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THE BOOM OF EXCHANGE TRADED PRODUCTS (ETPS)

Reference: CapLaw-2025-03

ETFs and ETPs have grown to over USD 7 trillion in assets under management (AuM) of which ETPs contributed USD 1 trillion. To reflect on selected key legal aspects which are relevant in the course of this boom the article at hand examines the regulatory framework for ETPs in Switzerland with a focus on structuring as well as listing requirements. It further highlights the role of special purpose vehicles and collateralization including recent developments such as the SIX Digital Collateral Service (DCS) for cryptocurrency collateral.

By Luca Bianchi / Michael Kremer / Donja Gehrig

1) Introduction

Over the last decade, the growth of Exchange Traded Funds (ETFs) and Exchange Traded Products (ETPs) exceeded USD 7 trillion in AuM (cf. EFAMA, *Demystifying ETPs: A simple guide for the European investor*, 1). SIX Swiss Exchange (SIX) has 172 ETP listings and a total of 440 listed crypto products (ETPs and structured products), an all-time high. BX Swiss (BX) has 106 ETPs which are listed and/or admitted to trading. This boom is driven by investor demand which in recent years was particularly high for crypto ETPs.

Against this background, this article provides a brief overview of ETPs and the key regulatory requirements applicable to their structuring and listing in Switzerland.

2) Exchange Traded Products (ETPs)

Under the Additional Rules for the Listing of Exchange Traded Products of SIX (ARETP SIX) and BX (ARETP BX), ETPs are defined as collateralized, non-interest-bearing bearer debt securities which are issued as securities and sold and redeemed continuously in the same structures and denominations (article 3 (2) ARETP SIX; article 1.2 ARETP BX). ETPs track the price movements of an underlying asset, either directly or with leverage (tracker certificate). Issuers seeking to list ETPs on a Swiss stock exchange must adhere to the listing requirements of SIX or BX. Moreover, the production and offer of ETPs must be compliant with the general regulations of the Financial Services Act (FinSA) and, in particular, the specific requirements for structured products outlined in article 70 FinSA and article 96 of the Financial Services Ordinance (FinSO).

Furthermore, ETPs are not to be confused with ETFs. As opposed to ETFs, ETPs do not fall within the scope of the Collective Investment Schemes Act (CISA) in accordance with the „form over substance“ principle applied by the Swiss Financial Market Supervisory Authority (FINMA) when distinguishing structured products from collective investment schemes. ETPs are debt instruments and thus do not qualify as collective investment schemes in Switzerland.

Accordingly, ETPs are not subject to FINMA approval requirements or supervision. Instead, ETPs qualify as structured products pursuant to article 3 (a) (4) of the FinSA.

Given the ETP market's growth and the sheer number of new products, regulatory compliance is essential for many issuers and offerors of ETPs.

3) Structuring of ETPs

a) Regulatory Requirements for Structured Products (Article 70 FinSA)

Under article 70 (1) FinSA, structured products offered in or from Switzerland to retail clients without an ongoing asset management or advisory relationship must be issued, guaranteed, or equivalently secured by a bank, insurance company, securities firm, or foreign institution under equivalent supervision.

Alternatively, a special purpose vehicle (SPV) may issue structured products to retail clients under article 70 (2) FinSA if:

- A **financial intermediary** under the Banking Act (BA), Financial Institutions Act (FinIA) or CISA, an insurance company under the Insurance Supervision Act (ISA) or a foreign institution subject to equivalent supervision offers the products; **and**
- **collateral** is provided corresponding to the requirements of article 70 (1) FinSA.

According to article 96 (2) FinSO, an SPV is a legal entity created primarily for issuing financial instruments, with the ability to engage in directly related secondary activities. The boom of crypto ETPs has led to an increasing number of Swiss or foreign SPVs as ETP-issuers instead of traditional banks or securities firms as issuers, although the latter remains possible as well.

Therefore, (SPV-issued) ETPs may be offered to retail clients, *inter alia*, by banks, securities firms or asset managers pursuant to articles 17 (1) or 24 (1) FinIA as authorized offerors provided the ETPs are adequately secured.

b) Collateralization Requirement (Article 96 (3) FinSO)

To meet the collateralization requirements corresponding to article 70 (1) FinSA, article 96 (3) FinSO specifies acceptable forms of security, including:

- a. A legally enforceable guarantee from a supervised financial intermediary ensuring the issuer's obligations or financially equipping the issuer to satisfy investor claims; **or**
- b. the provision of a legally enforceable real security in favor of investors.

The above list of eligible forms of enforceable security is not conclusive, allowing for alternative security forms. In practice, pledge agreements are regularly used as such legally enforceable security. The collateral pursuant to article 70 (2) **(b)** FinSA must not necessarily be provided by a supervised financial intermediary but may be provided by the SPV itself or a third party instead.

It is noteworthy that certain foreign jurisdictions provide for securitization companies or Protected Cell Companies (PCCs) with legally segregated compartments to ensure asset separation to the benefit of the investors in case of an insolvency of the issuer or one of its compartments. While structural security is not explicitly listed under article 96 (3) (a) and (b) FinSO, the legal doctrine argues for its eligibility. However, to be on the safe side, issuers typically complement structural security with pledges or other eligible collateralization mechanisms. The compartments of an SPV or the collateralization of ETPs typically do not qualify as collective investment schemes under the CISA because ETPs are issued as debt instruments. It would be desirable to introduce an issuance vehicle with segregated compartments under Swiss law in the future as well.

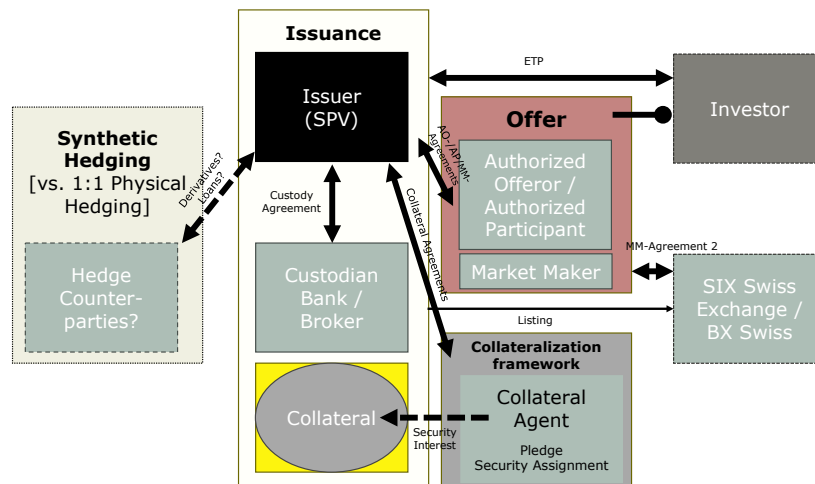
Consequently, a regulated or unregulated SPV, whether domiciled in Switzerland or abroad, may issue ETPs to retail clients without a bank guarantee if the requirements of article 70 (2) FinSA are met. Due to capital costs under the Basel III-regulations from the perspective of a bank or securities firm, issuances by SPVs without bank guarantees may be preferred if no consolidation requirements apply for these financial institutions from a regulatory and accounting perspective.

From a Swiss civil law perspective, the validity of pledges is controversial and thus legally uncertain if cryptocurrencies are pledged directly as the pledge object. While some legal scholars argue that cryptocurrencies can be pledged in accordance with articles 884 et seqq., respectively, 899 et seqq. of the Civil Code, others contend that they do not meet the legal requirements to qualify as a validly pledged asset under Swiss civil law (cp. Luca Bianchi, *Sicherung von strukturierten Produkten nach Art. 70 Abs. 2 FIDLEG*, SZW 1/2023, 67; Luca Bianchi, *Konvergenz von innovativen Finanzprodukten – same same, but different? (Teil 2)*, SJZ 11/2024, 508). Accordingly, under the SIX listing rules, it is currently required to pledge (at least also) the collateral account (i.e., the claim for surrender of the underlying instrument) to mitigate potential legal uncertainties in such cases (article 14 (1) (1^{bis}) ARETP SIX).

It is noteworthy that in February 2025, SIX and SIX Digital Exchange (SDX) introduced the **Digital Collateral Service (DCS)**, a new collateralization mechanism enabling its participants to use selected cryptocurrencies as collateral alongside traditional assets. This service streamlines collateral management by allowing entities to manage both traditional securities and crypto-assets on a single platform, thereby enhancing operational efficiency and reducing counterparty risk. Notably, DCS may be particularly advantageous for crypto ETP issuers, as it aims to provide a secure and efficient way to use crypto-assets as collateral.

c) Impact of Regulatory Requirements on ETP Structuring

To provide an example of a standard transaction structure which is aligned with the requirements of article 70 (2) FinSA, the graph below sets out an indicative structure chart for an ETP issued by an SPV as well as its collateralization framework. In practice, ETP structures and collateralization frameworks may vary from this example and allow for certain innovation.



4) Listing of ETPs

a) General Listing Rules

The Listing Rules (LR) of SIX or BX contain general provisions and govern primarily the listing of equity securities. The listing of ETPs is subject to the ARETP SIX or ARETP BX. In the absence of conflicting regulations or additional regulations outlined in the ARETP SIX or BX, the LR and their corresponding implementing provisions are generally applicable to the listing of ETPs. For example, the listing requirements of a clearing and settlement system permitted by the exchange (article 23 LR SIX) or of a Swiss paying agent (article 24 LR SIX) must also be fulfilled for ETPs.

b) Additional Listing Rules for ETPs

The listing of ETPs requires issuers to fulfill specific listing requirements. Issuers must either demonstrate sufficient capitalization or provide a guarantee or secure the ETP with appropriate collateral (article 4 ARETP SIX). Further, open-end ETPs must grant investors a redemption right, ensuring liquidity (article 6a ARETP SIX). The minimum capitalization of an ETP at issuance is CHF 1 million for SIX (article 7 ARETP SIX), whereas BX imposes no minimum threshold (article 9.1 ARETP BX). In addition, the issuer must appoint a market maker to facilitate continuous trading and liquidity (article 19 ARETP SIX; article 3.3 ARETP BX). For a successful listing, the issuer must provide evidence that it has a prospectus which has been approved by a prospectus office in accordance with the FinSA or that is deemed to be approved in accordance with the FinSA, which specifically includes a description of the collateral and the associated risks (if no exemption applies; article 15 ARETP SIX and article 7.4 LR BX).

Moreover, the Directive of SIX on the Procedure for Exchange Traded Products (DPETP SIX) sets out the procedure for the listing of ETPs. SIX issuers must submit a formal listing application (including also an application as a new issuer for first time issuers). The issuer must enclose a compliance declaration that the ETP is not a collective investment scheme and that the issuer or

the guarantor is a bank, an insurance company, a securities firm or a foreign institution subject to equivalent prudential supervision **or** that collateralization within the meaning of article 70 (2) (b) of the FinSA is guaranteed.

Further, the issuer must confirm, if applicable, that the custodian holds the assets serving as collateral on behalf of the issuer and is a custodian within the meaning of article 14 (4) ARETP SIX; and that, if applicable, the custodian keeps the assets serving as collateral available at all times within the meaning of article 14 (4) ARETP SIX and that these can either be allocated individually to the issuer or are allocated to a community and it is clear what share of the joint assets the issuer is entitled to (article 15a ARETP SIX).

Pursuant to article 4 DPETP SIX, the issuer must, *inter alia*, submit an issuer's declaration, a declaration of consent, and publish an official notice disclosing key issuance details. At BX, the submission of the listing application and its attachments are governed by the Directive to the Listing Procedure for Derivatives (article 10.1 ARETP BX).

SIX and BX generally require that underlying assets of ETPs must be sufficiently liquid, tradable, and transparent. These assets typically include, *inter alia*, equities, bonds, collective investment schemes, derivatives and futures, precious metals and commodities, and crypto-assets (article 9-13 ARETP SIX; article 7.1 ARETP BX). In addition, the Directive on Crypto-Assets as Underlying Instruments of SIX (DCA SIX) governs technical details and other requirements for crypto-assets as underlying instruments. At BX, special requirements for cryptocurrencies as underlying are stated in article 8 ARETP BX.

c) Special Listing Requirements for Collateralization

Pursuant to article 14 (1)-(3) ARETP SIX and article 6 ARETP BX, ETPs are secured by the underlying asset, either physically or in the form of a futures contract, or by the claim to the underlying asset in the case of crypto-assets. They can also be backed, *inter alia*, by liquid securities listed on SIX or BX or an equivalent foreign exchange, or by cash balances or precious metals. The collateral must cover at least the outstanding amount of the ETPs, and the assets are held by an independent third party custodian appointed by the issuer.

If the collateral consists of crypto-assets, additional requirements must be met (article 14 (4) ARETP SIX; article 8 ARETP BX). At SIX, the custodian must keep the assets available for the issuer at all times, ensuring that the assets can either be individually allocated to the issuer or be part of a collective pool with a clear indication of the issuer's share.

d) Approval Duty for Crypto Custodians of ETPs

The following are permitted as custodians of crypto ETPs (article 14 (4) ARETP SIX): a) custodians within the meaning of article 4 (2) of the Federal Act on Intermediated Securities (FISA) or a person pursuant to article 1b of the Banking Act (BankA) (fintech license); or b) foreign institutions that are subject to equivalent supervision. SIX may demand that suitable documents

are provided as evidence of the crypto-asset custodian's regulatory status (article 14 (5) ARETP SIX).

As regards the additional evidence of an equivalent supervision of foreign institutions which intend to act as crypto custodians for ETPs, in practice, SIX has accepted alongside the approval letter by the foreign regulator or excerpts of lists of approved entities of the regulator, for example, a detailed application with an argumentation concerning the equivalent supervision including legal memoranda or confirmations by reputable foreign law firms as regards foreign law aspects as enclosures. However, such demands for additional evidence by SIX basically constitute a de facto approval requirement for foreign custodians of crypto-assets for ETPs by SIX. This is reflected in SIX's practice to request separate applications regarding the recognition of (foreign) crypto custodians by SIX in certain cases and the publication of a list of recognized crypto custodians on the SIX webpage. In our view, a (de facto) SIX-approval duty for (foreign) crypto custodians would merit (if not require) a more specific legal basis in the ETP listing regulations.

If the crypto custodian does not meet the above requirements, the issuer or the guarantor making a guarantee commitment in accordance with the Directive on Guarantee Commitments (DGC) must be a regulated financial institution, such as a bank, insurance company, securities firm or a foreign institution subject to equivalent supervision (article 14 (6) ARETP SIX).

5) Conclusion

Switzerland has established itself as a key financial center for ETPs, supported by a transparent regulatory framework and a booming ETP market, particularly in the crypto-asset segment. The structuring and listing of ETPs require compliance with specific regulatory and collateralization requirements which ensure investor protection and market stability.

The increasing use of SPVs and new collateralization solutions, as well as cryptocurrencies, reflects the innovative nature of the ETP market. While regulatory developments continue to shape the financial products landscape in Switzerland, in civil law, legal uncertainties regarding the direct pledging of cryptocurrencies remain controversial and unresolved. Further regulatory adoption of additional types of digital assets (besides cryptocurrencies) such as equity or debt tokens as well as other (illiquid) underlings for ETPs (such as a broad range of alternative investments) will be essential to address these challenges and support the continued growth of the Swiss ETP market. A further highlight will hopefully be the introduction of tokenized ETPs at BX Digital or SDX at some point in the future.

Illiquid assets, on the other hand, may currently typically not be used as underlyings of ETPs due to the existing LR and the increased risk which they pose to investors. However, permitting more illiquid assets as underlyings (e.g., private equity, private debt or real estate) of ETPs under the SIX or BX listing regulations in the future would certainly constitute a business opportunity with respect to the securitization of different kinds of assets in the wrapper of ETPs and would meet an existing demand by issuers and investors which can be observed in the market for

unlisted structured products, all aligned with the general trend towards the democratization and assetization of alternative investments.

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M&A TRANSACTIONS IN THE SWISS FINANCIAL MARKET – PART II: ASSET DEALS INVOLVING SWISS REGULATED ENTITIES

Reference: CapLaw-2025-04

The Swiss financial market laws provide for a number of regulatory notification and approval requirements which must be adhered to in the context of asset deals involving entities prudentially supervised by FINMA. This article provides an overview of the relevant regulatory requirements which may be applicable in the context of acquiring a portfolio of assets, liabilities and contracts by and/or from a Swiss regulated financial institution.

By Alexander Wherlock

1) Introduction

In the past two years the number of traditional share deals involving Swiss regulated entities has vastly increased. There has been M&A activity in the public markets (such as the well-publicized public take-over battle between Liontrust Asset Management plc and the investor group NewGAME regarding the listed Swiss fund manager, GAM Holding AG) and the private markets (among others, the acquisition of Kaleido Privatbank AG by Bank Richelieu, or the acquisition of Société Générale Private Banking (Suisse) SA by Union Bancaire Privée). The Swiss financial market laws set out a number of regulatory notification and approval requirements which must be adhered to in the context of the acquisition of a qualified participation in Swiss regulated financial institutions under a share deal. In the article CapLaw-2024-85, „M&A Transactions in the Swiss Financial Market – Part I: Acquiring a Qualified Participation in a Swiss Regulated Entity“ the author provided an overview of the regulatory requirements which must be complied with upon acquiring a qualified participation in a Swiss regulated entity.

In addition to the activity in the traditional M&A-markets, there has been a rise in the number of asset-related deals (Asset Deals) in the Swiss regulated sector. Such Asset Deals are often not as well publicized as traditional share deals but rather are typically executed away from the