bond, a lot has been done to move the needle towards green and sustainable finance. Regulators and governments like the EU Technical Expert Group and industry players like ICMA, LMA or rating agencies have introduced principles and guidelines to provide transparency and promote investments in the green loan / bond market.

The below table provides a high-level overview of the terminology and the major characteristics of the various loan and bond types, as such terms are currently used:

	Loans	**Bonds**
Green	Green loans: use of proceeds dedicated to ***green projects***	Green bonds: use of proceeds dedicated to ***green projects***
Social	-	Social bonds: use of proceeds dedicated to ***social projects***
Sustainable	Sustainability linked loans: credit margin partially linked to ***sustainability performance*** of borrower	Sustainability bonds: use of proceeds dedicated to ***green and social projects***

That said, there are no standard definitions of the terms "Green Finance" and "Sustainable Finance". In the following paragraphs, reference is made to the respective definitions provided by the Loan Market Association (LMA) and the International Capital Markets Association (ICMA).

a) Green, Social or Sustainability Bonds

"Green / social bonds are ***any type of bond*** *instrument where the proceeds will be exclusively applied to* ***finance or re-finance*** *new and/or existing eligible* ***green / social projects*** *and which are aligned with the* ***four core components*** *of the* ***ICMA Green Bond Principles ("GBP") / ICMA Social Bond Principles ("SBP")****."*

As *any type of bond* instrument can serve as a basis for a green / social bond there are no limits in structuring a green / social bond issuance. The GBPs and the SBPs list four types of bonds (i.e. plain vanilla bonds, revenue bonds, project bonds or bonds in connection with a securitization) and point out that depending on market developments additional types of bonds may fulfil the eligibility criteria to serve as basis for a green / social bond issuance.

Further, the proceeds from green / social bond issuances may be used for new ***financing or re-financing*** purposes, provided that the use of proceeds is in line with the principles. Both the GBPs and the SBPs include non-exhaustive lists with green / social project categories such as:

Green Project Categories	Social Project Categories
- climate change mitigation and adaption; - pollution prevention; - sustainable water and wastewater management; - green transportation and buildings, etc.	- food security; - affordable basic infrastructure (e.g. clean drinking water, sanitation, etc.); - access to essential services (e.g. healthcare, education, etc.); - socioeconomic advancement and empowerment, etc.

The ***four core components*** of the GBPs / SBPs are as follows:

- ***use of proceeds*** (i.e., determination of utilization and description of contribution to environmental goals like climate change mitigation / adaption, natural resource / biodiversity conservation, pollution prevention or green buildings / infrastructure);
- ***process for project evaluation and selection*** (i.e., disclosure of process / criteria to determine green / social projects and to identify / manage environmental and social risks associated with the project);
- ***management of proceeds*** (i.e., tracking and ringfencing of proceeds to be used for green / social projects to meet high transparency requirements); and
- ***reporting*** (i.e., annual report contains description of green / social projects and allocation of proceeds whereas material developments have to be reported on an ad hoc basis).

Sustainability bonds are a combination of the above-mentioned green and social bonds. That said, the proceeds of sustainability bonds are exclusively applied to finance or re-finance a combination of both green and social projects, all in compliance with the four core components of both the GBPs and the SBPs.

b) Green Loans

*"Green loans are **any type of loan** instrument made available exclusively to **finance or re-finance new and/or existing** eligible **green projects** and which are aligned with the **four core components** of the **LMA Green Loan Principles ("GLPs")**."*

Pursuant to the LMA definition ***any type of facility*** can meet the eligibility criteria to qualify as green loan, i.e. no matter whether it is a term loan or a revolving credit facility. The latter comes with higher monitoring costs as to the use of proceeds and the identification of the "green" use of proceeds may not be as crystal clear as with respect to a term loan.

The other components of the definition of green loans are the same as with respect to green / social bonds. This is due to the fact that the LMA Green Loan Principles are based on the GBPs and quite similar.

c) Sustainability Linked Loans

*"Sustainability Linked Loans are **any type of loan** instruments and / or contingent facilities (such as bonding lines, guarantee lines or letters of credit) which **incentivize** the borrower's achievement of ambitious, predetermined **sustainability performance** objectives (LMA Sustainability Linked Loan Principles, "**SLLPs**")."*

Same as the GBPs and the GLPs, the SLLPs have ***four core components***:

- ***link to borrower's overall corporate social responsibility strategy*** (i.e., clear communication by borrower to lenders of sustainability objectives and how these align with sustainability performance targets);
- ***target setting – measuring the sustainability of the borrower*** (i.e., negotiation between borrower and lenders of appropriate sustainability performance targets with a view to incentivize improvements in borrower's sustainability profile over the term of the loan);
- ***reporting*** (i.e., provision of information relating to borrower's sustainability performance and indicators to lenders on a regular basis); and
- ***review*** (i.e., need for external review (e.g. by an auditor, environmental consultant, ratings agency) to be negotiated and agreed between borrower and lenders (for

publicly traded companies reliance on borrower's public disclosures may be sufficient for lenders to verify borrower's performance against the sustainability performance targets)).

The key difference between sustainable loans and green loans is that the proceeds borrowed under a sustainable loan are not tied to a green project, rather the proceeds may be used for general corporate purposes, refinancing of existing financial indebtedness, acquisitions, etc. That said, the sustainability factor is not linked to the use of proceeds but to the sustainable performance of the borrower and there is a financial incentive if the borrower improves on the relevant sustainability criteria. Therefore, the sustainability linked loan market is open to all sizes of corporates, in particular, also small and medium sized companies which cannot come up with a project which requires ESG (environmental, social and governance) funding.

By way of illustration, the sustainability link can be described by the "carrot and stick" model, where the borrower receives a discount if it meets the defined performance targets (carrot) and needs to pay a premium if it fails to meet the required targets (stick). Therefore, it is required that the borrower and the lenders agree on the mechanics of the sustainability linked loan documentation. There are various options how a sustainability linked loan can be structured, e.g. by way of the following mechanics:

– ***margin ratchets***: margin in- or decreases depending on whether the borrower meets predefined ESG goals (e.g. 50% reduction in printing operations / greenhouse gas emissions / air travels etc. over 5 years);

– ***ratings linked*** financing costs: margin linked to company's sustainability rating provided by sustainability rating agency; or

– ***KPIs linked*** benchmark: margin linked to defined KPIs published by the borrower.

A failure by a borrower to meet its sustainability goals does not trigger any prepayment events or events of default. Rather, it results in an increase of the financing costs.

d) Collateralized Loan Obligations

Sustainability linked loans have, in addition to the flexible use of proceeds, another beneficial feature in that they serve as ideal collateral for sustainable securitizations. Such instruments are essential to provide investment opportunities to a vast range of investors and to connect institutional investors' capital in the bond market with sustainable investments on the loan market level.

This is where monitoring, reporting and disclosure obligations become even more important so that investors have comfort that the underlying assets meet and continue to meet minimum ESG requirements.

3) Legal and Regulatory Developments and Achievements

"To bring climate risks and resilience into the heart of financial decision-making, climate disclosure must become comprehensive, climate risk must be transformed, and investing for a two-degree world must go mainstream" Mark Carney, Governor of the Bank of England (2013-2020), during speech given at the Task Force on Climate-related Financial Disclosure Summit on October 8, 2019 in Tokyo.

Sustainability-related disclosure requirements are necessary and a standardized taxonomy is key to encourage sustainable investments – whether effected by way of legislative acts and regulatory requirements or by way of rules or guidelines of self-regulatory organizations.

a) Switzerland

While the Swiss legislator is discussing a revision of the Reduction of CO2 Emissions Act ("**CO2 Act**") to, inter alia, implement the greenhouse gas reduction commitments under the Paris Convention into Swiss legislation, it is not currently envisaged to integrate any sustainability-related disclosures in the financial sector and regulations for climate compatible investments into the CO2 Act. If and when any such provisions are implemented into Swiss legislation, they would likely be integrated into the special financial market laws acts, such as the Financial Markets Infrastructure Act or the Banking Act.

Under current Swiss financial market laws, there is no explicit obligation for financial institutions to consider climate risks and impacts in their decision making. There are also no specific sustainability linked disclosure requirements nor is there a specific obligation to consider ESG factors. From a Swiss regulatory perspective, financial institutions should (at least indirectly) take into account climate risks, especially when it comes to risk management considerations. Although, climate risks do in general not constitute a risk category itself, they can crystallize under certain other risk categories. Also, financial institutions need to consider climate risks within their duties of care and loyalty in connection with the risk assessment and education of their clients.

In addition to financial markets laws and regulations, self-regulation plays an important role in the Swiss financial framework. Absent any explicit legal basis for sustainability and climate risk related considerations, self-regulatory organizations (such as the Swiss Sustainable Finance Organization ("**SSF**")) are important to – in a first step – set standards and provide guidance. SSF's studies aim at promoting sustainable investments and to strengthen Switzerland's position in the global financial markets for sustainable finance. Sustainable Finance is also a strategic priority matter of the Swiss Bankers Association ("**SBA**"). Pursuant to the SBA, Switzerland has the potential to become a leading financial center for sustainable finance if, among others, institutional investors are encouraged to take ESG factors into account in their investment strategy and by way of promoting investments in sustainable financial products (e.g. through tax incentives and elimination of tax burdens).

b) European Union

In March 2020, the final EU Taxonomy Technical Report was published setting standards for a uniform classification and designation framework for sustainable financial products and for sustainability linked disclosures which could tackle lack of benchmark consensus and offers market participants with coherent definitions. Further, the EU Action Plan (March 2018) has, among others, explicitly required (i) to clarify institutional investors' and asset managers' duties on sustainability and to increase transparency on their strategy and climate-related exposures and (ii) to strengthen sustainability disclosure. This has been achieved and implemented with the Disclosure Regulation (EU/2019/2088) which entered into effect in November 2019. This regulation implements harmonised rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products.

Also, in connection with the revision of the Capital Adequacy Directive and Regulation (CRD V and CRR II), it is being discussed whether green / brown factors should be considered in connection with the risk weighting of regulatory capital. In addition, it is contemplated that systemically important financial institutions are explicitly required to disclose ESG-related risks. Further, the European Banking Authority has been mandated to investigate whether ESG factors should form part of the regulatory supervision.

4) Concluding thoughts

Climate change triggers, among other things, very significant costs and there does not seem to be any doubt that sustainable investments in the trillions are required to address climate change effectively. Various ESG financing methods provide investment opportunities to a broad range of potential participants and investors and thereby increase investments made / funds raised through sustainable finance. While investments in sustainable financial products or green bond issuances / sustainable borrowings were in the past mainly driven by philanthropic or reputational reasons, recent developments show a trend that these instruments and transactions become more and more important and there is also a clear trend towards ESG disclosure and sustainability considerations becoming part of the legal and regulatory framework.

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Signing Documents in Times of Covid-19

Reference: CapLaw-2020-16

A modern interpretation of the writing requirements under the Swiss Code of Obligations

By Christiana Fountoulakis

1) Home office and signatures drawn on the iPad

The pandemic caused by the coronavirus imposes social distancing at all levels, including in the world of business. Telecommunication has become more important than ever: video and telephone conferences, e-mail and messenger services like Slack or WhatsApp are the indispensable means the business world relies on.

Legal services are continuing, despite the standstill of court and debt collection periods. As the case may be, they become even more numerous in view of the crisis: to current offers, contracts, or briefs in arbitration proceedings one might further add terminations, deferrals, granting of loans, assignments, etc.

Some of these transactions are subject to form requirements and must be signed by the parties who undertake to be bound. Article 14(1) of the Code of Obligations states in this regard that "[t]he signature must be appended by hand". The idea, originally at least, underlying that rule is that the contract is drawn up on a physical medium and that the parties "put pen to paper", as the expression goes, so as to ensure a certain solemnity.

Where the form-bound act is a contract, the procedure presupposes either the signing of one single document in presence of both parties' representatives or, in case of consecutive signing, the printing and dispatching of multiple documents, until all parties possess a signed copy of the contract. It is a somewhat cumbersome, time-consuming and, as the case may be, costly procedure, not only in times of the Coronavirus.

For a while now, technology has found ways to avoid such lengthy back-and-forth sending of paper documents. Virtually every type of computer hardware allows for the installing of (pretty basic) software that offers the possibility of applying digitally a "handwritten" signature to electronic documents. The advantage of these signature methods is that they are extremely easy to use and can be done from almost anywhere, provided that a smartphone or computer is available. In times of home office, many a lawyer has switched to iPads with handwritten signature on the iPad-Pro, for example, using the existing .pdf version of contracts with the "iAnnotate" programme and the "flatten" function to ensure durability. Another option is to use one's signature, previously affixed on a piece of paper that has then been scanned and saved as a text or images document, by copying it on the document requiring the signature.

I will refer to the methods just described as "digital" or "digitally applied" signatures, for in Swiss law the term "electronic signature" is reserved to asymmetric cryptography as defined in the Federal Act of 18 March 2016 on Electronic Signature (FAES (*Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur und anderer Anwendungen digitaler Zertifikate, ZertES*)). Whereas the "electronic signature" is considered as functionally equivalent to a handwritten signature (see at 2) below), the situation is less clear as regards the methods of "digitally applied" signatures (see at 3) below). I argue in the following that these digital signatures too should be deemed to fulfil the requirement of a written and signed communication to the extent they are applied on a change-resistant electronic document.

2) The authenticated electronic signature

a) Mode of operation

Article 14(2bis) of the Code of Obligations states that the equivalent to a handwritten signature is the so-called authenticated electronic signature, provided it fulfils the requirements of the FAES. The electronic signature is based on a system of private keys (ensuring the signature) and public keys (intended to "verify" this signature) to guarantee the identity of the person who signs. To be valid, the electronic signature must be based on a certificate "from a recognized certification service provider" and, since 2017, needs to be "authenticated" in the sense that it is time-stamped, which makes it possible to establish the moment of creation of the signature and to fight against computer attacks and fraud.

According to the Swiss legislator, all transactions for which the law requires the written form may be concluded electronically if they bear such an authenticated electronic signature. There are a few exceptions to this principle, for example in relation to bills of exchange and cheques, where replacement of the handwritten signature by other means is excluded.

b) Measures taken by the Federal Council in view of the covid-19 crisis

In times of government-imposed home office, and as the qualified electronic signature is meant to be the "digital equivalent" of the handwritten signature, the Federal Council has reacted quickly in order to facilitate the conclusion of form-bound contracts by way of the Internet. The Federal Council has thus temporarily modified the Regulation on electronic signatures (*Verordnung über Zertifizierungsdienste im Bereich der elektronischen Signatur und anderer Anwendungen digitaler Zertifikate*): So far, a person intending to use an "authenticated electronic signature" had to personally present him- or herself at the authority providing the cryptographic keys. In Coronavirus times, identification "may be established in real time by means of audio-visual communication" (article 7a of the Regulation). This possibility, hitherto restricted to the financial sector, will exist for six months counting from the 1 April 2020, unless the social distancing measures taken because of the pandemic are lifted earlier.

c) Weaknesses of the authenticated electronic signature

Whether the action taken by the Federal Council is prone to enhance the notoriously low popularity of the electronic signature in Swiss law must be doubted.

First of all, the scope of application of cryptographic signatures remains limited in terms of private law because corporate entities and foundations cannot use them: although the new version of the FAES has introduced a so-called electronic stamp for legal persons and authorities, intended to allow their identification in electronic communications (cf. article 2(d), article 8(1) FAES), article 14(2^{bis}) of the Code of Obligations) does not recognise this stamp as an equivalent to the handwritten signature.

Second, the current electronic signature overshoots the target of protection that the legislator wishes to guarantee by requiring, for certain transactions, a handwritten signature. The purpose of such handwritten signature generally is to provide for legal certainty, to ensure the identity of the person making the commitment, and/or to prevent that person from acting hastily. Of course, the electronic signature guarantees all this, and to a much larger extent than the handwritten signature. Its current authentication process is arguably much safer than the handwriting requirement. But does this not show that the current electronic signature system cannot really be called the "equivalent" of a handwritten signature? The law provides the hand signed document as *the least rigorous form requirement*; transactions that are considered particularly risky or important, such as the foundation of a company, are subject to the notably stricter form of notarisation (public authentication). By requiring – to the extent it does – a mere handwritten signature, the law thus presumably does take into account that the protection the signature offers in terms of authenticity *is not infallible*.

Third, and this is arguably the most important point, the electronic signature is quite impractical for international business transactions. First of all, and as previously mentioned, the electronic signature is based on a so-called authenticated certificate, which the applicant must obtain from an accredited provider by means of an identification procedure. That certificate is personal and can only be used by the applicant. Consequently, in a company, all employees with signing authority must acquire such an authenticated certificate; there is no possibility of obtaining one single certificate that could be stored on a server and made available to all the employees concerned. Furthermore, the electronic signature only allows for one's own signing. The contractual partner who is also to sign must possess his own electronic signature. However, one major problem is that the requirements for an electronic signature are not standardized worldwide. The Swiss FAES only regulates the Swiss electronic signature. It is an "island solution". If one wants a business partner domiciled abroad to provide an electronic signature valid under Swiss law, one must ask him to apply for one in Switzerland. In fact, foreign electronic signatures are not automatically recognised, for this would require the existence of international agreements none of which currently exist. It is obvious that the identification of the foreign business partner by the Swiss accredited authorities (which are all Swiss companies at present) can be difficult: even if the foreign business partner does not have to appear in person during the times of the Coronavirus, he must still communicate with the Swiss certificate provider by video and the latter must control the authenticity of his passport, which is not easy with foreign identity documents. The electronic signature of Swiss law is therefore currently a means that hardly meets the needs of international legal business.

3) Digitally signed change-resistant documents

a) Hand-written signature – a flexible regime

The Swiss rules requiring the handwritten signature on the original document have *never been very rigorous* and have moreover been *considerably relaxed* in the course of the last decades. In earlier times already, it was held that, where business practice permits, the representative is authorised to sign using the signature of the principal. More recently, it has virtually unanimously been admitted that a telefax of the original document bearing the author's signature in writing fulfils the requirements of article 13 of the Code of Obligations, arguing that practical considerations and trade usages render such increased flexibility of the law necessary. In a similar vein, most authors consider the transmission of a scanned document bearing the party's signature as sufficient.

b) "Online" signatures

Text processing programmes have long since gone one step further. Software nowadays offers the possibility of applying a "handwritten" electronic signature to certain documents: a signature drawn with one finger on the mousepad can be saved in the "Preview" software, or a signature can be drawn on a PDF document. The same software also offers the possibility to save a photo of a signature on paper or to record a signature on a smartphone screen. Once the signature has been saved, it can be applied to PDF documents with a single click. Similarly, it is just as easy to sign a document with a pen on a smartphone or tablet touch screen. A signature can also be generated using software such as Photoshop, to name but one.

These processes are not only very simple, but above all make it possible to sign completely dematerialized documents. For example, a letter or deed could be written on a word processor, converted into PDF format, signed and dispatched electronically. In one way or another, *these signatures are all handwritten* by the author, either directly or by means of an instrument such as a mouse.

These signing procedures are thus easily covered by the scope of article 14(1) of the Code of Obligations, which requires that the signature be "appended by hand". The fact that the means by which the signature is set is not a conventional pen cannot be of any relevance, since it has always been undisputed that the kind of device one uses for signing does not matter, as far as it is suitable for that purpose. Remains the fact that the record is on an electronic, non-physical file. However, the electronic data carrier is no longer an obstacle to admitting that the form requirements for a "written document" are fulfilled: if the doctrine considers it sufficient for a signed original document to be scanned, saved as an electronic file and sent, it has clearly abandoned the requirement for a physical data carrier.

c) Use of a scanned signature

One can go even one step further and allow for the use of a "scanned signature": the author of the document inserts an electronically stored signature into the text of an electronic document that is then sent as an attachment to an e-mail. In our view, such a way to sign fulfils the requirement of a handwritten signature, as does the "online" signature. The (only) notable difference is that, in the first case, the author of the document has signed "in advance" and not at the very moment of the conclusion of the act in question. Nonetheless, the signature is his, and it has been "appended by hand". This is also the reason why that signature is not a "facsimile" within the meaning of article 14(2) of the Code of Obligations: it is not a mechanical reproduction of one's signature, but rather the signature itself. The fact that the scanned signature does not sign the document "live" but that the signature has been appended at some earlier point in time cannot be of importance. In fact, the situation is comparable to a blank signature, where a party signs a document that still has essential parts to be added. The validity of a blank signature is nowhere doubted, and the same must hold true in respect to the scanned signature.

d) Digitally appended signatures are functionally equivalent to the handwritten signature

Online signatures and scanned signatures are functionally equivalent to the handwritten signature because they guarantee the same purposes the legislator pursues when requiring – traditionally – a handwritten signature. They confirm the content on the (electronic) document (purpose of evidence). They fulfil a warning function by making the undersigning party realise, at the moment it signs online or affixes its signature, that it is committing itself to the transaction. Finally, they enable attribution of the rights and duties arising out of the signed transaction to the undersigning party. Obviously, legal writing requirements cannot assure all those functions alone, especially not the last-mentioned one. The rules on the writing requirement are read together with the rules on authorisation, commercial and private powers of attorney, etc., and they are complemented by penal law putting under sanction the falsification of documents, including the unauthorised use of a signature. These complementary rules do also apply where the signature is not handwritten but appended, or affixed, digitally. In other words, it is in combination with the other existing rules of private (and penal) law that digitally applied signatures can perfectly serve the same purposes as the handwritten signature.

4) Conclusion

"Digital signatures" on digital documents fulfil the writing requirement of articles 13 and 14(1) of the Code of Obligations. They are signatures appended by hand that guarantee, (at least) to the same degree as a traditional handwritten signature, the purposes pursued by the legislator, that is, evidence, protection of hasty transactions, and identification of the party assuming the rights and duties of the transaction.

It should however be noted that the Federal Tribunal has not yet had the occasion to express itself on the matter. For the time being, parties signing "digitally" where writing requirements are imposed by the law are thus running a certain risk.

Obviously, there is no such risk where it is the parties themselves who have agreed on a form reservation, be it because they do not want to be bound earlier than the corresponding contract is available in the agreed form, be it because, for purposes of evidence, they wish to adhere to a certain form (article 16 of the Code of Obligations). The parties can agree on any kind of form requirement, which of course includes a "digital signature" on a digital document.

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Santhera Pharmaceuticals Equity-Linked Financing Transaction

Reference: CapLaw-2020-17

Santhera Pharmaceuticals Holding AG entered into an equity-linked financing arrangement with IRIS in the initial gross amount of up to CHF 12 million over 12 months, with the option to extend by another CHF 12 million over another 12 months, providing Santhera with a liquidity line which can be tapped if certain conditions are satisfied.

ams AG Capital Increase to Finance Acquisition of OSRAM

Reference: CapLaw-2020-18

On 3 April 2020, ams AG completed a capital increase by way of a rights offering raising gross proceeds of approximately CHF 1.75 billion. The proceeds will be used to partially finance the acquisition of OSRAM Licht AG. The banking syndicate was led by HSBC and UBS acting as joint global coordinators. In addition, ams entered into a bridge facility agreement for the purpose of securing the financing of the acquisition and sold treasury shares by way of a private placement.

Zur Rose Group Issuance of CHF 175 Million Convertible Bonds

Reference: CapLaw-2020-19

Zur Rose Group, Europe's largest e-commerce pharmacy, successfully placed CHF 175 million 2.75% bonds due 2025 convertible into shares of Zur Rose Group AG. The bonds were issued at 100% of their principal amount and will mature on 31 March 2025. The proceeds will be used, among others, to rapidly adjust to the significantly increased levels of demand for vital medication offered by online pharmacies since the beginning of the COVID-19 crisis. Merrill Lynch International and UBS AG acted as Joint Global Coordinators and Joint Bookrunners.

Credit Suisse Issuance of USD 3 billion and EUR 2 Billion Bail-inable Notes

Reference: CapLaw-2020-20

Credit Suisse Group AG issued USD 3 billion 4.194% Fixed Rate/Floating Rate Senior Callable Notes due 2031 under its U.S. Senior Debt Program and issued EUR 2 billion 3.250% Fixed Rate Reset Senior Callable Notes due 2026, in each case under its Euro Medium Term Note (EMTN) Programme. These transactions were consummated on April 1 and April 2, respectively. The Notes are bail-inable bonds that are eligible to count towards Credit Suisse's Swiss gone concern requirement and will be listed in the SIX Swiss Exchange.