

Position Paper

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Re Public Securities Offerings in Switzerland by Non-Swiss Issuers

International Offerings of Equity Securities in Switzerland by non-Swiss Issuers – Swiss Prospectus Requirements

A. Scope

This position paper addresses the requirements of Swiss law relating to the documentation of public offerings of shares by non-Swiss issuers in Switzerland. In particular, we discuss the question of to what extent a non-Swiss issuer of shares is required to observe the Swiss statutory requirements relating to the contents of an offering prospectus.

This position paper and the views expressed herein do not constitute legal advice in relation to individual transactions and may not be relied upon or used as a substitute for legal advice taken in the individual case.

For purposes of this position paper, we have assumed the following:

- a) A non-Swiss company (the **Issuer**) makes a public offering of shares¹ (the **Offering**) to its existing shareholders;
- b) the Offering will be based on an offering prospectus that complies with the prospectus requirements applicable in the European Union or the United States of America; and
- c) the existing shares of the Issuer are not listed on a Swiss stock exchange, in particular not on SIX Swiss Exchange, and no listing in Switzerland is

¹ This position paper does not deal with the public offering of debt instruments, any derivatives or units in collective investment schemes. Under Swiss law, the offering of certain equity securities of issuers such as, for example, foreign companies whose purpose is collective capital investment, could be characterized as an offering of units in collective investment schemes. Therefore, it is recommended to seek independent Swiss law advice in each individual transaction involving the offering of shares.

sought with respect to the shares to be issued in connection with the Offering.

B. Legal Analysis

1. Rules of Swiss law on Securities Prospectuses

If an equity offering is made without a concurrent listing in Switzerland, the information documents disseminated in connection with the Offering are not subject to filing with or approval by any Swiss regulatory or self-regulatory authority: in Switzerland, unlike many other jurisdictions, shares can be offered to the public on the basis of a prospectus that has never been vetted by a local regulator.

Public offerings of new shares by Swiss companies are, however, subject to certain prospectus requirements set out in the Swiss Code of Obligations². In particular, the prospectus must disclose the following:

- the contents of the issuer's entry in the commercial register;
- the amount and structure of the issuer's share capital;
- the most recent audited statutory (holding company only) and consolidated financial statements of the issuer. In addition, if the prospectus is published more than nine months after the end of the balance sheet date, unaudited statutory and consolidated interim financial statements must also be included;
- the issuer's dividend history for the past five years preceding the date of issuance of the new shares; and
- the issuer's resolution regarding the issuance of the new shares.

In relation to international offerings, i.e., offerings of non-Swiss issuers, the Swiss prospectus requirements must be put into perspective in two respects: First, the prospectus requirements do not apply in cases of non-public offerings, i.e., private placements. Second, the Swiss prospectus disclosure requirements have been designed for equity offerings by Swiss corporations.³ This raises the question of whether the Swiss prospectus requirements are applicable also to non-Swiss issuers making an Offering in Switzerland.

² Art. 652a of the Swiss Code of Obligations.

³ For example, the reference to the commercial register (*Handelsregister*), a public trade register for Swiss business associations, only makes sense for Swiss companies.

No reported case decided whether a foreign issuer must comply with Swiss law prospectus requirements when issuing shares in Switzerland. Learned writing is divided:

- Some authors hold that the reference to Swiss prospectus liability provisions in the rules governing the conflict of laws do not extend their effect to a statutory provision in Swiss company law on prospectus requirements which was drafted solely for Swiss companies. Following this analysis, Swiss prospectus requirements would not apply at all to international share offerings of non-Swiss issuers. Two decisions of the Swiss Federal Tribunal regarding bond issues support this approach: they held that Art. 752 CO only applies to Swiss companies and not to foreign issuers. The Swiss Federal Tribunal, however, held that another provision regarding prospectus liability specifically addressing bond issues was applicable.
- Other authors highlight the risk that a Swiss court could apply Swiss prospectus requirements to non-Swiss issuers as well. Broadly, their reasoning is as follows:
 - Under Swiss law rules on the conflict of laws⁴, an investor who has suffered damage in a public offering of bonds or shares may choose to base its claim on either Swiss law or on the law of the place of incorporation of the issuer.
 - If Swiss law applies, the relevant statutory rules sanction, among other things, a prospectus that has not been prepared in compliance with the Swiss statutory requirements.
 - Accordingly, if an issuer fails to observe the Swiss statutory requirements discussed above, it may be subject to the Swiss liability regime.

As noted, the question is not resolved by the courts.

2. Consequences of Non-Compliance with Swiss Statutory Prospectus Requirements

Non-compliance with Swiss statutory prospectus requirements in an offering prospectus for a public equity offering in Switzerland is enforced under Swiss law through civil prospectus liability. However, a respective claim could be successful

⁴ Art. 156 of the Swiss Federal Act on Private International Law.

only if, *inter alia*, the plaintiff could establish causation. In other words, the plaintiff must show that the failure to provide certain information in the prospectus was an actual and adequate cause of the damage she has suffered. For example, if a prospectus does not record the dividend history of an issuer for the last five years, an investor may only successfully recover damages from the Issuer or anyone who participated in the Offering if she can prove:

- that she would not have bought the shares, or would have bought them at a different price, if she had known of the information in question; and
- that the failure to provide the information caused the damage in question.

If the failure to publish certain information does not constitute cause for the damage in question, there is no cause of action for prospectus liability.

3. Impact of Swiss Prospectus Requirements on International Offerings

If a non-Swiss Issuer undertakes an Offering that is also directed to, or open to, the Swiss market, such issuer typically will have prepared a comprehensive information document under the laws of its place of incorporation or the laws of its place of listing. We understand that in the member states of the European Union and the United States of America, the requirements for the contents of a prospectus go beyond the statutory requirements of Swiss law discussed above and, consequently, that information relating to the Issuer and the Offering will generally be much more comprehensive than any investor could expect solely on the basis of Swiss statutory rules.⁵

However, as a matter of practice certain information required to be disclosed under Swiss statutory law is often missing from an international prospectus. This is frequently the case in respect of:

- the five-year dividend history;
- contributions in kind; and
- the statutory (holding company only) financial statements.

As stated above, it is uncertain whether Swiss law requires a non-Swiss Issuer to disclose such information items in an offering prospectus. Moreover, even if one takes the view that Swiss law requires the disclosure of such information in case

⁵ The situation may be different if, pursuant to local laws no prospectus at all or just in a very brief disclosure document is prepared in relation to a public offering of new shares.

of an Offering by a non-Swiss Issuer, Swiss prospectus liability would only arise if (i) the relevant information was missing, (ii) the plaintiff could, *inter alia*, show that the failure to provide such information had an impact on his or her investment decision, and (iii) the plaintiff could show that the failure to provide the information was the actual and adequate cause of the damage suffered. This will, in our view, typically not be the case – even more so since we understand that under the applicable rules in the EEA and in the United States of America, the prospectus must contain *all* information allowing the investor to take an informed investment decision, so that any relevant information should in any event be directly or indirectly included in the prospectus.

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