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Securities

Exemptions and Alleviations from the Duty to Publish a Prospectus under FinSA and FinSO – A Practical Perspective
By Valentin Jentsch 2

Regulatory

Insurance Supervision Act: Proposed New Rules regarding Distribution of Insurance Products (Point of Sale) and Insurance Intermediaries
By Bertrand Schott / Simon Bühler 10

Partial revision of the Insurance Contract Act
By Reto M. Jenny 18

The limited qualified investor fund (L-QIF) – an innovation for the Swiss fund and asset management industry
By Diana Imbach Haumüller 22

EU Capital Markets Recovery Package: Meeting the Economic Challenges of the "COVID-19 pandemic"?
By Franca Contratto 32

News | Deals & Cases

Onex Sell-Down of SIG Shares 36

LafargeHolcim Issuance of EUR 850 Million Sustainability-Linked Notes 36

Valora Share Placement 37

UBS Issuance of EUR 1.5 Billion Notes 37

Credit Suisse Group Issuer Substitution under Bail-In Bonds 37

Events

Schulthess Corporate Law Convention 2021 (*Schulthess Forum Aktienrecht 2021*) 38

Exemptions and Alleviations from the Duty to Publish a Prospectus under FinSA and FinSO – A Practical Perspective

Reference: CapLaw-2020-70

On 1 December 2020, the revised duty to publish an approved prospectus in accordance with the Financial Services Act and the Financial Services Ordinance became fully effective. A remarkable novelty of the new Swiss prospectus regime is the introduced set of explicit exemptions and alleviations from the duty to publish a prospectus, which are largely in line with the Prospectus Regulation (earlier, the Prospectus Directive) of the European Union. This article discusses the exemptions and alleviations from the duty to publish a prospectus under the new Swiss prospectus regime from a practical perspective.

By Valentin Jentsch

1) Introduction

In a series of earlier articles in this newsletter (CapLaw 2016-1, CapLaw 2017-1, CapLaw 2018-56, CapLaw 2019-51), Christian Rehm and René Bösch introduced the new Swiss prospectus regime. In this article, I will take a closer look at exemptions and alleviations from the duty to publish a prospectus. My main point is that exemptions from the duty to publish a prospectus have passed the acid test, but also that alleviations from the duty to publish a prospectus have missed the target, at least in part.

On 1 January 2020, the Financial Services Act (FinSA) and the Financial Services Ordinance (FinSO) entered into effect. Since FINMA licensed the reviewing body for prospectuses with effect from 1 June 2020, triggering the statutory transition period of six months, the duty to publish an approved prospectus, together with the respective rules and regulations, became fully effective on 1 December 2020.

It is fair to say that the new prospectus regime represents a veritable paradigm change to Swiss financial market law. In comparison with previously applicable rules and regulations in Switzerland, a remarkable novelty of the new financial market architecture is the explicit stipulation of exemptions and alleviations from the duty to publish a prospectus in accordance with article 35 FinSA. These exemptions and alleviations were largely inspired by international standards, embodied in the Prospectus Directive (applicable at the time) and the Prospectus Regulation (applicable today) of the European Union.

In this article, I discuss these exemptions and alleviations from a practical perspective. From the variety of open issues, the article seeks to provide a broad conceptual analysis of those legal institutions, but also to clarify selected questions of interpretation regarding the newly introduced rules and regulations.

2) Exemptions from Duty to Publish a Prospectus

a) System of Prospectus Exemptions

i. Exemptions for Public Offer by Type of Offering

According to legislative materials, exemptions by type of offering are to be understood conclusively. Consequently, a total of six exemptions can be distinguished. If the requirements of a private placement exemption are given, a public offer can be made without publishing a prospectus. Pursuant to relevant legislative materials, all these exemptions are justified from the perspective of investor protection and for reasons of proportionality.

- Article 36(1)(a) FinSA applies to public offers that are exclusively addressed at investors classified as professional clients within the meaning of article 4(3) FinSA. From a practical perspective, this exemption is of particularly high relevance.

- Article 36(1)(b) FinSA relates to public offers that are addressed at fewer than 500 investors. Other than in Europe, it is arguably not possible to combine the 500 exemption with the exemption for professional clients. First, Swiss law does not provide for this option. Second, the threshold of 500 is much higher than 150. Apart from that, the 500 exemption is apparently not very practical, if the offering is handled by a consortium of investment banks, as such banks hardly ever let each other look into their books.

- Article 36(1)(c) FinSA refers to public offers that are addressed at investors acquiring securities to the value of at least CHF 100,000. Assuming that wealthy investors are more sophisticated and thus need no protection, this exemption is somewhat similar to, but still different from, the professional clients exemption mentioned above.

- Article 36(1)(d) FinSA is available for public offers with a minimum denomination per unit of CHF 100,000. This exemption is particularly important for bonds and other debt instruments.

- Article 36(1)(e) FinSA covers public offers not exceeding a total value of CHF 8 million over a 12-month period. Due to these thresholds, it can be expected that mainly small and medium-sized enterprises or start-up companies will claim this exemption.

- An additional exemption, which is applicable to financial service providers only, is enacted in article 36(4) FinSA. It is restricted to securities offered publicly at a later stage and requires (a) existence of a valid prospectus, and (b) consent for use of the issuer or persons, who have assumed responsibility for the prospectus, within the meaning of article 45 FinSO.

Article 36(5) FinSA contains a delegation clause, which is unique in Swiss legislation to date. According to this clause, the Federal Council may adjust the number of investors and the amounts under letters (b) to (e) of article 36(1) FinSA, thereby taking account of recognized international standards and legal developments abroad. These rather tight restrictions reasonably limit delegation power.

ii. Exemptions for Public Offer by Type of Security

According to legislative materials, exemptions by type of security can be justified by the fact that investor protection in the form of a prospectus is not necessary in all these cases, since investors are sufficiently protected or at least informed about these securities in another, comparable way. This list of exemptions is relatively long and at first glance perhaps somewhat opaque.

- First of all, article 37(1) FinSA applies to equity securities (a) issued outside the scope of a capital increase in exchange for previously issued equity securities of the same class, (b) issued or delivered on the conversion or exchange of financial instruments of the same issuer or corporate group, or (c) issued or delivered following exercise of a right linked to financial instruments of the same issuer or corporate group. With a view to practical relevance, convertible or exchangeable bonds and similar instruments are among the most likely candidates claiming this exemption.

- Article 37(1) FinSA also applies to securities (d) offered for exchange in connection with a takeover, or (e) offered or allocated in connection with a merger, division, conversion, or transfer of assets, provided that information equivalent in terms of content to a prospectus is available. With regard to the equivalence requirement, which is defined in article 46(1) FinSO, it is interesting to note that pursuant to article 46(3) FinSO, information in a prospectus for public exchange offers is deemed to be equivalent under these rules and regulations, but this assumption does not exist for the documentation relating to mergers and other corporate restructurings.

- Article 37(1)(f) FinSA is applicable to equity securities distributed as dividends to holders of equity securities of the same class, provided that there is information on the number and type of equity securities and on reasons for and details of the offer. For such dividends, in cases where there is no election by shareholders between dividend in kind and cash dividend, the exemption does not have to be relied on in the first place because there is no (public) offer at all.

- Without further requirements, article 37(1)(g) FinSA relates to securities offered or allocated to current or former members of the board of directors or management board or to employees. The logic behind this exemption is that there are other means of protection vis-à-vis employers that do not warrant another protection by way of disclosure.

- With a view to the type of issuer, article 37(1)(h) FinSA covers securities issued by, or with an unlimited and irrevocable guarantee from, the Confederation or cantons, an international or supranational public entity, the Swiss National Bank, or foreign central banks. It is unfortunate that municipal public entities (in particular large cities) were not included in the list; this should be amended, even though investors are often not so well informed about municipalities.

- Due to a lack of significant threat to investor protection, article 37(1)(i) FinSA refers to securities issued by non-profit institutions for raising funds for non-commercial purposes.

- Finally, article 37(1) FinSA is available for (j) medium-term notes, (k) money market instruments, and (l) derivatives not offered in the form of an issue. These exemptions are convincingly formulated and make sense.

Article 37(2) FinSA contains a delegation clause, which is more comprehensive than the one discussed above. Pursuant to this clause, the Federal Council may provide for additional exemptions from the duty to publish a prospectus for further types of publicly issued securities, again taking account of recognized international standards and legal developments abroad. This clause is certainly not unproblematic, as it considerably weakens the rule of law. After all, it allows a rather fast change of the regime in FinSO as compared to a change of FinSA itself.

iii. Exemptions for Admission to Trading

Exemptions for admission to trading are mostly adapted to the corresponding European rules and regulations. However, they take into account certain specialties of the Swiss capital market. This includes in particular exemptions by type of security, since only those are controllable by a trading venue.

- Article 38(1)(a) FinSA covers equity securities that over a period of 12 months account for less than 20% of the number of equity securities of the same category already admitted to trading on the same trading venue. Compared to the previously applicable standard in the Listing Rules of SIX Swiss Exchange, this exemption represents a significant expansion in size. However, the exemption does no longer apply to increases of debt instruments.

- Article 38(1)(b) FinSA applies to equity securities issued upon conversion or exchange of financial instruments or following the exercise of rights linked to financial instruments, provided that those equity securities are equity securities of the same category as those already admitted to trading. This is the case, if essential characteristics of equity securities are basically identical.

- Article 38(1)(c) FinSA relates to securities admitted to trading on a foreign trading venue, provided that such venue's regulation, supervision, and transparency are acknowledged as being appropriate by the domestic trading venue, or transparency for investors is ensured by other means. The concept of recognized foreign trading venue is specified in article 48 FinSO. Similarly, article 47 FinSO relates to securities admitted to trading on another Swiss trading venue.

- Article 38(1)(d) FinSA refers to securities for which admission is sought for a trading segment open exclusively to professional clients, provided that such investors are trading for their own account or for the account of other professional clients. This exemption is also legitimate – yet, no such segment exists today.

Article 38(2) FinSA further provides that exemptions from the duty to publish a prospectus by type of offering and by type of security apply by analogy to admission to trading. Article 49 FinSO specifies, where and to what extent this is the case. However, looking at the wording of article 49 FinSO, it should not be assumed that this provision is exhaustive because, *i.e.*, the minimum denomination exemption could also be applicable in this respect.

b) Equal Treatment of Investors

Article 39 FinSA provides equal treatment with regard to information. Pursuant to this provision, which applies to information beyond the scope and in the absence of a duty to publish a prospectus, offerors or issuers shall treat investors alike, when sending them essential information on a public offer. As briefly discussed here, this provision gives rise to many conceptual issues and interpretative questions.

On a conceptual level, it is important to note that this provision does in fact not add anything new, as the equal treatment of investors follows already from the (unwritten) general principle of capital market law on equal treatment of market participants in general and investors in particular. Just like this general principle of law, article 39 FinSA requires no absolute equality, but only relative equality (no selective disclosure). Under certain circumstances, a differentiated treatment of various investors can be justified. It is required, however, that such treatment is based on objective reasons and proportionate. An objective reason may be given, if such action lies in the best interest of all investors, or if investor protection is ensured by other means.

In addition, the scope of application of article 39 FinSA is unclear. With regard to the personal scope of application, reference is made to offerors and issuers, suggesting that there is a public offer or admission to trading. With respect to the material scope of application, the wording clearly refers to essential information on a public offer.

In addition, both the heading (information beyond the scope of the duty to publish a prospectus) and the introductory sentence (in the absence of a duty to publish a prospectus) indicate that there is no need for an offer at all.

Consequently, article 39 FinSA not only applies to private placements, which benefit from an exemption from the duty to publish a prospectus, but also to other capital market transactions, in which no public offer was made and no admission to trading was sought in the first place. Therefore, this provision, which is designed to prevent unjustified selective disclosure, also includes the process of an accelerated bookbuilding and blocktrades in particular.

3) Alleviations from Duty to Publish a Prospectus

a) General-Abstract Approach to Abridgments

i. Alleviations by Type of Issuer

The general-abstract alleviations by type of issuer, which provide for certain abridgments, are largely in line with European rules and regulations, while at the same time taking into account particularities of the Swiss market.

– Article 47(1) FinSA applies to economically less important companies, in particular small and medium-sized enterprises. FinSO annexes 1 to 5 all include alleviations for such companies, but the abridgments are practically inexistent.

– Article 47(2)(a) FinSA relates to small caps, *i.e.*, issuers with low market capitalization on a trading venue. FinSO annexes 1 to 5, however, do not contain any alleviations and abridgments for small caps.

– Article 47(2)(c) FinSA refers to well-known seasoned issuers, *i.e.*, issuers that regularly offer securities publicly, or whose securities are admitted to trading on a foreign trading venue, whose regulation, supervision, and transparency are acknowledged as being appropriate by a domestic trading venue. Article 57(2) FinSO defines well-known seasoned issuers as issuers that (a) have been listed with equity securities on the Swiss benchmark index for at least 2 years, and (b) have debt instruments outstanding with a total par value of at least CHF 1 billion. FinSO annexes 1 to 5 all include alleviations and several abridgments for well-known seasoned issuers.

– Moreover, article 47(2) FinSA may also be applicable to other issuers, *e.g.*, start-up or growth companies. Other than the European rules and regulations, FinSO annexes 1 to 5 do not contain any alleviations and abridgments specifically for such companies.

In addition, article 47(3)(e) FinSA provides that alleviations by type of issuer shall be granted uniformly and with respect to business activities and size of issuers. At least to some extent, this rule enables the consideration of particularities of start-up or growth companies.

ii. Alleviations by Type of Offering

The general-abstract alleviations by type of offering, which also provide for certain abridgments, are perfectly congruent with the European rules and regulations and with the previously applicable Listing Rules of SIX Swiss Exchange.

- Article 47(2)(b) FinSA covers and FinSO annexes 1, 4, and 5 include alleviations by type of offering. According to those schemes, some abridgments are available for issues of subscription rights in particular, but not for rights issues in general.
- In my opinion, however, article 47(2)(b) FinSA also covers issues of advance subscription rights. Therefore, similar abridgments should be included in FinSO annex 2.

In addition, article 47(3)(b) FinSA provides that alleviations by type of offering shall be granted uniformly and with respect to issue volume. This makes perfect sense, as existing investors are less affected by smaller offers.

iii. Alleviations for Other Reasons

Providing for further abridgments, the general-abstract alleviations for other reasons include in particular alleviations by type of transaction, but also alleviations by type of security, for the market, and for investors.

- Article 47(2) FinSA implicitly allows and FinSO annexes 1 to 5 include alleviations by type of transaction. According to these regulations, a few abridgments are available for a public offer without admission to trading and for the admission to trading without public offer.
- Article 47(2) FinSA implicitly permits further alleviations, *e.g.*, by type of security, for the market, and for investors. However, FinSO annexes 1 to 5 do not contain any alleviations and abridgments of this kind, at least not in the current version.

After all, article 47(3) FinSA provides that alleviations for other reasons shall be granted uniformly and in particular with respect to (a) type of securities issued, (c) market environment, and (d) investors' specific requirements for transparent information. In this respect, I am convinced that legal scholarship and capital market practice will point the way forward in the coming months and years.

b) Individual-Concrete Approach to Abridgments

Besides the general-abstract approach discussed above, another approach exists. Under the individual-concrete approach, the reviewing body is in charge of granting abridgments, *i.e.*, by deciding whether and to what extent certain information need not be included in the prospectus on a case-by-case basis.

– Article 41(1)(a) FinSA applies to disclosure seriously detrimental to offerors or issuers. Besides disclosure being seriously detrimental, this alleviation requires that an omission would not mislead investors with regard to facts and circumstances essential to an informed assessment of quality of issuer and characteristics of securities. In practical terms, this alleviation may apply to a situation, where offerors or issuers are in the process of planning future transactions.

– Article 41(1)(b) FinSA relates to information of minor importance. Under this alleviation, information is only of minor importance, if it has no bearing on the assessment of business situation and main prospects, risks, and litigation of the issuer or guarantor and security provider. In practice, this alleviation may be relevant for changes of notes in financial statements.

– Article 41(1)(c) FinSA refers to securities traded on another trading venue. This alleviation covers securities traded on a trading venue, provided that issuer's periodic reporting over the last 3 years complied with applicable financial reporting requirements. In my understanding, this alleviation only applies to public offers, as corresponding exemptions already exist with regard to admission to trading, notably in article 38(1)(c) FinSA and article 47 FinSO.

Pursuant to article 41(2) FinSA, the reviewing body may, to a limited degree, grant further alleviations, provided that interests of investors remain protected. Article 52(1) FinSO clarifies that it may depart from requirements in accordance with FinSO annexes 1 to 5. Article 52(2) FinSO specifies that it may grant further alleviations dependent on conditions such as incorporation of further or additional details. For example, where collateralized securities are issued, information of the issuer or guarantor is less important than information on the collateral.

4) Conclusion

From a practical perspective, capital market transactions by way of private placements have not always been crystal clear in the Swiss market. Following the role model of the European Union, Switzerland introduced a set of explicit exemptions as part of its new prospectus regime. Based on the analysis above, I tend to conclude that exemptions from the duty to publish a prospectus have passed the acid test. The codification of exemptions can be qualified as gain in legal certainty. However, what could and should be done better in the future relates to the clarification of the relationship between individual exemptions. To give an example, it still seems controversial in the legal literature, whether or not the exemption for professional clients can be combined with the 500 exemption. The same applies to exemptions from various other categories, *e.g.*, the exemption for securities with a high denomination.

Since corporations not listed on a stock exchange are now confronted with considerable additional expenditures of time and costs, it was definitely appropriate to meet these challenges with simplified and proportionate prospectus requirements. In my analysis, however, I come to the conclusion that alleviations from the duty to publish a prospectus have missed the target, at least in part. The general-abstract approach underlying individual schemes on minimum content of the prospectus has clearly not succeeded. The individual-concrete approach is currently still under development, whereby an orientation to previous practice and other capital market transactions would be advisable. As a result, it can be stated that general-abstract checklists are often not helpful, as individual-concrete considerations in each case may be needed.

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Insurance Supervision Act: Proposed New Rules regarding Distribution of Insurance Products (Point of Sale) and Insurance Intermediaries

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On 21 October 2020, the Swiss Federal Council published a message to Parliament (*Botschaft*) (message-ISA) for a revision of the Insurance Supervision Act (ISA), including a draft of the new provisions (draft-ISA). Among others, the proposed legislation introduces ***new rules regarding the distribution of insurance products (point of sale)***, in particular insurance products with investment character (qualified life insurance products), and thereby to some extent aligns the distribution rules with those of the Swiss Financial Services Act (FSA). In addition, the proposed new rules provide for certain far-reaching ***changes for insurance intermediaries***, which affect the scope of their services, their organization and cooperations.

By Bertrand Schott / Simon Bühler

1) Overview

The proposed new regulation concerning ***obligations at the point of sale*** leads to a ***certain alignment with the FSA***, in particular with regard to the new category of qualified life insurance products. Insurance products are outside the scope of the FSA. The aim of the new regulation is to create a level playing field among investment instruments, which made it necessary to create a regulation similar to the FSA for insurance products that have an investment character.

In our view, the new duties of the draft-ISA are of purely supervisory law nature, i.e. they are in particular not provisions of civil law or of a dual nature (*Doppelnormen*). Further, one should also note that the revision of the Swiss Insurance Contract Act (coming into force on 1 January 2022) further increases the protection of the insureds.

The regulation in the draft-ISA is designed to cover distribution activities, in particular the recommendation of products, rather than for example portfolio-related advice or portfolio management, which is why, for example, the draft-ISA does not provide for a duty to perform a suitability check as contained in the FSA. The new obligations at the point of sale apply ***in relation to all insureds***; there is no client segmentation and corresponding gradation of point of sale obligations as provided for in the FSA. While the draft-ISA provides for a category of "professional insureds" as defined in the new Swiss Insurance Contract Act, these by their nature typically do not hold life insurance policies and, therefore, are usually outside the scope of most of the new distribution rules.

The following is an ***overview*** of the proposed ***point of sale obligations***:

	Addressees:		Applies in relation to:	
Duty:	**Insurance Company**	**Insurance Intermediary**	**Qualified Life Insurance Prod.**	**Further Insurance Prod.**
Basic Information Sheet (BIS)	39b* (create) 39h(1) (provide)	39h(1) (provide)	✓	×
Third-Party Compensation – Disclosure	39h(2)	45b (non-tied intermediaries only)	✓	✓ (non-tied intermediaries only)
Third-Party Compensation – Hand over	×	45b(2) (non-tied intermediaries only)	✓ (non-tied intermediaries only)	✓ (non-tied intermediaries only)
Further Information	30c (status as prof. insured) 14a(2) (conflicts of interest)	45 (general information) 45a(2) (conflicts of interest)	✓	✓
Appropriateness Check	39j	39j	✓	×
Documentation	39k(1)	39k(1)	✓	×
Rendering of Account	39k(2) and (3) 80	39k(2) and (3) 80	✓ ✓	× ✓
Registration with Ombudsman's Office	82c(1)	82c(1) (non-tied intermediaries only)	✓	✓

* all numbers refer to the draft-ISA

The draft-ISA also provides for certain other far-reaching ***changes for insurance intermediaries***, which affect the scope of their services and their organization in relation to ***all insurance products***. An important change concerns the new rule that ***insurance intermediaries may only be either tied or non-tied***; both at the same time is no longer possible. This will require major business adjustments, including the review of existing cooperation agreements and joint ventures. There is still a registration requirement for non-tied insurance intermediaries, which has been extended and adapted to the FSA. Unlike under the FSA, one of the new draft-ISA requirements for entry in the register is that the ***non-tied insurance intermediary must have its seat, domicile or a branch in Switzerland*** (however, the Swiss Financial Market Supervisory Authority (FINMA) may grant ***exceptions*** in justified cases). Since the register for non-tied insurance intermediaries is kept directly by FINMA (unlike the adviser's register under the FSA), non-tied intermediaries are supervised persons in the sense of the Swiss Financial Market Supervision Act. In contrast, tied insurance intermediaries are not subject to a registration requirement because they are already supervised by FINMA via the insurance company for which they work (unchanged).

The revised ISA is expected to ***enter into force no earlier than January 2022*** with transitional periods for certain key changes, such as a transitional period of one year for the distribution rules regarding qualified life insurance products (for more details, see article 90a draft-ISA).

2) Proposed New Distribution Rules for Insurance Companies and Intermediaries

a) Definition of Qualified Life Insurance Products

The proposed new rules at the point of sale mainly apply to so-called ***qualified insurance products*** (*qualifizierte Lebensversicherungen*; article 39a draft-ISA). As the message-ISA explains, this term is supposed to capture all insurance products with an investment character rather than pure risk insurance products.

Article 39a draft-ISA ***defines qualified life insurance products*** as (a) life insurance products that involve a risk of loss for the insured in the savings process, (b) capital redemption operations (*Kapitalisationsgeschäfte*) or (c) tontines (*Tontinengeschäfte*):

- ***Life insurance products that involve a risk of loss for the insured in the savings process*** concern products of all life insurance classes (except for classes A6 and A7 described below) that involve a risk of loss due to market fluctuations. As per the message-ISA, a risk of loss means that the present value of the savings portion of an insurance policy at the time of ordinary payment or conversion may be lower than the nominal amount of all savings premiums paid. Thus, life insurance products without investment components or with participation in surplus as the only investment component are not considered qualified life insurance products.

- ***Capital redemption operations*** (insurance class A6) are contracts under which the client transfers assets and delegates their management (based on a mathematical model) to an insurance company that involves no (or very limited) biometric risks (see FINMA circular 2016/6 "Life Insurance", N 11). The message-ISA states that capital redemption operations, "as a rule", involve an investment risk for the insured, which is why it is justified to classify them as qualified life insurance products.

- ***Tontines*** (insurance class A7) are contracts under which the contributions of all insureds are pooled and invested, whereby the investment risk remains with the insureds. The resulting capital is distributed as an annuity (*lebenslange Rente*) to the insureds alive and, if provided so in the contract, to the heirs of the deceased insureds (see message-ISA). In the words of the message-ISA, the "predominant capital market element" of tontines justifies treating them as qualified life insurance products.

The first category (life insurance products involving a risk of loss) was still referred to in the preliminary draft as "life insurance products involving an investment risk", which is more far-reaching, because an investment risk can also consist of a product performing below average in comparison with other (comparable) products, for example. Under the proposed new rule (and according to the message-ISA), all life insurance products with capital protection (in the sense of protection of the investment brought in) are outside the scope of the definition.

b) Basic Information Sheet / Advertising

Insurance companies ***offering qualified life insurance products*** must ***prepare a Basic Information Sheet (BIS)*** (*Basisinformationsblatt*) for these with information that is easily understandable, kept up-to-date and enabling the insured to compare similar qualified life insurance products (article 39b-d draft-ISA; the FSA contains corresponding requirements). Article 39g draft-ISA introduces a liability for anyone who fails to exercise due care and thereby provides in the BIS information that is inaccurate, misleading or in violation of statutory requirements. When ***recommending a qualified life insurance product***, the ***BIS must be provided*** (free of charge) by the insurance company or intermediary, respectively, prior to the conclusion of the contract (article 39h(1) draft-ISA).

Advertisements for qualified life insurance products must be clearly recognizable as such (article 39i(1) draft-ISA). The advertisement must contain a reference to the BIS and to where it can be obtained (article 39i(2) draft-ISA). Information conveyed (by advertising or other means) must be consistent with the information in the BIS (article 39i(3) draft-ISA).

c) Duty to Provide Information

As is already the case under current law, insurance intermediaries will be subject to a duty to provide certain basic information to their clients in advance in relation to ***all insurance products*** (for details, see article 45 draft-ISA that extends the scope of information to be provided). The information may be provided electronically and in standardized form. Specific information duties apply with regard to compensation from third parties (see 2) f)) and potential conflicts of interest (see 3) c)).

d) Appropriateness Check

Before providing ***recommendations on qualified life insurance products***, the insurance company or intermediary, respectively, has to perform an ***appropriateness check*** (article 39j draft-ISA; the FSA contains a corresponding requirement). To this end, the insurance company or intermediary, respectively, must request information on the insured's knowledge and experience. If the insurance company or intermediary, respectively, concludes that a qualified life insurance product is not appropriate for the insured, it shall advise the insured against such product. If the information provided is not sufficient to assess appropriateness, the insured must be informed that no appropriateness check is conducted.

No appropriateness check is required if a qualified insurance product is concluded on the initiative of the insured and without rendering personal advice (*execution only*).

e) Documentation and Rendering of Account

Insurance companies and intermediaries shall be subject to documentation and accountability obligations ***for qualified life insurance products*** under the proposed new rules (article 39k draft-ISA). The ***documentation requirement*** includes (a) the keeping of record of which qualified life insurance contract was concluded, (b) the information collected on knowledge and experience of the insureds, (c) the absence of an appropriateness test (if applicable) and (d) any issued recommendation against entering into qualified life insurance contracts.

On request, insurance companies and intermediaries shall be required to ***provide*** the insureds with (a) a copy of the documentation (or make it available in another appropriate manner) and (b) information on the underlying financial instruments' valuation, performance and costs. The insureds' entitlement and the procedure for obtaining a copy of the file and other information is governed by articles 80 et seq. draft-ISA.

f) Compensation from Third Parties

Compensation from third parties regularly aim at promoting certain types of insurance products and thus lead to a potential conflict of interest for the party distributing the insurance products. The draft-ISA addresses this as follows:

Insurance companies are required to ***inform*** insureds about compensation from third parties ***received*** in connection with ***qualified life insurance products*** when recommending such products (article 39h(2) draft-ISA), but not about compensation paid to insurance intermediaries (see message-ISA). Neither the draft-ISA nor message-ISA yet define the type and scope of information required. In our view, the standard as set forth for non-tied insurance intermediaries (see below) may be applied.

Non-tied insurance intermediaries are by definition in a fiduciary relationship (*Treueverhältnis*) with the insureds and must act in their interest (as opposed to tied insurance intermediaries who typically act on behalf of an insurance company). The proposed new regulation contains the following rules that apply in relation to ***all insurance products*** intermediated (article 45b draft-ISA):

- In case ***remuneration*** of the non-tied insurance intermediary ***is limited to commissions received from insurance companies (or from any third party)***: If the non-tied insurance intermediary receives its entire compensation from the insurance company or from any third party (commission), there is a ***duty to inform*** the insured ***in advance*** of such commission (see below).

- In case ***remuneration*** of the non-tied insurance intermediary ***includes both commissions received from insurance companies (or from any third party) and (direct) compensation from the insured***: If the non-tied insurance intermediary receives both a commission from the insurance company (or from any third party) and a remuneration from the insured at the point of sale, a ***disclosure*** of the commissions is not sufficient. In addition, the insurance intermediary must obtain from the insured an ***express waiver*** regarding the handing over of the commission. If no such waiver is obtained, the commissions must be handed over to the insured.

In both cases (as described above), the ***information*** regarding compensation from third parties must meet certain ***minimum requirements*** (article 45b(3) draft-ISA). In terms of content, it must include the ***type and scope*** of the remuneration. Disclosure of ***calculation parameters and bandwidths*** is sufficient if the amount is not determinable in advance (i.e., prior to the conclusion of the contract between the non-tied intermediary and its client). If, in such cases, calculation parameters and bandwidths are disclosed in advance, this is sufficient in our view, i.e. the non-tied intermediary does not need to provide further information on the individual (concrete) third-party compensation at a later date when the amount of such third-party compensation can be determined. Further, the information must be provided ***in advance***, i.e. "before the service is provided or before the contract is concluded". In addition, the non-tied insurance intermediary must provide information on actual compensation received from third parties on request.

Compensation in the above sense is defined as payments from third parties accruing to the non-tied insurance intermediary ***in connection with the provision of a service***, such as brokerage fees, commissions, discounts or other financial benefits (article 45b(4) draft-ISA; the FSA contains a corresponding definition).

3) Proposed New Rules for Insurance Intermediaries

a) Obligation to Opt for either Tied or Non-Tied Intermediary

Against the background of protecting insureds from conflicts of interest, the proposed new regulation ***prohibits*** insurance intermediaries ***from operating as tied*** (on behalf of an insurance company) ***and non-tied*** (in the interest of the insured) insurance intermediary at the same time (article 44(1)(b) draft-ISA).

The clear distinction between tied and non-tied intermediaries is also the basis for a ***more focused supervision by FINMA***; FINMA has signaled that it will expand its supervision of non-tied intermediaries (see message-ISA and article 46 draft-ISA concerning FINMA's tasks).

b) Registration

Non-tied insurance intermediaries may carry out their activity only if they are entered into a ***register of non-tied insurance intermediaries*** that is ***kept by FINMA*** (articles 41(1) and 42 draft-ISA). The draft-ISA plans to expand the current registration requirements by introducing the requirements of (a) ***seat, domicile or branch in Switzerland***, (b) good reputation and the guarantee for the fulfillment of obligations under the draft-ISA, and (c) registration with an ombudsman's office (article 41(2) draft-ISA).

The proposed introduction of a new requirement to have a seat, domicile or branch in Switzerland means that ***foreign non-tied insurance intermediaries without physical presence in Switzerland*** (i.e. acting on a pure cross-border basis) ***would no longer be admissible for registration and thus for carrying out their activity in Switzerland*** (in contrast to foreign "advisers" under the FSA). Only activities outside the territorial or substantive scope of the draft-ISA would remain permissible (e.g. see article 2(2)(f) draft-ISA concerning the intermediation of certain supplementary insurance products). The message-ISA explains that this requirement "appears to be essential for effective supervision by FINMA", in particular the enforcement of its supervisory instruments. However, ***FINMA may grant exceptions*** in justified cases (*begründeten Fällen*). The message-ISA does not specify what such cases may be.

Tied insurance intermediaries are not subject to registration duties. In contrast to today, they may no longer register themselves voluntarily, unless they provide evidence of desiring to take up an activity abroad and of the foreign law requiring a Swiss register entry (article 42(4) draft-ISA).

c) Conflicts of Interest / Organizational Precautions

Insurance intermediaries (tied and non-tied) are obliged to (a) ***identify*** potential conflicts of interest and (b) take adequate ***organizational measures*** to prevent these from occurring or from disadvantaging the insureds (article 45*a*(1) draft-ISA). If disadvantages for insureds cannot be excluded, this must be ***disclosed*** to them before concluding an insurance contract (article 45a(2) draft-ISA). The Federal Council is authorized to regulate the details. A corresponding obligation exists for insurance companies in article 14a draft-ISA.

d) Basic Training and Further Education

Insurance intermediaries (tied and non-tied) are required to have the ***skills and knowledge*** necessary for their activities (article 43 draft-ISA). The insurance companies and the insurance intermediaries have to define sector-specific minimum standards for ***basic training and further education***. Should no appropriate minimum standards exist, the Federal Council shall determine these.

e) Ombudsman's Office

Non-tied insurance intermediaries (as well as insurance companies) are required to register with an ombudsman's office (article 82c(1) draft-ISA). This aims at providing insureds with the possibility of a mediation procedure before an ombudsman for all disputes (see message-ISA). The Swiss Federal Department of Finance is responsible for recognizing ombudsman's offices; recognition is subject to certain requirements being met (article 83 draft-ISA). Insurance companies that have only professional insureds may on request be exempt from a registration with an ombudsman's office.

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Partial revision of the Insurance Contract Act

Reference: CapLaw-2020-72

On June 19, 2020, the Swiss Parliament approved the partial revision of the Insurance Contract Act (ICA). The revised ICA will enter into force on 1 January 2022. The following article is intended to provide an overview of some (but not all) of the changes (for the revised ICA see https://www.admin.ch/opc/de/federal-gazette/2020/5661.pdf). References to articles of the ICA are references to the revised law (unless otherwise noted).

By Reto M. Jenny

1) Other text forms as an alternative to communication in written form

For various communications under the revised ICA, as an alternative to the simple written form (article 12 *et seqq.* of the Code of Obligations, CO), the proof by text shall be possible. In contrast to the simple written form, this does not require a manual signature.

2) Right of withdrawal (articles 2a and 2b ICA)

The revised ICA provides for a possibility of the policyholder to withdraw, within 14 days, its offer for the conclusion of the insurance contract or the declaration of acceptance of the offer. The time limit of 14 days starts running as soon as the policyholder has submitted its offer or accepted the contract. The deadline is met where the policyholder notifies the insurance company on the last day of the deadline of his/her withdrawal or hands over his/her withdrawal declaration to the post office.

However, the policyholder's right to withdraw does not extend to (key) contract modifications; a corresponding suggestion did not find a majority in the parliament. The right of withdrawal is excluded in the case of collective personal insurance, provisional cover notes and agreements with a term of less than one month.

The withdrawal has the effect that the offer for the conclusion of a contract or the policyholder's declaration of acceptance is ineffective from the beginning. The parties must reimburse services already received. In line with the Supreme Court case law in connection with the right of withdrawal for door-to-door sales and similar contracts (according to the CO), such reimbursement is governed by the provisions regarding unjust enrichment.

3) Rights of termination (articles 3a, 28a, 35a, 35b, 36, and 46b ICA)

The revision also deals with rights of termination, and the amendments include the following: The revision amends the policyholder's right of termination where the insurance company breaches its duty of information according to article 3 ICA. One amendment concerns the expiration of the termination right after two years (currently after one year) since the violation of the information duty (article 3a (2) ICA).

In the event of a significant reduction in risk, the revised ICA foresees a right of the policyholder to terminate the contract with a notice period of four weeks or to demand a reduction in premium. If the insurance company refuses a premium reduction or if the policyholder does not agree to the offered reduction, the policyholder may terminate the contract within four weeks after receipt of the insurer's comments (article 28a ICA).

The revised ICA provides for an ordinary right of termination at the end of the third or each subsequent year with a period of notice of three months. This provision aims at insurance contracts with a duration of more than three years (article 35a (1) ICA). The contractual parties are free to stipulate an ordinary termination already before the expiry of the third year, but the notice period shall be identical for both parties (article 35a (2) ICA). For life insurance contracts, there is no ordinary right of termination according to article 35a ICA, but the policyholder is entitled, regardless of the agreed duration, to terminate the life insurance contract after one year (article 89 ICA). In case of a supplementary health insurance to the social health insurance, the ordinary right of termination and the right of termination in a loss event (cf. article 42 (1) of the current ICA), shall be available to the policyholder only. For a collective daily benefits insurance, both parties are entitled to these rights (article 35a (4) ICA).

The revised ICA stipulates also an extraordinary right of termination: As for other long-term contracts, an insurance contract may be terminated for important reasons (article 35b ICA). Any circumstance which makes, according to a good faith standard, the continuation of the contract unacceptable to the terminating person constitutes such an important reason. The same holds true for an unforeseeable change in the legal requirements, which makes the fulfillment of the contract impossible (article 35b (2) ICA). In the dispatch of the Federal Council, a change of the practice on the basis of FINMA circulars is mentioned as a possible example, while it is, at the same time, referred to the fact that extraordinary terminations should be, as a matter of principle, rather rare. Contractual provisions permitting an insurance company to unilaterally limit the duration or extent of, or to annul, periodic obligations as a consequence of illness or accident in case of termination after the occurrence of the insured event are null and void (article 35c ICA).

Further, in case of lack of the necessary license, or of its revocation, of the insurance company, the policyholder is entitled to terminate the contract at any time (article 36 ICA).

Further, the law provides for a termination right of the policyholder in case a so-called multiple insurance arises provided that the policyholder did not have knowledge of the occurrence of a multiple insurance at the time of the conclusion of the later contract (article 46b (2) ICA). The termination right is limited to four weeks since detection of the multiple insurance.

4) Non-disclosure (article 6 (3) ICA)

The revised ICA explicitly stipulates a causality requirement for benefit reductions in case of non-disclosure of material facts for the assessment of the peril: If the contract is terminated by cancellation in accordance with paragraph 1, the insurer's obligation to pay benefits for losses that have already occurred shall lapse ***insofar as*** the occurrence or extent of such losses has been influenced by the non-disclosure or the incorrect notification of a significant risk event (article 6 (3) ICA).

Instead of the requirement of written questions and answers, the revised law stipulates that questions and answers can either be in writing or in any other form allowing proof by text (e.g. online or by email).

5) Retroactive insurance (article 10 ICA)

Further, the revised law provides that the effects of the insurance contract can be referred back to a point in time before its conclusion, provided that an insurable interest exists. Such retroactive insurance is void if only the policyholder or the insured knew or had to know that an insured event had already occurred (article 10 ICA). In contrast, the current law provides, with basically the exception of fire and transport insurance, for the nullity of such retroactive insurance, which triggered wide criticism from legal scholars. By abolishment of the old provision, the revised law provides more legal certainty, in particular for claims-made policies and addresses cases such as the polyarthritis case of the Supreme Court (BGE 127 II 21): In that case, an insured concluded a supplemental health insurance contract and notified, upon conclusion of the insurance contract, her illness. At that moment, she had been pain-free for a prolonged period. Shortly after conclusion of the contract, however, the illness broke out again. The insurance company denied coverage, and the Supreme Court protected that decision, holding that the insured peril has materialized prior to the contract conclusion.

6) Breach of obligations (article 45 ICA)

The law currently in place has already provided for a requirement of fault: Negative consequences of a breach of obligations by the policyholder/beneficiary agreed upon by the parties could only be held against the policyholder/beneficiary to the extent that such violation was made by fault. According to the current Supreme Court case law, however, an insurer could have denied coverage where no causal requirement was explicitly agreed upon (*i.e.*, the policy remained silent on that issue) to the extent that the law does not otherwise provide for such a causality requirement (as in the case of the current article 38 (2) ICA). The revised law now provides for a causality requirement for the breach of contractual obligations by the policyholder or the insured: To the extent that the policyholder proves that the violation had no influence on the occurrence of the insured event and on the scope of the benefits owed by the insurance company, an agreement burdening the insured with a legal disadvantage in case of non-compliance would be invalid (article 45 (2) (b) ICA).

7) Down payments (article 41a ICA)

The revised ICA contemplates a beneficiary's right to request down payments for the amount undisputed by the insurance company once its claim is due.

8) Limitation period (article 46 ICA)

The revised ICA stipulates for a longer limitation period of five years (instead of two years), starting to run from the moment in time when the event triggering the insurer's indemnification duty occurs. An exception exists for claims arising from the contract of collective daily sickness benefit insurance: The limitation period is two years in such cases. The revision has not modified the moment in time when the limitation period starts running (*dies a quo*).

9) Direct right of action for liability insurance (article 60 ICA)

A fundamental change of the revised law includes the direct right of action in the field of liability insurance: The damaged third party or his legal successor may directly claim, within the scope of any existing insurance cover and subject to the objections and defenses which the insurance company can hold against him based upon law or the contract, against the insurance company (article 60 (1bis) ICA). Such direct right of action is not alien to Swiss law, but has so far been limited to a few instances, e.g. in the ambit of the Road Traffic Act.

In the case of compulsory liability insurance, defenses arising from gross negligence or willful causation of the insured event, breaches of contractual obligations, non-payment of premiums or a contractually agreed upon deductible cannot be held against the damaged third parties (article 59 (3) ICA).

Other changes for the liability insurance concern the extension of cover to all employees of the insured company for business liability insurance (*Betriebshaftpflichtversicherung*; article 59 (1) ICA) as well as the clarification that recourse claims of third parties are covered, too (article 59 (3) ICA).

10) Right of recourse

The new law provides for a right of recourse of the non-life insurer. Prior to the Supreme Court decision of the year 2018 (BGE 144 III 209), the insurance company was considered – in terms of recourse pursuant to article 51 (2) CO – a person liable according to contract and could not take recourse against such persons who were liable based on law (with no fault; *Kausalhaftung*). Based on the new law, the insurance company will be able to take recourse against all persons liable to pay compensation/damages, *i.e.*, also against such who face contractual or causal liability. According to legal scholars, liability insurers, however, do not have an integral right of recourse, but their position is still limited by article 51 (2) CO.

11) The professional policyholder (article 98 (2) ICA)

The revised ICA introduces the notion of the professional policyholder. With respect to them, the prohibition to contractually deviate from certain absolutely mandatory provisions (article 97 ICA) or, to the detriment of the policyholder or the insured, from other provisions (article 98 ICA) does not exist, *i.e.*, where the contract is concluded with a professional policyholder, the parties may derogate from such mandatory provisions (cf. article 97 and 98 ICA). The term professional policyholder is defined by law (article 98 (2) ICA) and includes, *inter alia*, companies with a professional risk management (article 98 (2) (f) ICA) and companies that exceed two of the following three criteria: (i) balance sheet total of CHF 20m; (ii) net revenue of CHF 40m; and (iii) equity/net assets of CHF 2m (article 98 (2) (g) ICA).

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The limited qualified investor fund (L-QIF) – an innovation for the Swiss fund and asset management industry

Reference: CapLaw-2020-73

Swiss funds are frequently not investors' first choice, especially as regards alternative investments for professional investors, where time to market is often crucial. High time and cost pressure means that even Swiss clients often prefer foreign funds. With the L-QIF, Switzerland will have a real alternative designed to strengthen the competitiveness of its fund and asset management industry by increasing the number of collective investment schemes launched in the country. The way has been paved, and it will ultimately be up to the politicians and the Swiss fund and asset management industry itself to make good use of the L-QIF. So far, the outlook is promising.

By Diana Imbach Haumüller

1) Background

a) Competitive disadvantage of Swiss funds

Switzerland is an important location for asset management and the distribution of collective investments. However, its position as a "production location" for collective investment schemes is not strong. Restricted distribution possibilities abroad on the one hand, namely due to the lack of recognition of Swiss securities funds under the UCITS Directive and the still pending decision on the AIFMD third-country passport, and the unfavorable Swiss withholding tax on the other hand, have a negative impact on the competitiveness of Swiss funds on an international level. Further, the considerable amount of time and expense involved in acquiring the necessary product approval results in even Swiss clients giving preference to foreign collective investment schemes over Swiss ones. Particularly when it comes to alternative and innovative fund products for qualified investors, today's Swiss funds are often not competitive. This is an unsatisfactory situation, especially given the ample pool of outstanding expertise available within Switzerland's fund and asset management industry.

Against this background, the Asset Management Association Switzerland (formerly the Swiss Funds and Asset Management Association SFAMA) initiated the idea of the limited qualified investor fund (L-QIF). The core element of the proposal was to provide a flexible collective investment scheme under Swiss law which will not require FINMA approval and so can be set up much more quickly and cost-effectively. This product, which is to be available only to qualified investors as defined by the Collective Investment Schemes Act (CISA), should nevertheless guarantee the customary levels of quality and security. To this end, while L-QIFs themselves will not require approval, their asset manager or fund management company must be an institution supervised by FINMA. Indirect fund supervision such as this takes due account of qualified investors' need for client protection, so it is important to point out that L-QIFs will not be unregulated as they will have to comply with the rules set out in the CISA.

Other fund locations already have such fund vehicles, a case in point being the Luxembourg RAIF (Reserved Alternative Investment Fund), which has already become established and is also used by institutional investors in Switzerland.

b) Development of the draft bill

The Federal Council took up the initiative and mandated the Federal Department of Finance (FDF) on 5 September 2018 to prepare a corresponding draft. Meanwhile, the idea of the L-QIF also found broad support in parliament. A motion to this effect by Ruedi Noser, member of the Council of States, was adopted by the Council of States on 24 September 2018 and subsequently by the National Council on 13 March 2019, with overwhelming majorities in both cases. Shortly after this, on 26 June 2019, the Federal Council opened the consultation process for an amendment to the CISA to create the L-QIF. The consultation draft met with broad approval, leading to the adoption of the dispatch on 19 August 2020, albeit with a slight delay due to the COVID-19 situation. Currently, it is expected that the Council of States will discuss the draft bill in its spring 2021 session, followed by the National Council in summer 2021.

If this pace can be kept up, it seems realistic that the first L-QIF can be launched as early as 2022.

2) Structure, systematics, and key features

a) Principle

The L-QIF is not a new category of financial instruments but a collective investment scheme according to the CISA and thus generally subject to the provisions of the CISA. Only for the sake of clarity, this is again stated in Art. 118*a* para. 2 Draft-CISA (D-CISA). Any exceptions to this principle are explicitly stated in the Act itself, either in the new, L-QIF-specific title 3*a*. (Art. 118*a* et seqq. D-CISA), or in corresponding provisions in other articles throughout the Act, such as the provisions on licensing (Art. 13 para. 2bis D-CISA) or approval (Art. 15 para. 3 D-CISA).

Art. 118*d* D-CISA comprises a comprehensive catalog of provisions which are not applicable to the L-QIF. This negative catalog contains (under letter a) the investment requirements which do not apply to the L-QIF and are replaced by specific provisions in the new title 3*a* as well as (under letter b) articles which do not fit from a conceptual point of view. The latter particularly include provisions granting FINMA the power to take decisions in individual cases or supervisory powers. One of the most prominent articles in this regard is Art. 10 para. 5 CISA, giving FINMA the power to fully or partially exempt collective investment schemes from certain provisions of the financial market acts, provided that they are exclusively open to qualified investors and that the protective purpose of the Act is not impaired. Since the L-QIF is neither approved nor authorized by FINMA and is also not supervised, such powers would be useless in the case of the L-QIF. Adequate substitutes for these regulations are therefore needed.

Because the L-QIF is undoubtedly a collective investment scheme under the CISA, it must also be treated equally to other Swiss funds from a tax perspective. Like the explanatory report before it, the dispatch explicitly states that the tax treatment of the L-QIF will not differ from that of other Swiss funds, including single-investor funds. This is a clear statement and a key element for the success of the L-QIF in practice.

b) Key features of the L-QIF

The regulation of the L-QIF is based on its legal definition (Art. 118*a* para. 1 D-CISA), which comprises of four core elements with which all L-QIFs must comply:

1. Collective investment scheme according to the CISA
2. Only open to qualified investors (let. a)
3. Managed according to the specific provisions for L-QIFs (let. b)
4. No product approval/licensing or supervision by FINMA (let. c)

If the fund fails to comply with one or more elements of this legal definition, FINMA approval is mandatory (Art. 15 CISA). The following explanations take up the most important features of these four core elements of the L-QIF.

3) Collective investment scheme according to the CISA

a) L-QIF: a Swiss fund

This is the first core element, stipulated in the introductory sentence of Art. 118*a* para. 1 D-CISA. Consequently, an L-QIF is necessarily a Swiss collective investment scheme within the meaning of Art. 7 CISA, i.e. in particular collective investment by the investors, third-party management, and the principle of equal treatment of the investors.

b) Legal form and eligible assets

As a Swiss collective investment scheme, the L-QIF must be structured according to one of the legal forms provided for in the CISA. This has been clarified, albeit indirectly, by Art. 118*c* D-CISA, which states that the L-QIF must have either the legal form of a contractual investment fund, an investment company with variable capital (SICAV) or a limited partnership for collective investment (LP). Contrary to the consultation draft, an investment company with fixed capital (SICAF) is not an eligible legal form. In this respect, the dispatch points out that the structuring of an L-QIF as a SICAF is no longer an option, this being due in part to the recent abolition of bearer shares. It also seems appropriate to exclude the SICAF from the group of possible legal forms for the L-QIF in view of its very limited practical relevance.

As the aim of the bill is to promote innovation, the investment regulations regarding the L-QIF will be liberalized, particularly in view of the limited circle of investors. The law thus contains no restrictions regarding possible investments or the distribution of risk, making the concept of the L-QIF extremely flexible. However, transparency toward the investors is key, and these topics must be disclosed in the fund documents accordingly (Art. 118*n* and Art. 118*o* D-CISA). This means that "hybrid" L-QIFs investing in a combination of different asset classes, such as securities and real estate, are also permitted. Besides the better time to market, this flexibility makes the L-QIF extremely attractive.

However, even though the L-QIF is very flexible it should be kept in mind that basic principles applicable to all collective investment schemes also apply to L-QIFs. Against this background, the draft establishes in Art. 78*a* D-CISA the general principle according to which the fund management company or the SICAV must ensure that the liquidity of the collective investment scheme is appropriate to the investments, investment policy, risk diversification, group of investors and redemption frequency. This principle is not new but will now be explicitly stated in the CISA which is also in line with international developments.

As the investment regulations applying to the four fund categories of FINMA-approved open-ended collective investment schemes, i.e. securities funds, real estate funds or other funds for traditional and alternative investments are not applicable to the L-QIF, it is not possible to use the names of those categories for an L-QIF as this could mislead investors (Art. 118*e* para. 3 D-CISA). This means for instance that there will be no "real estate fund L-QIF", even if a specific L-QIF would in fact apply the investment regulations for FINMA approved real estate funds. Finally, it has to be made transparent to investors that an L-QIF is not approved, licensed or supervised by FINMA (Art. 118*e* D-CISA). This is of course a matter of transparency for the investors.

4) Only open to qualified investors

The second core element according to the legal definition concerns the limited circle of investors, with investments in L-QIFs reserved exclusively for qualified investors (Art. 118*a* para. 1 let. a D-CISA). Art. 10 CISA defines which investors are considered qualified in this sense. According to Art. 10 para. 3 CISA, all professional clients according to the Financial Services Act (FinSA) are considered qualified investors according to the CISA. These include both professional clients in the narrower sense and institutional clients according to Art. 4 para. 4, and Art. 5 paras 3 and 4 FinSA. In addition, according to Art. 10 para. 3ter CISA, private clients within the scope of a long-term asset management or investment advisory agreement with a prudentially supervised financial intermediary pursuant to Art. 4 para. 3 lets a and c FinSA are qualified, unless they have declared that they do not wish to be considered as such.

It is interesting to note that with regard to the segmentation of insurance companies' clients, the draft contains some general adjustments. In particular, with the entry into force of the L-QIF regulation, asset management and advisory clients of FINMA-supervised insurance companies will also be considered as qualified investors according to Art. 10 CISA.

The draft does not differentiate between the different categories of qualified investors. This is amongst others for the following reasons appropriate:

– Unlike private investors, professional investors are capable of understanding the investments and risks of complex financial instruments in detail. Furthermore, lengthy negotiations on the detailed design of collective investment schemes for such investors are often conducted in practice prior to the formal product approval process. Once an agreement has been reached on the conditions and the wording of the fund documents, investors should be able to invest as quickly as possible. Especially in the case of more complex funds, however, the corresponding approval process can easily take a few more months. If time to market is too long, this is a "deal breaker" for many investors, who will opt instead for a more readily available foreign structure.

- In addition, as professional investors are qualified investors according to Art. 10 CISA, the respective foreign collective investment schemes are not – unlike Swiss funds – subject to the approval of FINMA or even any foreign supervisory authority according to Swiss law. With the FinSA and the Financial Institutions Act (FinIA), which entered into force on 1 January 2020, this distortion of competition to the detriment of Swiss funds has become even more pronounced as the corresponding adjustment in Art. 120 para. 4 CISA limits the obligation of foreign collective investment schemes to appoint a FINMA-licensed representative and a paying agent in Switzerland for "per se" professional investors according to the FinSA. The L-QIF will contribute to a level playing field between Swiss and foreign funds.

- Finally, the L-QIF does not create additional risks for qualified investors. Many of these investors are investing in foreign funds or structured products that are also not FINMA approved and to which no product-specific supervisory rules apply. With the "indirect supervision" of the L-QIF a Swiss based, FINMA licensed manager is necessarily involved. This also strengthens the protection of these investors.

5) The concept of indirect supervision

a) Principle

The third core element of the L-QIF is its management according to the specific regulations for the L-QIF as stipulated in Art. 118*g* and Art. 118*h* D-CISA (Art. 118*a* para. 1 let. b D-CISA). In this context, the term "management" is used as a generic term for the activities addressed in Art. 118*g* and 118*h* D-CISA (operational management, administration, asset management, investment decisions) and not only for investment decisions.

The aim of the L-QIF is to eliminate the dual supervision of product and institution. However, this is only possible if a financial intermediary approved and supervised by FINMA "assumes responsibility" for the collective investment scheme. This is often referred to as "indirect supervision" of the L-QIF, as only certain financial intermediaries supervised by FINMA can manage them in the sense mentioned above. These administrators or managers must comply with all supervisory obligations and are supervised by FINMA in this respect, since they are themselves licensees. Such supervisory obligations also include compliance with all legal obligations regarding the management of collective investment schemes, including L-QIFs. To ensure this, an appropriate organization (Art. 9 para. 1 FinIA) is required at all times, among other things. As this is a crucial part of the licensing process for financial intermediaries, it is also highly relevant in the supervision of a FINMA-licensed financial intermediary managing an L-QIF. If there is a severe breach of obligations relating to the management of an L-QIF, the managing financial intermediary will face supervisory measures.

Against this background, all L-QIFs must also undergo an audit, conducted by the supervisory auditor of the FINMA licensed manager of the L-QIF (Art. 118*i* CISA). The respective regime should essentially correspond to that for approved collective investment schemes, but the details will only be provided in the implementing ordinance (Art. 118*i* para.6 D-CISA).

In the case of collective investment schemes organized under company law, i.e. a SICAV or LP, the product and the licensee, i.e. the fund company, are identical. Therefore, SICAVs and LPs normally require a license (Art. 13 para. 2 lets b and c CISA), and the relevant fund documents must also be approved by FINMA (Art. 15 para. 1 CISA). In order to achieve a considerably shorter time to market, both the license and the product approval must be waived in the case of corporate legal forms of the L-QIF. This is provided for in Arts 13 and 15 D-CISA. Consequently, self-management is not permitted for SICAV L-QIFs as such a SICAV is not a FINMA licensed manager. A similar concept applies to L-QIFs in the legal form of an LP.

b) Open-ended L-QIFs

i. Management by a fund management company

Open ended L-QIFs, i.e. contractual investment funds and SICAVs, must be managed by a fund management company. For contractual investment funds, this principle is stated in Art. 118*g* para. 1 D-CISA. With regard to SICAVs, this is ensured by requiring that the administration and investment decisions be delegated to one and the same fund management company (Art. 118*h* para. 1 D-CISA). As mentioned above, self-management is not possible for a SICAV L-QIF.

From a regulatory perspective, the fund management company is formally in charge of the L-QIF. It may delegate investment decisions in compliance with the relevant provisions of the FinIA (Art. 14 para. 1 and Art. 35 FinIA) in accordance with Art. 118*g* para. 2 D-CISA. The same also applies to any sub-delegation under Art. 118*g* para. 3 D-CISA. These principles apply mutatis mutandis to delegation by the fund management company of a SICAV (Art. 118h para. 3 D-CISA).

ii. Delegation

Investment decisions may be delegated to a manager of collective assets in accordance with Art. 2 para. 1 let. c FinIA (Art. 118*g* para. 2 let. a D-CISA). However, it was not the intention to limit the possibility of delegation to managers of collective assets only. For the sake of clarification, the dispatch therefore explicitly states that, in accordance with the authorization chain of Art. 6 FinIA, investment decisions may also be delegated to institutions that are exempt from the obligation to obtain a license as managers of collective assets due to stricter regulation. Delegation to a bank, a securities firm or a fund management company is therefore also permitted. The same applies to insurance undertakings under the Insurance Supervision Act, which are also exempted from obtaining a license as managers of collective assets under Art. 9 para. 2 of the Financial Institutions Ordinance. For L-QIFs, however, delegation of investment decisions to (simple) asset managers pursuant to Art. 17 FinIA is excluded. This also applies to any sub-delegation.

The dispatch also emphasizes that an L-QIF can be set up as a single-investor fund, and redelegation of the investment decisions to the single investor is possible (Art. 7 paras 3 and 4 sentence 1), provided that the single investor is subject to prudential supervision. However, in contrast to FINMA-approved collective investment schemes, no exception to the principle that the single investor must obtain a license is provided for which is particularly relevant for pension funds. This stands in contrast to the criticism voiced in the consultation. In practice, for FINMA approved collective investment schemes such redelegation is common practice for pension funds, provided that the necessary organization is in place and the (cantonal) pension fund supervisory authority agrees. The dispatch justifies the more restrictive position on L-QIFs by stating that such redelegation would contradict the principle that investment decisions for L-QIFs must be delegated to an institution supervised by FINMA. This reasoning is not entirely conclusive, since the management of an open-ended L-QIF, including investment decisions, must in any case be transferred to a fund management company as a first step. In the event of redelegation, the fund management company is obliged to supervise the delegate appropriately. The same applies, to so-called multi-investor funds, in which typically an investor from the group of companies makes the investment decisions.

The delegation of investment decisions by the fund management company to a foreign manager of collective assets is also permitted under certain circumstances (Art. 118*g* para. 2 let. b. D-CISA). This is possible if the foreign manager of collective assets is adequately regulated and supervised in its country of domicile (cipher. 1) and if there is an agreement between FINMA and the competent foreign supervisory authority on cooperation and the exchange of information, where such an agreement is required by foreign law (cipher. 2).

c) Closed-ended L-QIFs

In the case of an L-QIF in the legal form of an LP, Art. 118*h* para. 2 D-CISA stipulates that management must be delegated to an asset manager of collective assets licensed and supervised by FINMA. Based on the authorization chain in Art. 6 FinIA, delegation to a more strictly regulated financial intermediary is also possible. Regarding the sub-delegation it can be referred to what has been outlined under section b) above. After all, the management of the LP does not have to be delegated under para. 4 if the general partner holds at least a license as a manager of collective assets.

During the consultation process, a similar regulation to the SICAV was proposed for the LP, according to which the management of an L-QIF in the legal form of an LP should have been delegated to a fund management company. However, it was pointed out that this provision does not make sense for an LP. In contrast to open-ended collective investment schemes, the management or administration in the case of a LP is limited to a minimum. The focus is primarily on keeping the fund accounts and certain administrative activities such as tax settlements. As closed-ended collective investment schemes generally do not issue or redeem units during their term, hardly any decisions are necessary, and the setting of issue and redemption prices or income distributions is not relevant. Consequently, the activities for which a fund management company is particularly qualified are hardly in demand with regard to the management of an LP. The revised version of Art. 118h D-CISA is therefore to be welcomed.

6) No approval, license or supervision

a) No approval or authorization of L-QIFs

The fourth and final core element of the L-QIF is the waiver of product approval or authorization on the part of the fund company. According to Art. 118*a* let. c D-CISA, an L-QIF needs neither approval nor authorization. Consequently, Art. 15 para. 3 D-CISA provides for an exemption from the obligation to obtain approval of the fund documents of the L-QIF and any amendments thereto. The same applies to the authorization requirement for the SICAV and the LP, in respect of which Art. 13 para. 2^{bis} D-CISA now provides for an exception for L-QIFs.

In order to ensure a similar level of transparency for L-QIFs, Art. 118*f* D-CISA requires the institution entrusted with the management of the L-QIF to notify the FDF of the assumption or abandonment of the management of an L-QIF. The FDF will maintain a publicly accessible directory of all L-QIFs and the institutions responsible for their management.

b) Change of status

It is also possible for a collective investment scheme designed as an L-QIF to obtain FINMA approval at a later date (opting-up). This seems to be in fact an interesting option in cases where qualified investors would like to invest and set up a fund quickly but are considering opening the fund for other investors at a later stage. With the L-QIF the fund could be launched relatively quickly. Once the fund is up and running, and has achieved a certain track record, the approval process would be potentially swifter, as many questions in the course of the approval process could be answered with practical experience. As the initial investors are already invested in the fund, there is also no time pressure regarding the approval process. However, in order to obtain FINMA approval, an L-QIF must comply fully with the regulation for approved collective investment schemes according to CISA, including the more restrictive investment regulations.

On the other hand, it is also possible that a collective investment scheme that already has a FINMA license or approval may wish to become an L-QIF (opting-down). Art. 118*b* D-CISA provides for this possibility. In addition to compliance with the regulations concerning the limited circle of investors (Art. 118*a* para. 1 let. a D-CISA) and the specific administrative provisions for the L-QIF (Art. 118*a* para. 1 let. B D-CISA), the return of the FINMA approval or license is only permissible if it is ensured that the interests of existing investors are safeguarded. Further details on the question can be expected from the Federal Council on the basis of its power to issue ordinances in Art. 118*b* para. 2 D-CISA.

7) Conclusion

The L-QIF project gained momentum very quickly by Swiss standards and is an outstanding example of measured and purposeful deregulation. The concrete configuration of the draft law is well balanced, even if there is still some room for improvement here and there from the perspective of the financial industry, for example with regard to redelegation by single-investor funds. The draft will enable the Swiss fund and asset management industry to offer its clients increasingly competitive Swiss fund products. This will hopefully also have an impact on the range of innovative fund solutions on offer, e.g. in the areas of sustainability and fintech. This would also be an opportunity for the Swiss financial sector to position itself as a pioneer.

The flexible and liberal design of the L-QIF does indeed hold great potential in practice. However, it is also clear that the L-QIF will remain a collective investment scheme under the CISA. On the one hand, this fact sets certain limits to the flexibility of the design. On the other, it also offers advantages, especially with regard to tax treatment.

Finally, while its potential should not be overestimated, especially because of the limited possibilities for its use at international level and the unfavorable Swiss withholding tax, the L-QIF offers a great opportunity for the Swiss fund and asset management industry, and in particular for professional investors in Switzerland.

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The content of this article is the personal opinion of the author. This opinion is not necessarily identical to the position of the Asset Management Association Switzerland.

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EU Capital Markets Recovery Package: Meeting the Economic Challenges of the "COVID-19 pandemic"?

Reference: CapLaw-2020-74

As part of its overall strategy to repair the immediate economic damage triggered by the COVID-19 pandemic, the EU is about to adopt a "Capital Markets Recovery Package". The aim of the reform is to implement targeted amendments to existing EU capital market rules in order to promote market-based finance as one of the core pillars of the EU's coronavirus recovery strategy. This article sheds light on the key elements of the proposed reforms and assesses whether these regulatory adjustments may also help to finally advance the highly ambitious EU Capital Markets Union project.

By Franca Contratto

1) Background and Overview

In the wake of the outbreak of the COVID-19 pandemic the European Union is facing a drastic decline in economic growth. While major member states, such as Spain, the United Kingdom, Italy and France are among the worst affected economies (estimated declines in GDP vary between 9.4% and 12.4%), the EU's cumulated economic performance is expected to shrink by 7.4% in 2020.

The EU has developed a broad strategy to mitigate the negative economic impact of the coronavirus pandemic. It comprises, among others, a EUR 1.8 trillion "Stimulus Package", a "Banking Package" which intends to facilitate bank lending to households and businesses as well as a "Capital Markets Recovery Package". While earlier efforts to create a pan-European Capital Markets Union (CMU) have so far borne little fruit, European policymakers now seem united in their conviction that well-integrated, deep capital markets will have a key role to play in financing the post-pandemic recovery. Whereas public companies across the EU anxiously seek to be recapitalized, thousands of small and medium-sized enterprises require bank loans at an unprecedented level.

Against this background, the Commission has proposed targeted amendments to the Prospectus Regulation (EU-Regulation No. 2017/1129, PR), the Markets in Financial Instruments Directive (EU-Directive No. 2014/65/EU, MiFID II), the Securitization Regulation (EU-Regulation No. 2017/2402, SR) and the Capital Requirements Regulation (EU-Regulation No. 575/2013, CRR). The goal of the reform is threefold: The Recovery Package seeks to (1) facilitate investments in the real economy, (2) allow for a rapid re-capitalization of public companies listed in the EU, and (3) to enhance banks' lending capacity, primarily to ensure funding for small and midcap enterprises. In their entirety, these erratic pieces of a "regulatory jigsaw" seek to ensure that the EU will meet the extremely pressing challenge to secure funding for the post-crisis recovery and to re-establish long-term growth potential within Europe.

2) Contents of the "Capital Markets Recovery Package"

a) Introduction of a new short-form "EU Recovery Prospectus"

One of the key goals of the Commissions' recovery package is to facilitate a rapid and easy re-capitalization for European issuers who have been heavily affected by the economic shock of the COVID-19 crisis. The Commission therefore proposes to introduce a new "EU Recovery Prospectus" which shall help issuers to reduce their debt-to-equity ratios by means of a simplified and cost-effective procedure. In the words of the Commission, the new disclosure instrument shall be "easy to produce for companies, easy to read for investors, and easy to scrutinize for national competent authorities". To meet these goals, the "EU Recovery Prospectus" will be a stand-alone document limited to 30 pages which focuses on essential investor information, such as, e.g. risk factors. An amendment to the Transparency Directive (EU-Directive No. 2013/50, TD) proposed by the European Council would further allow member states to postpone the introduction of the new European Single Electronic reporting Format (ESEF) for issuers' financial reports by one year.

However, according to the intentions of the EU Commission and the European Council, the EU Recovery Prospectus should have a strictly limited scope: It will only be available for well-seasoned issuers that have been listed for no less than 18 months and who seek to increase equity by issuing shares. The European Council has further highlighted the importance of restricting the simplified procedure to economically "meaningful capital increases"; it therefore proposes to limit the EU Recovery Prospectus to offers which are equivalent to no more than 90% of the outstanding capital thereby avoiding highly dilutive issuances. The simplified disclosure regime is meant to be temporary and designed to expire 18 months after the date of application of the Regulation.

In turns, the EU passport mechanism will fully apply to the EU Recovery Prospectus so as to encourage investments from all over Europe and thereby contributing to an even stronger, pan-European integration of national capital markets.

b) Light-touch Adjustments to the MiFID II-Regime

The Commission has further proposed a series of targeted amendments to EU-Directive No. 2014/65/EU (MiFID II). The key proposals can be characterized as follows:

- ***Phasing-out of paper-based disclosure***: Currently, the default method for disclosure and client-related communications as provided for under MiFID II investor protection standards is paper based. To alleviate the regulatory burden on securities firms the Commission proposes to phase out paper-based communication, unless retail clients have explicitly requested so.

- ***Exemptions to product governance for non-complex investments***: Financial services relating to non-complex ("plain vanilla") bonds shall be exempted from product governance-related requirements as provided for in Article 24(2) MiFID II. The exemption applies no matter whether vanilla bonds are sold only to professional investors or also distributed to retail clients.

- ***Alleviations on reporting duties***: The Commission proposes to eliminate or reduce certain reporting duties in order to ensure that market participants remain efficient and competitive despite the challenging environment of the economic downturn caused by the pandemic. The proposed alleviations include a suspension of best execution reports to be published by trading venues and systematic internalizers as provided for in Article 27(3) MiFID II ("RTS 27") until 2022.

- ***Changes to derivatives rules regarding commodity underlyings***: Risk reducing transactions in energy derivatives (oil, coal, natural gas and power) may play a key role to shield the real economy from high volatilities in energy prices due to the coronavirus crisis. To allow effective use of risk reducing transactions the Commission proposes changes to the position limit regime and targeted hedging exemptions.

Overall, the Commission has proved to be rather wise not to trade away established investor protection measures provided for in the MiFID II-framework. Political support from the European Council and the European Parliament will only be guaranteed if the proposed alleviations of the regulatory scheme do not considerably weaken protection for lesser-experienced investors and retail clients.

c) Enlarged Scope of the Simplified Securitization Framework ("STS"-Regime)

Another component of the planned EU capital markets recovery package targets the EU Simple Transparent Securitization Regime (EU-Regulation No. 2017/2402). Adopted with the goal to simplify and standardize the rules applicable to securitizations, the so-called "STS-Regime" has only just come into force on 1 January 2019. While much effort had been put into drafting a well-balanced set of market-friendly rules, recent figures speak a disappointingly clear language: As shown in a recent report of the European Financial Markets Association securitization volumes have seen a steady and sharp decline from a market high of EUR 182.5bn in 2018 to as low as EUR 28.7bn in mid-2020 (cf. AFME press release, European capital markets performance in 2020, 28 October 2020). Up until now the STS-Regime has apparently not proven the success hoped for.

Nonetheless, the European Commissions is convinced that securitizations will play a key role to increase banks' lending capacities and thereby safeguard funding for SMEs who had been hit hard by the COVID-19 crisis. The Commission has, therefore, drafted significant amendments to the STS-Regime in order to incentivize the use of securitization as an effective tool to move risk off banks' balance sheets. The proposed changes to Regulation No. 2017/2402 can be summarized as follows:

- ***Extension of the STS-Regime to on-balance sheet synthetic securitizations***: Provided that certain criteria are met, banks using on-balance sheet synthetic securitizations should in the future profit from the STS-Regime. In contrast to true-sale securitizations where assets (e.g. mortgages, bank loans etc.) are sold to a Securitization Special Purpose Entity (SSPE) and transformed into tradeable securities, banks originating on-balance sheet synthetic securitization continue to own the underlying exposures. However, so-called arbitrage synthetic securitizations, which fueled the outbreak of the 2007/08 financial crisis, will not qualify to profit from the simplified STS-Regime.

- ***Removal of regulatory obstacles to allow for the securitization of non-performing exposures (NPEs)***: As a result to the economic downturn caused by the COVID-19 crisis, the volumes of non-performing bank loans are expected to grow considerably. The current STS-framework adopted by Regulation No. 2017/2024 was not designed to allow for NPE securitizations. The reform therefore seeks to remove specific regulatory obstacles so as to allow banks to offload non-performing exposures in an effective and transparent way.

To avoid greater risks for investors or for financial stability and to maintain the credibility of the securitization market, high prudential standards will have to be observed: Whereas Regulation No. 2017/2024 already provides for extensive disclosure requirements and for a prohibition to sell securitized instruments to retail investors, targeted amendments of the Capital Requirements Regulation No. 575/2013 will introduce specific capital requirements for synthetic excess spreads (SES). Supervisory authorities may impose comprehensive and severe sanctions in case of wrongdoing by any party involved in the securitization process. Originators who fail to comply with the relevant provisions of the STS regime risk a considerable monetary sanction (minimum of EUR 5 Mio./maximum 10% of the annual turnover); they may also be banned temporarily from issuing STS-securities and their products will be removed from the website listing STS-investments. Member states are free to introduce criminal charges.

3) Conclusion & Outlook

For decades, European economies have been predominantly bank-based. Despite ongoing efforts to establish a strong, fully-integrated European Capital Markets Union, statistics for 2019 confirm the persistent weakness of EU capital markets by showing that as little as 12% of European companies' funding was raised on capital markets whereas the lion's share (88%) is still being secured by bank loans (AFME press release, Capital markets union needs bolder action to tackle remaining obstacles, 12 October 2019).

However dramatic the consequences of the COVID-19 pandemic may be, there is a glimmer of hope that the crisis will also bring something good: The current policy proposals give reason to believe that the coronavirus crisis can act as a wake-up call to finally abandon the dangerously one-sided dependence on bank-based finance in Europe. Provided that EU policymakers take fast forward steps to readjust the current regulatory framework EU capital markets may deploy a considerable growth potential in the shadow of the crisis and thereby contribute to the creation of a more robust and resilient post-pandemic European economy.

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Onex Sell-Down of SIG Shares

Reference: CapLaw-2020-75

On 1 December 2020 SIG Combibloc announced that Onex Corporation and its affiliates have sold their remaining stake of 32 million shares in SIG representing approx. 10.1% of SIG's share capital. Following the settlement of the transaction, Onex will cease to be a shareholder of SIG.

LafargeHolcim Issuance of EUR 850 Million Sustainability-Linked Notes

Reference: CapLaw-2020-76

Holcim Finance (Luxembourg) S.A. successfully completed the issuance of EUR 850,000,000 0.500 per cent. Sustainability-Linked Notes due 2031. The Notes are guaranteed by LafargeHolcim Ltd, the holding company of the LafargeHolcim group. The Notes are the first sustainability-linked notes in the building materials industry aligned to the Sustainability-Linked Bond Principles 2020 published by the International Capital Markets Association, with investors entitled to a higher coupon should LafargeHolcim not achieve its sustainability performance target.

Valora Share Placement

Reference: CapLaw-2020-77

On 16 November 2020 Valora Holding AG successfully completed the private placement of 400,000 newly registered shares sourced from existing authorized capital and 40,000 treasury shares by way of an accelerated bookbuilding. Credit Suisse and UBS acted as Joint Bookrunners.

UBS Issuance of EUR 1.5 Billion Notes

Reference: CapLaw-2020-78

On 5 November 2020, UBS Group AG successfully completed its issuance of EUR 1.5 billion in aggregate principal amount of Fixed Rate/Fixed Rate Callable Senior Notes due November 2028 under its Senior Debt Programme. The Notes are bail-inable (TLAC) bonds that are eligible to count towards UBS's Swiss gone concern requirement.

Credit Suisse Group Issuer Substitution under Bail-In Bonds

Reference: CapLaw-2020-79

Credit Suisse Group AG was successfully substituted for Credit Suisse Group Funding (Guernsey) Limited as issuer under seven different series of outstanding bail-in bonds issued by Credit Suisse Group Funding (Guernsey) Limited and with an aggregate principal amount of approximately USD 10.4 billion. In connection with this issuer substitution, all rights and obligations of Credit Suisse Group Funding (Guernsey) Limited under the notes, as well as under the related internal loan agreements pursuant to which the net proceeds received from the issuance of the Notes were onlent to subsidiaries of Credit Suisse Group AG were transferred to Credit Suisse Group AG.

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