The International Capital Markets Review

Third Edition

Editor
Jeffrey Golden

Law Business Research

The International Capital Markets Review

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For further information please email
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Third Edition

Editor
Jeffrey Golden

Law Business Research Ltd

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Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing, Felicity Bown

PUBLISHING ASSISTANT
Lucy Brewer

MARKETING ASSISTANT
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EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2013

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and 'cherry-pick' best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding $700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than $180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to

facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011

Chapter 26

SWITZERLAND

Thomas Bähler and Anna-Antonina Gottret[1]

I INTRODUCTION

Switzerland is a member country of neither the European Union nor the European Economic Area (EEA). Therefore, as it is not bound by EU capital markets legislation Switzerland is left with a certain autonomy to regulate its capital market as it deems fit. However, Swiss regulators often try to find a common platform with foreign regulators, in particular with those of the EU, to ensure and consolidate mutual access to their respective markets. Consequently, Switzerland has to adapt its capital market legislation to the EU standards. The most recent example in this regard has been an implementation of the Directive on Alternative Investment Fund Managers (AIFMD) this year. On 3 December 2012, the European Securities and Markets Authority (ESMA) approved a cooperation arrangement between the Swiss Financial Market Supervisory Authority (FINMA) and other regulators in the EU Member States for the supervision of Swiss-managed alternative investment funds, including hedge funds, venture capital funds, private equity funds and real estate funds. The resulting memorandum of understanding (MoU)[2] took effect on 21 July 2013 is the first such cooperation arrangement with a non-EU state and it permits Swiss alternative investment funds to access the EU Market.

1 Thomas Bähler is a partner and Anna-Antonina Gottret an associate at Kellerhals Attorneys at Law. The authors would like to thank Karim Maizar, an associate at Kellerhals, for his invaluable contributions.

2 MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities; www.esma.europa.eu/system/files/mou_with_finma_switzerland.pdf.

i Legal framework

Currently, there is no comprehensive federal act that regulates the Swiss capital market as a whole. In Switzerland, the regulation of such subjects as securities dealing, investment funds, banking and insurance have been regulated separately. As a result, standards of supervision and investor protection vary considerably depending on the applicable regulatory framework. The most important pieces of legislation are as follows:

a the Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority (FINMASA);
b the Federal Act of 24 March 1995 on Stock Exchanges and Securities Trading (the Stock Exchange Act, SESTA);
c the Federal Ordinance of 2 December 1996 on Stock Exchanges and Securities Trading;
d the Ordinance of 25 October 2008 of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading;
e the Federal Act of 8 November 1934 on Banks and Savings Banks;
f the Federal Ordinance of 17 May 1972 on Banks and Savings Banks;
g the Ordinance of 30 June 2005 of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Banks and Securities Dealers;
h the Federal Act of 23 June 2006 on Collective Investment Schemes (the Collective Investment Schemes Act, CISA);
i the Federal Ordinance of 22 November 2006 on Collective Investment Schemes;
j the Federal Ordinance of 21 August 2008 of the Takeover Board on Public Takeover Offers;
k Regulations of the Takeover Board of 21 August 2008; and
l the Federal Code of Obligations of 30 March 1911 (CO), governing the issuing of equity and debt securities.

Moreover, in Switzerland, there are three major regulated exchanges: first of all the SIX (the principal trading platform in Switzerland for equity and debt securities), second, EUREX (the automated trading platform for standardised derivative instruments) and finally Scoach (the trading platform for structured products). The listing of securities at the main Swiss exchange, the SIX Swiss Exchange (the SIX), is governed by the SIX listing rules (the SIX LR).

ii The Financial Market Supervisory Authority (FINMA)

Regulatory supervision in Switzerland is undertaken by the Swiss Financial Market Supervisory Authority (FINMA), which is the regulatory body established in 2007 by law and governed by the FINMASA. This merged the Federal Office of Private Insurance (FOPI), the Swiss Federal Banking Commission (EBK) and the Anti-Money Laundering Control Authority into one agency responsible for all financial regulation in Switzerland. This includes the supervision of banks, insurance companies, stock exchanges, collective investment schemes and securities dealers, as well as other financial intermediaries in Switzerland. They all require an operating licence issued by FINMA. There is, however, no regulatory authority for public offerings of securities (other than collective investment schemes) in Switzerland.

Through its supervisory activities, it ensures that supervised institutions comply with the requisite laws, ordinances, directives and regulations, and continue at all times to fulfil the licensing requirements.[3] FINMA may also impose sanctions. Generally, FINMA decisions may be challenged at the Swiss Federal Administrative Court, the decisions of which may be appealed at the Swiss Federal Supreme Court.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Revision of CISA

On 13 February 2013 the Federal Council resolved to bring into force the revised Collective Investment Schemes Act (CISA) and its implementing Ordinance (CISO) as per 1 March 2013. The revision of the CISA was initiated by the Federal Council in 2011. It aims to close regulatory gaps and to harmonise Swiss law with international standards. In particular, Swiss regulation needed to be compatible with the Directive on Alternative Investment Fund Managers (AIFMD) to maintain European market access for Swiss investment fund managers and products to the extent permissible under the directive.[4]

Management of collective investment schemes

The revised CISA demands that all managers of collective investment schemes, Swiss and foreign, are licensed by FINMA unless they qualify for a specific exemption (Article 2/1a and c CISA). According to previous law, only managers of Swiss collective investment schemes were required to be licensed by FINMA, and managers of foreign investment funds could under certain restrictive conditions voluntarily submit to FINMA supervision. Asset managers who manage an amount of assets below an established threshold for collective investment schemes distributed exclusively to qualified investors are exempted. Those exempted may nonetheless voluntarily ask to be subject to CISA if this is required by the law of the country in which the collective investment scheme they manage is constituted. This new regulatory condition is clear, transparent and compatible with international standards. Another new aspect of the CISA reform is the right afforded to foreign asset managers to seek authorisation in Switzerland for their Swiss branch. This right, which goes far beyond international standards, makes FINMA's supervisory activity more difficult and could result in a lesser degree of protection for the investors concerned. The impact of this new measure on the improvement of the quality of asset management, one of the principal objectives of the CISA reform, is still to be seen.[5]

3 See FINMA, Annual Report 2012, S. 32; www.finma.ch/e/finma/publikationen/Documents/jahresbericht-2012-e.pdf.

4 Koller Christian, Revision of the Swiss Collective Investment Schemes Act – Consequences for Managers of Foreign Investment Funds, CapLaw 2/2013, S. 18ff.

5 See FINMA, Annual Report 2012, S. 32; www.finma.ch/e/finma/publikationen/Documents/jahresbericht-2012-e.pdf.

Custody of the assets of collective investment schemes
According to the revised CISA, custodian banks may only delegate the custody of the assets of a collective investment scheme to regulated and supervised third-party custodians and central securities depositories. This obligation does not apply to cases where mandatory custody of certain financial instruments in a particular location is imposed by local legal requirements or the very terms of the instruments, rendering such regulated and supervised custody unachievable. The liability regime of a custodian bank in delegating custody has also been reinforced. The custodian bank is now considered to be liable for any damages caused by its delegate unless it is proved to have taken due care in selecting, instructing and monitoring its delegate. As a result of this new regime, the protection afforded to investors with respect to custody is increased.[6]

Distribution of collective investment schemes
Public investors can also benefit from greater protection in the field of fund distribution. All licence holders and third parties involved in distribution can be required to keep written records, and be subject to new obligations regarding transparency, especially with respect to fees. While the conditions for the distribution of foreign funds to public investors remain unchanged (i.e., a representative and paying agent must still be appointed and FINMA must still approve the product), CISA now requires the representatives and paying agents to obtain FINMA's approval before being allowed to terminate their mandate. Thus, representatives or paying agents cannot simply terminate their mandate upon learning of a foreign fund's particular difficulties. FINMA can allow investors to keep a point of contact in Switzerland. In addition, FINMA must now also conclude cooperation agreements with all the foreign supervisory authorities concerned with the funds being distributed, which will enable it to monitor distribution more efficiently. Regarding the distribution of foreign funds to qualified investors, CISA now requires a representative to be appointed as a point of contact for investors in Switzerland.[7]

Revision of SESTA
On September 2012, the Swiss Parliament adopted a new law amending the Federal Act on Stock Exchanges and Securities Trading (SESTA). Subsequently, the Swiss government revised the Stock Exchange and Securities Trading Ordinance (SESTO). Both SESTA and SESTO came into force on 1 May 2013. The purpose of the revision is to align Swiss insider-trading rules in accordance with existing rules in the EU, with the aim of strengthening the integrity and the competitiveness of Switzerland's financial market. The SESTA revision extends essentially to the following issues:

a the criminal offences of the use of insider information and market manipulation have been extended and transferred from the Swiss Penal Code to the Stock Exchange Act. In particular, prohibition of insider trading and market price manipulation is now for all market participants;

6 Ibid.

7 Ibid.

b prosecution is carried out at federal level (federal prosecutor and Federal Tribunal). In particular, FINMA has received wide ranging powers for regulatory sanctioning of improper market conduct by both regulated and non-regulated persons.

Insider information and market manipulation

According to the old regime, insider trading was considered to be an offence that can only be committed by the types of persons expressly mentioned in Article 161 of Swiss Criminal Code of 21 December 1937 (SCC), who have access to material, non-public information because of a privileged position, such as directors or managers, auditors or agents of the company, members of a government agency or public servants, whereas employees without direct contact with the decision-makers of a company, shareholders or persons who incidentally become aware of confidential information are not covered by this provision. Such a narrow definition was seriously criticised for not protecting sufficiently the functionality of the financial market and the equal treatment of the investors.

To improve this situation and to align Swiss law with the law of most EU Member States, the definition of insiders was extended. The revised insider-trading rules provide for a broader definition of insider and distinguish between three types of insiders:

a primary insiders: members of the executive management and an oversight body (e.g., the board of directors). A primary insider is sanctioned with imprisonment of up to three or, if qualified, five years, or with a fine (Article 40(1) and (2) SESTA);

b secondary insiders: persons who obtain inside information from a primary insider (such as a journalist who receives confidential information in advance) or, under the new rules, persons who obtain inside information through the commission of a felony or a misdemeanour. A secondary insider is sanctioned with imprisonment of up to one year or with a fine (Article 40(3) SESTA); and

c accidental insider: a person who accidentally receives inside information is sanctioned with a fine (Article 40(4) SESTA). Under the old regime they were not subject to criminal sanctions.

For the same reasons that insider trading is treated as a crime, so too is price manipulation following the revision and it can, thus, serve as a predicate offence to money laundering if the offender realises a financial profit of more than 1 million Swiss francs (Article 40a(2) SESTA). The newly created regulatory provision of Article 33f SESTA punishes not only simulated transactions (as Article 161-bis SCC currently does), but also sanctions manipulative real transactions such as ramping, camping or pegging, or squeezing or cornering, spoofing, and front- and parallel running, as well as scalping. Article 33f SESTA applies now to all market participants and does not require the element of financial profit.

Financial market supervision and a bigger role for FINMA

The revised SESTA also introduced a new administrative regime regarding insider trading and prohibition of market manipulation applicable to all market participants. FINMA now has the authority to enforce compliance (Article 33e SESTA). Under the new law, FINMA is able to sanction market participants for insider dealings.

In case of violations of the regulatory prohibition of insider trading, FINMA has at its disposal various catalogues of sanctions, depending on whether a FINMA-supervised person or a non-supervised person is concerned:

a in case of supervised persons, FINMA can impose different measures in accordance with the FINMASA, such as a ban on professional practice, revocation of permits, publication of rulings and disgorgement of profit. FINMA may also impose a temporary or permanent ban on performing securities trading activities according to Article 35a SESTA; and

b for non-supervised persons, FINMA may impose a duty of disclosure, a publication of decisions and the disgorgement of profit, or it may issue declaratory orders (Article 34 SESTA in conjunction with Article 29 et seq. FINMASA).

Sanctioning and responsible authorities

The cantons are no longer responsible for criminal assessment and sanctioning of insider violations. Now those tasks belong to the federal authorities (the Office of the Attorney General of Switzerland and the Federal Criminal Court). FINMA remains responsible in the field of supervision. In cases where FINMA (supervisory proceedings) and the Office of the Attorney General of Switzerland (criminal investigations) initiate proceedings at the same time, particular heed needs to be paid to the coordination of such proceedings. FINMA and the Office of the Attorney General are required and empowered to coordinate such proceedings (Article 38 Paragraph 2 FINMASA).

Revision of Circular 08/38

At the end of March 2013, FINMA opened a consultation procedure regarding the total revision of the Circular 'Market Conduct Rules'. The consultation for the Circular's draft ran until 13 May 2013. The Circular entered into force on 1 August 2013. This Circular replaced Circular 08/38. The revision of the FINMA Circular includes, along with its adaptation to the new rules of the SESTA and to the SESTO, the following key points:

a clear definition of new federal-level legal principles for market supervision in relation to insider trading and manipulation of the market; and

b more precise statement of the duties of organisations and extension to those subject to prudential supervision. This means, for example, that the organisational obligations set forth in the Circular shall no longer apply exclusively to securities dealers but to all entities subject to prudential supervision, in accordance with their respective specific business activity, size and structure.

The revised Circular clearly defines the prohibition standards. It defines the revised scope of the SESTA and contains a non-exhaustive list including abusive practices. Moreover, the Circular clearly states that not only securities dealing on the Swiss stock exchange is relevant, but also securities dealing in the primary market, on a foreign stock exchange and business activities such as those of the commodities and foreign exchange markets.

The main focus of the revision is on organisational requirements, which are no longer directed exclusively at securities dealers, but also at all institutions under prudential supervision. The requirements are not the same for every institution, however, and are applied on an individual basis, depending on business activities, size, etc. The

organisational measures necessary must be defined according to a risk assessment that is conducted on a regular basis (at least annually).

ii Developments affecting derivatives, securitisations and other structured products

OTC derivatives

In Switzerland there is no mandatory clearing or trade reporting regime in place for OTC derivatives transactions.[8] Switzerland is, however, committed to the implementation of the G20 reforms on OTC derivatives transactions. The Swiss Federal Council decided on 27 August 2012 that the existing Swiss regulation of financial market infrastructure must be amended to comply with the Financial Stability Board (FSB) recommendations and with the new international standards developed for financial market infrastructures. The Federal Department of Finance has been instructed to prepare a draft consultation paper by spring 2013 and aims at coordinating its approach with the EU with a view to adopting a regulation equivalent to the European Markets Infrastructure Regulation (EMIR). In its press release of 29 August 2012, the State Secretariat for International Financial Matters expressly stated that: 'To ensure the competitiveness of Swiss market players and market access in the EU, regulation equivalent to that of the EU is to be sought in [trading and financial market infrastructure reforms]'.[9]

Thus, Switzerland is in the preparation phase of its upcoming reforms and its regulatory framework is still to be defined.

iii Cases and dispute settlement

Groups of companies

The Swiss Federal Supreme Court has ruled on several occasions on the requirements on whether companies are treated as a group in terms of capital market law and financial market supervision.[10] In January 2012, the Swiss Federal Supreme Court was addressed to determine whether certain activities that were rendered by a coordinated group of companies meant they should be treated as a group. According to the court several companies may become subject to regulatory supervision if they act in concert and market themselves as a unified group that performs activities regulated by Swiss law, even if one company – assessed on a stand-alone basis – would not be deemed to render such services. In its consistent ruling the court has provided a list of elements and criteria that help to indicate whether a group of companies is subject to supervision:

a the group appears as a coordinated unit;
b unclear internal organisation and structures;
c no clear separation of the group entities in the books and records;
d complicated group structure;

8 Thomas Werlen und Stefan Sulzer, Update on Over-The-Counter (OTC) Derivatives Legislation in the US, in Switzerland and in the EU; CapLaw 2/2013, S. 27ff.; https://caplaw.swisslex.ch/JournalPortal.mvc/AssetDetail?assetGuid=f9ba1c16-1897-4b48-8dd3-6a6401d57dd4.

9 Report from the Commission to the EU Parliament and the Council from 22 March 2013, P. 5.

10 2C_89/2010 of 10 February 2011 E. 3.1 and 3.2, BGer 137 II 284; BGer 136 II 43 E. 4.3.

e absence of clear legal separation of the group entities; and
f all group entities had their registered domicile at the same address.

Not all of the above-mentioned criteria have to be fulfilled. Additionally, the court held that it is not necessary that participants intentionally circumvent regulatory provisions; the fact that a group as such is engaged (as a group) in activities that are subject to FINMA supervision is sufficient.[11] As a result, group members are subject to supervision and sanctions by FINMA even if individually they do not fulfil all the requirements necessary to be regulated.[12] The Swiss Federal Supreme Court held that a decision to liquidate the group, and the publication of the prohibition on the members of the board and the management from marketing their services for five years, is an adequate sanction.[13]

Intermediated securities

In a recent judgment the Swiss Federal Supreme Court analysed and clarified certain legal points in respect of intermediated securities and confirmed that intermediated securities are transferable personal or corporate rights against an issuer, which are credited to a securities account and which are transferable according to the rules of SESTA (Article 3/1 SESTA); they are assets with their own legal nature (*sui generis*). Ownership with regard to intermediated securities is not the same as ownership with regard to moveables. As a result, any claims by the owner for delivery of intermediated securities are mere contractual claims. The owner does not have the same right to require physical delivery of such assets as would apply to 'real' moveables.[14] Specifically, Article 641 Paragraph 2 of the Swiss Civil Code does not apply to intermediated securities.[15]

Exception from duty to make public tender offer

According to Article 32 Paragraph 1 SESTA, a party acquiring more than one-third of the voting rights of a target company is obliged to make a public tender offer (subject to an opting up or opting out of the target company). However, the Swiss Takeover Board may make exceptions, for instance, if the takeover is a means of financially restructuring the target company.[16] On 2 April 2012, the Swiss Takeover Board granted to five investors individually and as a group an exemption from the obligation to make a public offer in the event that one of the five investors or the five investors as a group exceeded the threshold of 33.33 per cent according to Article 32 Paragraph 1 SESTA. The Swiss Takeover Board argued that investors who are willing to support a company in a crisis must be treated more favourably; acquisitions that are intended to financially restructure a target company have therefore to be facilitated. The term 'financial restructuring' has to be construed in terms of the specific

11 2C 30/2011; BGer 12.1.2012, E.3.1.2.
12 2C 30/2011; BGer 12.1.2012, E.3.1.3.
13 See also Zürcher Wolfgang, *The International Capital Markets Review*, 2nd Edition 2012, p. 254f.
14 4A 155/2011; BGer 10.1.2012; E. 5.2.2.
15 See also Zürcher Wolfgang, *The International Capital Markets Review*, 2nd Edition 2012, p. 256.
16 Article 32/2e SESTA.

business economics. As a result, Article 33 Paragraph 2e SESTA addresses all measures that remedy the financial situation and the earning power of a company. Such measures must be necessary and reasonably adequate to secure the survival of a company, but there can be no guarantee for long-term success. The offeror has to demonstrate that it was under no legal obligation to make such a contribution.[17]

iv Relevant tax and insolvency law

Tax law

Corporate Tax Reform III

Since 2007, Switzerland's privileged taxation of holdings, mixed and domiciliary companies has been under big pressure from the European Union. In 2008 the Swiss Federal Council initiated the Swiss Corporate Tax Reform III, which aimed to improve the tax situation for international groups tax-resident in Switzerland. The federal government proposed to replace the holding, domiciliary and mixed company regime in the next five to seven years with a series of measures. In May 2013, the Swiss federal government published an interim report of the Swiss Corporate Tax Reform III steering committee; however, to date there has been no more development in this direction. Throughout this year, the Swiss government will continue its work on the reform of Swiss tax legislation. At the end of 2013 or in 2014, a formal consultation process will be launched by the Federal Council.[18]

Private letter ruling allows tax free distributions out of capital contribution reserves from Swiss corporations' capital

As of 1 January 2011, Switzerland introduced the 'capital contribution principle' with retrospective effect for contributions made after 1 January 1996. Normally, any dividend distribution other than a redemption of nominal share capital is subject to Swiss withholding tax at the rate of 35 per cent. However, distributions or repayments from capital contribution reserves (CCR) can be made free of Swiss withholding taxes and are tax free for individuals, subject to Swiss income tax. Swiss funds therefore account for CCR distributions either as capital gains, and not dividends (because they are also tax free for individuals) or book them to a separate account (e.g., income from CCR). Non-Swiss funds do not typically account separately for CCR distributions. The Swiss Federal Tax Administration (SFTA), therefore, took the stance that everything accounted for as 'income' is taxable for Swiss fund tax reporting purposes, irrespective of the nature of the income.

However, in a private letter ruling issued in mid February 2013, the SFTA indicated that such income items could be treated as tax-free CCR distributions if:

a these can clearly be identified (i.e., there is an auditable paper trail); and

17 Decision No. 501/01 of 2 April 2012 of the Swiss Takeover Board (N. 4).

18 Rainer Hausmann, Swiss Corporate Tax Reform III, Tax News Ernst & Young June 2013, p. 5; www2.eycom.ch/publications/items/tax_news/201302_taxnews/201302_EY_Tax_News_e.pdf.

b taxable income and tax-free CCR distributions are separately submitted to and published not only with the SFTA (in the official gazette Kursliste), but also with SIX Telekurs.[19]

As a result, depending on their exposure to Swiss corporations as well as the number of Swiss individual investors, funds may wish to consider the implications of the ruling for them, and, if appropriate, to take measures (with their fund administrator, fund tax reporting provider and their Swiss distribution and sales force) to comply with the above requirements.

Insolvency law

On 21 June 2013 the Swiss Parliament amended the Federal Council's proposal on the Swiss Debt Enforcement and Insolvency Law. The amendment aims to facilitate the financial restructuring of companies. The proposal is currently under a referendum deadline, during which time opponents of the measure may collect the number of signatures necessary to require a popular vote on the change of law in this matter. The referendum deadline expires on 10 October 2013.[20]

v Role of exchanges, central counterparties (CCPs) and rating agencies

Rating agencies

FINMA Circular 12/1 on Credit Rating Agencies, which replaced Circular 08/26, entered into force on 1 January 2012. Circular 12/1 is directed at all institutions supervised by FINMA that use credit ratings and governs the recognition of institutions that can issue credit ratings for regulatory use. The fully revised circular redefines FINMA's requirements for credit rating agencies in various supervisory areas, and standardises conditions for recognition.

Besides governing the regulatory use of ratings by banks and securities dealers, particularly when calculating required equity capital, this circular also redefines their use by insurance companies (e.g., investment requirements for tied assets) and by collective investment funds (investment techniques and derivatives). Other changes to FINMA Circular 08/26 are based on current guidelines for international standards and take into account the Swiss market environment. The requirements on credit rating agencies specified in the circular are intended to provide minimum qualitative rating standards.[21]

vi Other strategic considerations

Banking regulation

On 1 June 2012 the Federal Council adopted a package of measures designed to strengthen Switzerland's position as a banking centre. As a result of the total revision of the Capital Adequacy Ordinance, the new rules (Basel III) of the Basel Committee on

19 Rolf Geier, European fund tax reporting: Switzerland, Tax News Ernst & Young June 2013, p. 6; www2.eycom.ch/publications/items/tax_news/201302_taxnews/201302_ey_tax_news_e.pdf.

20 www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20100077.

21 See FINMA, www.finma.ch/e/aktuell/pages/mm-rs-ratingagenturen-20110825.aspx.

Banking Supervision came into force on 1 January 2013. The Basel III reforms introduced a simple, transparent, non-risk based leverage ratio to act as a credible supplementary measure to the risk-based capital requirements.[22] The Federal Council has granted the Swiss banks an implementation period extending to the end of 2018.

III OUTLOOK AND CONCLUSIONS

In Switzerland, the regulation of such businesses as securities dealing, investment funds, banking and insurance has not yet been brought together under one roof, as has been the case in other European countries, including the Scandinavian countries, Luxembourg and the United Kingdom. As a result, standards of supervision and investor protection vary considerably depending on the applicable regulatory framework.

As a non EU-country in the middle of the EU, Switzerland keeps on adapting its legislation to the EU capital markets provisions and often tries to find a common platform with foreign regulators. The effects on the Swiss capital market of the most recent of these changes, presented in this chapter, will be seen in the very near future.

22 See also Zürcher Wolfgang, *The International Capital Markets Review*, 2nd Edition 2012, p. 256.

Appendix 1

ABOUT THE AUTHORS

THOMAS BÄHLER

Kellerhals Attorneys at Law

Dr Thomas Bähler is a partner at Kellerhals Attorneys at Law, one of Switzerland's leading full-service law firms. His practice focuses mainly on national and international corporate, commercial and contract law. Dr Bähler has extensive experience in representing clients in all matters of capital market law, and he advises various SIX-listed companies on SIX matters. His areas of specialisation are merger and acquisitions, private equity, competition law and intellectual property law, as well as succession planning for entrepreneurs. He not only gives legal advice to corporate clients on drafted national and international commercial contracts, but also represents them in proceedings before courts. Dr Bähler is recognised as one of the most experienced and effective business lawyers in Switzerland, particularly noted for his outstanding work with corporate law and M&A transactions. Given his strong negotiation skills, he achieves the best possible results for his clients. The combination of his academic background and memberships of the boards of listed and non-listed companies means that he is both legally precise and pragmatic. He is, among other things, a co-founder and member of the management board of the Swiss Economic Forum, Switzerland's leading annual meeting of entrepreneurs committed to innovation and excellence in business, and juror for the Swiss Economic Award. He also regularly publishes in academic and business journals in his major fields.

ANNA-ANTONINA GOTTRET

Kellerhals Attorneys at Law

Dr Anna-Antonina Gottret, Dr iur, Attorney at Law, LLM, is an associate at Kellerhals Attorneys at Law, one of Switzerland's leading full-service law firms. Her practice focuses on national and international competition and antitrust law, intellectual property law, corporate law, M&A, capital market law, as well as on general commercial and contract law. She also advises clients on matters of EU law. She specialises in cross-border

transactions involving eastern European countries, especially Poland. She also regularly publishes in academic and business journals in her major fields.

KELLERHALS ATTORNEYS AT LAW
Effingerstraße 1
CH-3001 Berne
Switzerland
Tel: +41 58 200 35 00
Fax: +41 58 200 35 11
thomas.baehler@kellerhals.ch
anna.gottret@kellerhals.ch
www.kellerhals.ch