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Swiss Securities Regulation and Capital Market Law: A Comprehensive Overview

Keywords

Capital Market, Regulation, Securities Law, Investment

INTERNATIONAL CAPITAL MARKETS SECTION

Swiss Securities Regulation and Capital Market Law: A Comprehensive Overview

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I. REGULATORY AUTHORITIES

A. *Political Organization of Switzerland*

Switzerland is a federal republic consisting of twenty-six cantons.¹ Cantons have the power under the Federal Constitution to enact legislation concerning matters not within the federal competence.² These include civil and criminal procedure, most tax law as well as the banking and stock exchange laws. Federal law, contained in the Code of Obligations (CO), controls public offerings of equity securities by Swiss corporations, public offerings of bonds by all issuers and various forms of negotiable instruments. Substantive civil and criminal law are also within the federal competence. Federal laws are interpreted by cantonal courts with possible recourse to the Federal Supreme Court.

B. *General Remarks on Regulatory Authorities in the Securities Law Field*

Switzerland has no comprehensive federal legislation controlling the

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1. Article 1 of the Federal Constitution of May 29, 1874, as amended.

2. *Id.* art. 3.

sale and exchange of securities. Consequently, no central governmental agency regulates securities markets. This may change in the future, however, due to an emerging consensus in the financial and political communities on the advantages of a federal stock exchange law.³ The laws of the various cantons provide for limited supervision of the securities trading in their respective territories.

C. Central Control of Banking

The Federal Banking Commission is the most important federal agency enforcing laws affecting the securities markets. The Federal Banking Commission is an autonomous body consisting of seven to nine independent experts appointed by the *Bundesrat*. It is the supervisory authority under the Federal Banking Law⁴ and the Federal Law on Investment Funds.⁵ Since banks are the most significant participants in the Swiss securities markets, these regulatory functions have considerable influence on such markets. Under the Federal Banking Law, the Banking Commission grants and withdraws banking licenses and supervises the financial structure, management and operation of banks. In addition, the *Bankenverordnung* in its new version of January 1, 1990, broadened the regulatory definition of "banks" to include so-called "bank-like finance companies."⁶ Finally, it issues the decisions necessary to enforce the rules of the Federal Banking Law.⁷

3. In 1989, the Federal Council (*Bundesrat*) appointed a special task force to study, among other questions related to the Swiss capital market, the possible adoption of a national stock exchange law. It has recently published its first report recommending a centralized stock exchange and a central notification for all securities transactions. One of the major purposes of a new Federal stock exchange law should be significantly enhanced transparency.

4. Swiss Federal Banking Law (*Bundesgesetz über die Banken und Sparkassen*) of Nov. 8, 1934, as amended [hereinafter *Bankengesetz*], art. 23.

5. The Federal Law on Investment Funds of July 1, 1966 [hereinafter *Anlagefondsgesetz*] and the Implementing Ordinance to the Federal Law on Investment Funds of Jan. 20, 1967 [hereinafter *Anlagefondsverordnung*].

6. The new Article 2(a) of the Ordinance concerning the Swiss Federal Banking Law (*Verordnung zum Bundesgesetz über die Banken und Sparkassen*) of May 17, 1972, as amended [hereinafter *Bankenverordnung*], defines bank-like finance companies as institutions that:

- a) Publicly accept third party money to finance for their own account an unlimited number of unrelated persons and enterprises;
- b) refinance themselves in order to finance an unlimited number of unrelated persons or enterprises for their own account;
- c) underwrite firmly or on commission securities or other similar negotiable instruments and offer them publicly on the primary market.

The new rules contain transitional arrangements. All institutions initially falling under the definition of Article 2(a) have to announce this to the Federal Banking Commission within six months (i.e., at the latest on June 30, 1990). They then have a transitional period of three years to adapt to the new legal regime. In special cases, the Banking Commission may extend or shorten this period.

7. See *infra* note 38 and accompanying text.

Under the Federal Law on Investment Funds, the Federal Banking Commission authorizes the establishment of funds and supervises their activities for compliance with applicable statutes and regulations. For foreign investment funds, it grants the necessary authorization to the designated Swiss bank for a public offering of interests in the funds.⁸

D. *The Swiss Nationalbank*

The Swiss Nationalbank's principal duties are to regulate the money market and to counsel the relevant authorities with respect to currency questions.⁹ Organized in the form of a stock company, the Nationalbank is a semi-public corporation supervised by federal authorities. Fifty-nine percent of its share capital is held by the cantons with the remainder held privately. The Board of Directors of the Nationalbank has forty members: twenty-five elected by the Federal Government and fifteen by the stockholders.¹⁰

The Nationalbank issues, among other things, directives to banks regarding the maintenance of reserves, expansion of credit facilities, acceptance of foreign source deposits, export of capital and involvement in foreign exchange transactions.¹¹ The Nationalbank is authorized to prohibit or place conditions upon the following transactions if they exceed ten million Swiss francs: (1) specified loans to foreign borrowers, (2) purchases or offerings of the shares of foreign companies, (3) credits and investments abroad, and (4) participation in initial placements of debt certificates with maturity greater than twelve months.¹² Particularly important for the securities markets is the Nationalbank's authority to obtain copies of and to examine the financial statements of all banks¹³ and to require notification of specific transactions in foreign securities.¹⁴

E. *Cantonal Law*

In each of the seven cantons where a stock exchange exists, cantonal laws provide for some type of supervision of the local exchange. The operations of the three main stock exchanges (Zurich, Basle and Geneva) are subject to cantonal laws, implementing ordinances and regulations of the chambers of the respective stock exchanges. The Zurich and Basle Stock Exchanges are essentially public institutions supervised at the cantonal level. The Geneva Stock Exchange is private and organized in the legal form of an association (*Verein*).¹⁵

8. See *infra* notes 240-249 and accompanying text.

9. Swiss Federal Law on the National Bank of Dec. 23, 1953, as amended [hereinafter *Nationalbankgesetz*], art. 2.

10. *Id.* art. 40.

11. *Id.* art. 14 et seq.

12. *Bankengesetz*, *supra* note 4, art. 8.

13. *Id.* art. 7.

14. *Id.* art. 8. See also *infra* notes 113-17 and accompanying text.

15. Articles of Incorporation of the Stock Exchange of Geneva (*Statuts, Bourse de*

In Zurich the regulatory structure¹⁶ relating to stock exchanges has three layers. The Cantonal government grants licenses, enacts ordinances and approves regulations relating to the trading of securities on and off the stock exchanges.¹⁷ The Zurich Stock Exchange Commission (*Börsenkommission*), whose members are the Director of the Department of Economics and six additional persons, of which two are members of the Stock Exchange Association selected by the Cantonal government, has the duty to consult with and make recommendations to the Cantonal government concerning proposed regulations, to evaluate the grant or withdrawal of broker-dealer licenses and to comment on required fees and deposits. The *Börsenkommission* also nominates candidates for the Zurich Securities Trading Office (*Börsenkommissariat*).¹⁸ The *Börsenkommissariat* supervises compliance with the regulations and statutes, enforces the record keeping requirements and oversees the official publication of the stock prices.¹⁹

For the Basle stock exchange, which has a more stringent regulatory regime than either Zurich or Geneva,²⁰ the supervisory functions are also

Genève) [hereinafter *Statuts, Bourse de Genève*], art. 1.

16. The most important statutory sources of the Zurich stock exchange are: Law on Professional Trading of Securities (*Gesetz betreffend den gewerbsmässigen Verkehr mit Wertpapieren*) of Dec. 22, 1912 [hereinafter *Wertpapiergesetz*]; Ordinance on Professional Trading of Securities (*Verordnung zum Gesetz vom 22. Dezember 1912 betreffend den gewerbsmässigen Verkehr mit Wertpapieren*) of June 26, 1913, [hereinafter *Wertpapierverordnung*]; Ordinance on Bonds Required for Intermediaries Trading in Securities (*Verordnung über die Beanspruchung der Kauttionen von Vermittlern im Verkehr mit Wertpapieren*) of Mar. 29, 1923; Ordinance on Duties and Authorities of the Stock Exchange Commissioners (*Verordnung über die Aufgaben und Befugnisse des Börsenkommissariates*) of Feb. 25, 1960 [hereinafter *Börsenkommissariatsverordnung*]. These and other legal sources and all self-regulatory rules of the Zurich Stock Exchange can be found in a manual (*Handbuch der Zürcher Effektenbörse*) edited by the *Effektenbörsenverein Zurich*.

17. *Wertpapiergesetz*, *supra* note 16, § 2 et seq.

18. *Id.* § 36.

19. *Id.* § 30 et seq. See also *Börsenkommissariatsverordnung*, *supra* note 16, art. 3.

20. The regulations of the stock exchange of Basle are too voluminous to be quoted in detail. The most important legal sources are: Law on Securities Trading and the Stock Exchange (*Gesetz über den Wertpapierhandel und die Effektenbörse*) of Jan. 14, 1982 [hereinafter *Börsengesetz*]; General Reglementation for the Securities Trading on the Stock Exchange of Basle (*Allgemeines Reglement für den Wertpapierhandel an der Basler Effektenbörse*) of Dec. 11, 1944 [hereinafter *Börsenordnung*]; Customs for the Trade in Securities on the Stock Exchange of Basle (*Usanzen für den Wertpapierhandel an der Basler Effektenbörse*) of Dec. 11, 1944 [hereinafter *Usanzen*]; Reglementation on the Admission of Securities for Listing on the Stock Exchange of Basle (*Reglement über die Zulassung von Wertpapieren zur Kotierung an der Basler Effektenbörse*) of Dec. 16, 1986 [hereinafter *Kotierungsreglement Basel*]; Ordinance Regarding Listing Fees on the Stock Exchange of Basle (*Verordnung über die Erhebung von Kotierungsgebühren an der Basler Effektenbörse*) of Feb. 25, 1986; Reglementation on the Procedure in the Event of Nonperformance and Financial Difficulties of Licensed Members of the Stock Exchange of the Canton Basel and on the Utilization of Bonds (*Reglement über das Verfahren bei Nichterfüllung und Zahlungsschwierigkeiten von konzessionierten Mitgliedern der Börsenkammer des Kantons Basel Stadt sowie über die Inanspruchnahme der Realkauttionen*) of Dec. 11, 1944 and Decision of the Cantonal Government Regarding an Increase of the

exercised by three bodies. Among other powers and authorities, the Cantonal government may promulgate regulations under its *Börsengesetz*, approve the articles of incorporation of the stock exchanges, appoint the members of its *Börsenkommission*, and designate the Stock Exchange Commissioner (*Börsenkommissar*).²¹ The *Börsenkommission* is comprised of the Director of the Department of the Interior who acts as chairman, and six other persons of two whom are members of the Stock Exchange Association. The *Börsenkommission* acts as an advisory board to the Cantonal Government. Moreover, it grants and withdraws securities trading licenses, issues reprimands and penalties and supervises the activities of the *Börsenkommissar*.²² The *Börsenkommissariat* exercises the immediate supervision over trading in securities and publishes a daily stock price list.²³ The *Börsenkommissar* participates in stock exchange meetings, controls the records of the exchange, supervises the payment of statutory fees as well as the posting of necessary bonds. The *Börsenkommissar* also exercises other supervisory functions relating to the day-to-day functioning of the stock exchange.²⁴ Since the Geneva stock exchange is predominantly a private institution, governmental rules are much less stringent than in Zurich or Basle.²⁵ The Cantonal government can, however, prohibit the quotation of foreign securities if the country of origin does not permit the trading of Swiss securities.²⁶ The Cantonal government appoints the Stock Exchange Commissioners, who have the legal duty to supervise the operation of the stock exchange and to announce and register the stock prices.²⁷ In practice, the Commissioners' functions are limited since the stock exchange operates on a self-regulatory basis.

F. Self-Regulatory Authorities

There are two important self-regulatory organizations whose activities affect the securities markets. One is the Swiss Bankers' Association (*Schweizerische Bankiervereinigung*) which is made up of virtually all

Bond for Stock Exchange Agents (*Regierungsratsbeschluss betreffend Erhöhung der Realkautions für Börsenagenten*) of Apr. 1, 1980; Regulation on the Recordkeeping of Securities Dealers (*Reglement über die Registerführung der Wertpapierhändler*) of Apr. 30, 1974. These and other legal sources and self-regulatory rules can be found in a manual (*Handbuch der Basler Effektenbörse*), edited by the *Börsenkommissariat Basel Stadt*.

21. *Börsengesetz*, *supra* note 20, § 13.

22. *Id.* § 15.

23. *Id.* § 17.

24. *Id.* § 17.

25. The two only governmental regulations are: Law on the Stock Exchange of Geneva (*Loi cantonale sur la bourse de Genève*) of Dec. 20, 1856 [hereinafter *Loi sur la Bourse*]; Implementing Ordinance Regarding the Law on the Stock Exchange of Geneva (*Règlement d'exécution de la loi sur la bourse de Genève*) of Sept. 2, 1930 [hereinafter *Règlement d'exécution*]. For a comprehensive collection of the governmental and the private regulation of the stock exchange of Geneva, the Geneva Stock Exchange has edited a special manual (*Manuel de la bourse de Genève*).

26. *Loi sur la Bourse*, *supra* note 25, art. 2.

27. *Id.* art. 7.

Swiss banks. The other is the Association of Swiss Stock Exchanges (*Vereinigung schweizerischer Effektenbörsen*) comprised of all seven Swiss stock exchanges.

The *Schweizerische Bankiervereinigung* has passed a broad series of Agreements (*Konventionen I - XIX*) covering many aspects of the banking business. These Agreements, which have certain anti-competitive provisions, have recently been investigated by the Swiss antitrust authorities (Cartel Commission). In its final report, the Cartel Commission recommended the elimination or alteration of many of the anti-competitive restrictions contained in the *Konventionen*.²⁸ The *Bankiervereinigung* has accepted some of these recommendations and vigorously disputed the arguments underlying others.²⁹ It is generally expected that the Department of Finance and Customs will transform the Cartel Commission's recommendations into legally enforceable orders.³⁰

Two Agreements of the *Bankiervereinigung* affect the Swiss securities markets. The first is Agreement XVII on Domestic Securities Issues (*Konvention XVII betreffend das inländische Emissionsgeschäft*). It establishes a calendar for domestic offerings in order to prevent an undesirable cumulation of new securities issues. The second is the Agreement XIX on Notes of Foreign Debtors (*Konvention XIX über Notes ausländischer Schuldner*). It establishes certain disclosure requirements, prohibits private notes in denominations of less than SFr. 50,000 and does not allow a quotation of notes on the stock exchanges.³¹ The Swiss Cartel Commission has recommended that the minimum denomination rule as well as the quotation prohibition be eliminated.³²

The *Vereinigung Schweizerischer Effektenbörsen* has also adopted two important regulations affecting the Swiss securities markets. One is the Swiss Brokerage Convention of September 16, 1985 (*Courtage-Konvention*). In its original version, the Convention fixed the minimum brokerage fees for all transactions in equity and debt securities effected both in Switzerland and on foreign securities exchanges. The Cartel Commission severely criticized the *Courtage-Konvention* as price fixing and recommended its elimination.³³ The *Vereinigung Schweizerischer Effektenbörsen* partially rejected the Commission's suggestions but did present a new version of the *Courtage-Konvention*.³⁴ It is expected that the Department of Finance and Customs will support the Cartel Commis-

28. *Veröffentlichungen der schweizerischen Kartellkommission und des Preisüberwachers (VSK) 1989*, no. 3 [hereinafter VSK 1989/3].

29. *Banken im Wettbewerb, Stellungnahme der Banken und Börsen zum Bericht der Schweizerischen Kartellkommission 1989* [hereinafter *Banken im Wettbewerb*]

30. See *infra* notes 54, 55, 112 and accompanying text.

31. Agreement XIX on Notes of Foreign Debtors (*Konvention XIX über Notes ausländischer Schuldner*). See *infra* notes 106-107 and accompanying text.

32. VSK 1989/3, *supra* note 28, 81 et seq.

33. *Id.* at 86 et seq.

34. *Banken im Wettbewerb, supra* note 29, 86 et seq.

sion's suggestions and that the *Schweizerische Bankiervereinigung* will appeal the orders of the Department the Swiss Supreme Court.³⁵

The second important Agreement adopted by the *Vereinigung Schweizerischer Effektenbörsen* is the Convention on the Admission of Foreign Securities for Trading and Listing on the Swiss Stock Exchanges of November 4, 1938 (*Vereinbarung betreffend die Zulassung von ausländischen Wertpapieren zum offiziellen Handel an den schweizerischen Effektenbörsen*). This Convention was initially signed by the seven Swiss stock exchanges, the Swiss Nationalbank, the Federal Department for Finance and Customs and the Cantonal governments of Zurich and Basle. In its original version, the Convention provided that a Swiss Admission Office (*Schweizerische Zulassungsstelle*), comprised of six members selected by the *Vereinigung Schweizerischer Effektenbörsen* and three members designated by the Federal Department of Finance and Customs, had to pass upon the acceptability for listing of foreign securities on Swiss stock exchanges. Since 1985, the Admission Office has granted admission only to debtors of a certain rating quality. In 1988, a decision was made that securities not meeting the required standards would be admitted to a second or "B" market. This second market has not yet been established.

The Cartel Commission has further charged that the Swiss Admission Office is dominated by interested parties. Consequently, it has recommended replacement of the present admission procedure with a disclosure scheme.³⁶ The *Vereinigung Schweizerischer Effektenbörsen* has again reacted negatively to these suggestions.³⁷

II. FEDERAL SECURITIES LAWS

As previously mentioned,³⁸ Switzerland has no comprehensive federal securities legislation. At the federal level, there are five laws that primarily affect the securities markets. The first of these is the Swiss Federal Code of Obligations (*Schweizerisches Obligationenrecht*) (CO) dated March 30, 1911, as amended). It contains the corporate law of Switzerland (Articles 620-763), including requirements for the offering of shares in connection with the formation of a Swiss company (Article 631) as well as for any subsequent issuance of shares by such a company (Article 650). The CO also contains provisions relating to potential liability of incorporators, directors and officers, among others, in connection with the issuance of securities (Articles 752-761). Additionally, the CO has many provisions regarding specific forms of securities (Articles 965-1155). Finally, the CO regulates the offering of bonds by domestic and foreign issuers (Articles 1156-1186).

35. See *infra* notes 54, 55, 112 and accompanying text.

36. VSK 1989/3, *supra* note 28, at 93 et seq.

37. *Banken im Wettbewerb*, *supra* note 29, 92 et seq.

38. See *supra* note 3 and accompanying text.

A further federal law affecting the Swiss securities market is the *Nationalbankgesetz*. Article 16(i) contains provisions that allow the Federal Council to limit or prohibit the acquisition by foreigners of domestic securities and to limit the importation of foreign bank notes. The *Bankengesetz* and the Implementing Ordinance of May 17, 1972, also have several rules affecting the securities markets. The most important is Article 8 requiring that notification be given of certain transactions in foreign securities to the Nationalbank. These capital export regulations can also restrict issues in foreign countries denominated in Swiss Francs.

Additional sources of federal law are the *Anlagefondsgesetz* and the *Anlagefondsverordnung*. Both regulate in detail the management of investment funds. Of particular importance for foreign investors is the Ordinance on Foreign Investment Funds (*Verordnung über die ausländischen Anlagefonds*) of January 13, 1971 (*Anlagefondsverordnung*), listing specific requirements for foreign investment funds.

Switzerland adopted in 1988 a federal insider trading law. This law, contained in Article 161 of the Federal Criminal Code (*Schweizerisches Strafgesetzbuch*) of December 21, 1937, as amended, prohibits insider transactions by certain persons in securities traded on Swiss stock exchanges.

There are a number of other laws and regulations which indirectly affect the trading of securities in Switzerland. One is the so-called *Lex Friedrich* which restricts the purchase of real estate by foreigners. As soon as the value of real estate property of a Swiss company is higher than a certain percentage (one third as a general rule) of the total assets, the acquisition of its shares by foreigners may cause legal problems. Another regulation influencing capital markets is the Swiss stamp tax law. This law requires a tax on the issuance of new securities and has so far prevented the formation of a Euro-market in Switzerland.

III. SECURITIES MARKETS AND PARTICIPANTS

A. Introduction

The seven stock exchanges in Switzerland are located in Zurich, Geneva, Basle, Bern, St.Gallen, Neuchatel and Lausanne. Only the stock exchanges in Zurich, Geneva and Basle are included in the following discussion. The other exchanges play a minor role and trade mainly in securities of a purely local character. The Zurich exchange had the largest turnover in securities in 1988 (569 billion SFr.),³⁹ followed by Geneva (200 billion SFr.)⁴⁰ and Basle (83 billion SFr.).⁴¹ In 1988, the Zurich stock exchange listed 2,919 securities of which 1,504 were Swiss bonds, 880 were foreign bonds, 309 were Swiss equity securities and 226 were foreign equity secur-

39. ZURICH STOCK EXCHANGE, FACTS AND FIGURES 1988, at 5.

40. GENEVA STOCK EXCHANGE, ANNUAL REPORT 1988, at 18.

41. BASLE STOCK EXCHANGE, 1988, at 69.

ities.⁴² In 1988, the Basle stock exchange listed 2,691 securities of which 1,341 were Swiss bonds, 876 foreign bonds, 249 Swiss equity securities and 225 foreign equity securities.⁴³ The Geneva stock exchange listed in 1988 2,324 securities of which 964 were Swiss bonds, 878 foreign bonds, 240 Swiss equity securities and 242 foreign equity securities.⁴⁴

To date, the Swiss stock exchanges have operated independently of one another. Each has promulgated its own rules, which in turn are subject to the respective cantonal laws. Recently, discussions and preparatory investigations have been initiated concerning the introduction of a federal electronic stock exchange. The outcome of such discussions and investigations is uncertain at this time.

B. *Trading in Listed Securities*

Trading in listed securities is the most common form of investment in Switzerland. On each stock exchange, the responsibility for an orderly trade in listed securities lies with the representative of the trade office (*Börsenkommissar*).⁴⁵ The *Börsenkommissar* has the power to suspend trading for short periods of time when large variations in the trading price of a security occur.⁴⁶

In order for a security to be listed on a stock exchange, a listing application must be submitted to the stock exchange on which listing is sought. Each stock exchange conducts a review of listing applications received in light of its listing requirements. Before a foreign security may be listed, however, it first must be approved by the Swiss Admission Office, which examines the suitability of foreign securities upon application from the issuers.⁴⁷ A decision by the Admission Office that a security is unsuitable for listing precludes listing on any stock exchange in Switzerland. However, a decision by the Admissions Office that a security is suitable for listing is not binding upon the individual exchanges, which are free to make their own determinations. The future of these rules on admissions of foreign securities, however, is unclear in view of the recent recommendations of the Swiss Cartel Commission.⁴⁸

In 1989, the Geneva stock exchange introduced a so-called second

42. ZÜRICH STOCK EXCHANGE, *supra* note 39, at 5.

43. BASEL STOCK EXCHANGE, *supra* note 41, at 54.

44. GENEVA STOCK EXCHANGE, *supra* note 40, at 19 et seq.

45. *Wertpapiergesetz*, *supra* note 16, § 30 (Zurich); *Börsengesetz*, *supra* note 20, § 17 (Basle); Implementing Ordinance of the *Loi de la Bourse*, *supra* note 25, § 3 (Geneva).

46. *Börsenordnung*, *supra* note 20, ¶ 3 (Zurich); *Börsengesetz*, *supra* note 20, § 17(m) (Basle); *Règlement d'exécution*, *supra* note 25, art. 25 (Geneva).

47. See *supra* note 36 and accompanying text. Details on this procedure are contained in the Reglementation on the Admission of Foreign Securities on Swiss Stock Exchanges (*Reglement über die Zulassung von ausländischen Valoren an die schweizerischen Börsen*) of May 13, 1987, as well as in the Directives for the Decisions of the Admission Office (*Richtlinien für die Entscheidung der Zulassungsstelle*) of Oct. 19, 1988.

48. See *supra* note 36 and accompanying text.

market (*deuxième marché*).⁴⁹ It should allow the trading of securities of mid-sized companies, particularly venture capital enterprises, that do not yet meet the listing conditions of the regular stock exchange but which would still like to realize the advantages of an officially regulated stock exchange. This second market does not, as a matter of principle, affect the pre-bourse of Geneva directly. Nevertheless, it is expected that the unofficial trading will play a less significant role since some of its volume will probably be absorbed by the second market.

C. Regulated Trade in Unlisted Securities

Each of the three major stock exchanges have regulated unofficial trading or "pre-bourse" (*Vorbörse or ausserbörslicher Handel*) at which securities of companies are traded that cannot or do not desire to meet the official listing requirements. The trading takes place before or after the normal trading hours at the regular rings. The trading itself follows rules similar to those of the official stock exchanges. The Zurich stock exchange has a specific regulation for the unofficial trading.⁵⁰ It provides that the unofficial trading is to be supervised by the Stock Exchange Association, but not by the *Börsenkommissar*. Accordingly, the resulting stock prices have only an unofficial character. The *Vörsenreglement* stipulates trading rules and defines the disclosure requirements which are much less stringent than those required by the normal listing rules.⁵¹ Some of the companies trading their securities on the pre-bourse either do not meet the listing requirements or prefer to avoid the more extensive disclosure rules required for listing. Other issuers use the unofficial stock exchange as a first step to achieving an official listing. Finally, newly issued bonds are often traded unofficially pending distribution of finalized documents. In August 1988, the volume of securities traded on the pre-bourse was: 363 in Zurich, 363 in Geneva and 299 in Basle.⁵²

D. Unregulated Trade in Unlisted Securities

Unofficial trading activities should be distinguished from off-the-floor trades in securities. In Switzerland, a significant amount of trading is con-

49. For the legal relementation of the second market see *Deuxième Marché, Règlement, directives d'application, Recommendations de la bourse de Genève* 1989. While capital requirements for this *Deuxième Marché* are less stringent, stricter disclosure rules do apply.

50. *Reglement über die Vorbörse* of Apr. 17, 1980, as amended [hereinafter *Vorbörsenreglement*]. The legal relementation of the unofficial trading of Geneva can be found in the Directives of the Pre-Bourse (*Directives du marché avantbourse*) of Sept. 28, 1987. Basle also has a similar trading institution which bears the name "pre-market" (*ausserbörslicher Handel*). It is not explicitly regulated.

51. *Vörsenreglement*, *supra* note 50, art. 6. The *Zürcher Effektenbörsenverein* recently announced a revision of the *Vörsenreglement* which, among other amendments, introduces an official supervision of the trading by the *Börsenkommissar*.

52. A. KOLB, *VORBÖRSE - INOFFIZIELLER HANDEL AN DER ZÜRCHER EFFEKTENBORSE* 40 (1989).

ducted outside the regular stock exchanges directly among the banks and other financial institutions. Since the Swiss securities laws do not require that all exchanges of listed securities take place on the stock exchanges, a trader is basically free to conduct transactions on or off the exchange floor.

Off-the-floor trade is often conducted by a bank by internally offsetting customers' buying against those selling. Such transactions are carried out off the floor but are confirmed to clients as having been executed on the relevant stock exchange. The bank then settles up at the official stock exchange prices. This method is often the simplest and cheapest way to carry out clients' orders.

In most cases banks act legally as self-contractors (i.e., they operate directly as the contracting party). This increases the confidentiality of the transaction. Moreover, the bank, not an unknown third party, is liable for payment and delivery of the security.

E. *Options and Financial Futures*

In 1988, the private organization SOFFEX (Swiss Options and Financial Futures Exchange AG) began to offer a fully automated exchange for traded options and financial futures and for clearing all traded contracts. Currently, the trade is limited to options on the stock of twelve large Swiss companies as well as one index option. In the future, the introduction of further options and financial futures is planned.

The SOFFEX-trading occurs completely outside the traditional stock exchange structure. Stock prices are registered on a fully electronic basis. Since options are not securities in the sense of the Zurich *Wertpapiergesetz*, the SOFFEX-activities are under no governmental control. There are, however, relatively strict private regulations⁵³ that provide, among other things, that

1. all transactions must be conducted through the SOFFEX system;
2. transaction volumes must be published;
3. market makers are obliged to make price offers; and
4. SOFFEX has the ability to sanction its members through various specified means.

F. *Brokerage Commissions*

Switzerland has a long standing tradition of privately fixed brokerage fees. The 1986 version of the Brokerage Convention (*Courtage-Konvention*) set minimum prices for brokerage services, except in securities transaction in excess of SFr. 2 million which could be privately negotiated. This horizontal price fixing purportedly served to prevent ruinous

53. SOFFEX, RULES AND REGULATIONS.

price competition and to enhance market transparency.

As already mentioned,⁵⁴ the Cartel Commission severely criticized the 1986 Brokerage Convention in its report on anti-competitive practices in the banking sector and suggested its elimination within a reasonable period of time.⁵⁵

The *Vereinigung Schweizerischer Effektenbörsen* did not accept this recommendation, arguing that a total elimination of the fixed fees would lead to an economically and socially undesirable concentration and restructuring of the sector. It did, however, enact a more liberal Brokerage Convention that became effective in January, 1990. In its new version, the Brokerage Convention allows fixed brokerage fees for transactions smaller than SFr. 500,000. The new Brokerage Convention significantly increases the fees for small transactions.

The future of the fixed brokerage commissions as well as the new Brokerage Convention itself appears to be highly uncertain. The Brokerage Convention has come under attack by members of the financial community. Additionally, some banks have given notice of their termination from the Convention. It is expected that the Department of Finance and Customs will transform the Cartel Commission's recommendations into strict orders. The member banks would then have recourse to the Federal Supreme Court.

G. *Stock Prices*

On all important Swiss stock exchanges, the prices for listed securities are established through a "bid and ask" system. Only on the SOFFEX, where Swiss options and financial futures are traded, are the prices fixed on a purely electronic basis. The cantonal stock exchange laws require the publication of the closing stock prices of listed securities in a special publication called the *Kursblatt*.⁵⁶ The final prices of securities unofficially traded as well as the SOFFEX prices are also published in the *Kursblatt*.⁵⁷

H. *The Role of Commercial Banks in Securities Markets*

Switzerland has a universal banking system. There are no legal rules requiring a separation of the commercial and investment activities of banks. A large number of different banks exist which are variously labelled as commercial, mortgage, savings, private, cantonal, local and for-

54. See *supra* note 33-34 and accompanying text.

55. VSK 1989/3, *supra* note 28, 86 et seq.

56. See *Wertpapiergesetz*, *supra* note 16, §§36, 38 (Zurich); *Wertpapierverordnung*, *supra* note 16, § 11 (Zurich); *Börsengesetz*, *supra* note 20, § 17 (Basle); *Börsenordnung*, *supra* note 20, § 21 (Basle); and *Règlement d'exécution*, *supra* note 25, § 5 (Geneva).

57. This official publication of unofficial prices is not undisputed. It has been argued, for instance, that such a practice violates Section 11 of the *Wertpapierverordnung* (Zurich). See KOLB, *supra* note 52, 84.

eign banks. Most of these banks, with the possible exception of savings institutions, are involved in a broad variety of banking and financial operations. While some of these banks are specialized solely in areas not related to securities transactions, most offer an extensive array of securities transaction services. Banks are the most important participants on the Swiss securities markets. They perform many functions, including those typically performed by investment companies, investment advisors, broker-dealers and underwriters. Banks also perform investment advisory functions in Switzerland. While many individuals and companies are active in this unregulated field, private banks and special investment advisory departments of larger banks are the predominant actors. The broker-dealer business is also heavily dominated by the Swiss banks. Almost all members of the cantonal stock exchanges that are admitted to the floor are banks. The relevant figures are: twenty-nine for Zurich, twenty-four for Geneva and eighteen for Basle.⁵⁸ Many of the over-the-counter dealers are also banks. Other market participants include finance companies and similar institutions. In Zurich there are 232, in Geneva fifty-eight, in Basle thirty such over-the-counter dealers.

I. Foreign Financial Institution and Securities in Swiss Capital Markets

Recently, Switzerland has seen a significant increase in the activities of foreign participants in the Swiss capital markets. This is particularly true for foreign banks and finance companies, which often create subsidiaries in Switzerland. The number of foreign securities traded on Swiss stock exchanges is quite significant.

In 1988, there were 116 foreign banks in Switzerland, of which approximately twenty were American. Moreover, 102 finance companies from abroad, including twenty American companies, were active in Switzerland.⁵⁹

The participation of foreign institutions on Swiss stock exchanges is somewhat limited. There are a few foreign securities exchange members with access to the floor but currently no U.S. banks. However, a number of foreign institutions are dealers in the over-the-counter market. These include the American institutions Chase Manhattan, Citibank, First Boston, Goldman Sachs, Merrill Lynch, and J.P. Morgan among others.

The number of foreign securities traded on Swiss stock exchanges is impressive. In Zurich, 226 equity securities of foreign companies are traded, including 110 of American corporations. The number of foreign listed bonds amounts to 880, of which 149 were issued by American companies. Geneva has 242 foreign stocks listed, including 113 American eq-

58. The most recent figures can be found in ZURICH STOCK EXCHANGE, *supra* note 39; BASLE STOCK EXCHANGE, *supra* note 41; GENEVA STOCK EXCHANGE, *supra* note 40.

59. Figures and names can be found in SCHWEIZERISCHE NATIONALBANK, DAS SCHWEIZERISCHE BANKWESEN IM JAHRE 1988, 308 et seq. (1989).

uity securities. Geneva also lists 878 foreign bonds. In Basle, 225 foreign equity securities and 876 foreign debt securities are listed.⁶⁰

J. *Types of Transactions*

The standing customs (*Usanzen*) of the major Swiss stock exchanges carefully define the different types of transactions carried out.⁶¹ Four major forms can be distinguished:

1. Cash (or Spot) Transactions

Cash or spot transactions are the simplest and most frequent type of stock exchange operations. In Zurich, all bonds and about seventy percent of the shares are traded on a cash basis. Theoretically, delivery and payment occur immediately after the deal is closed. For practical reasons, both take place between the third and the tenth day after the trade.

2. Fixed Forward Transactions

In fixed forward transactions (*Termingeschäfte*), closing and execution of the contract are separated. At closing, all terms (including price) of the deals are fixed, yet the performance takes place on a pre-determined future date. In Zurich, for instance, fixed forward transactions are executed as of the last day of a month which may be the last day of the current month, the next month or the month after. The Basle and Geneva exchanges also allow forward trading at six or nine months in the future. Forward trading in registered shares is limited on all stock exchanges to no more than three months.

In 1986, the Zurich stock exchange allowed forward trading in Swiss warrants. Deals may be made for settlements in one, two or three months, but only transactions related to warrants existing in quantities of at least SFr. 50,000 may be traded forward.

3. Premium Trading (*Prämiengeschäft*)

Premium trading is a special type of contingent or optional transaction. When a premium deal is closed, price, premium and date of execution are agreed upon. However, the buyer reserves the right to withdraw from the contract (i.e., to cancel the deal on the option day). If the buyer cancels the contract, however, he must pay the seller compensation in the form of a premium, which normally amounts to two to five percent of the market price (ecart). Premium trading allows investors to engage in speculative transactions with limited risks. Economically, they fill the func-

60. For these and additional figures, see sources quoted *supra* note 58.

61. All the transaction forms discussed below are regulated in the stock exchanges' custom rules. For Zurich, see *Usanzen*, for Basle, *Usanzen für den Wertpapierhandel an der Basler Effektenbörse*, § 21 et seq. Geneva has no specific *Usanzen*, but see *Règlement d'exécution*, *supra* note 25, art. 42 et seq.

tion of call option deals.

Premium trading occurs only for fully paid shares. In addition, there is no premium or forward trading for shares of banks and insurance companies or for units of investment trusts. Theoretically and legally, put options would also be possible in which the *seller* reserves the right to withdraw from the contract. Such transactions are, however, no longer executed in Zurich.

4. Carry-over Transactions (Contango Transactions) and Backwardation Transactions

These are deals between banks (credit transactions) which are closely interrelated with the proceedings on the stock exchange. For example, an investor may purchase securities in a forward deal speculating to resell them at a higher price. If the price goes down, it is possible to "lengthen" his position by means of a carry-over transaction. Such carry-over transactions are economical advances granted by the bank. Accordingly, the bank will require the payment of interest or other charges.

IV. DEFINITION AND FORMS OF SECURITIES

A. *Legal Rules*

The Swiss Code of Obligations has a broad set of rules related to the definitions and legal characteristics of securities.⁶² Article 965 defines a security as "any document in which a right is incorporated in such a way that it cannot be claimed or transferred to others without the document." The legal rules distinguish three specific categories of negotiable instruments. The first is *securities in a specific name*. These may be transferred by a change of possession of the instrument together with a written declaration which need not be written on the security itself.⁶³ The second is *bearer securities*. They may change hands by the mere transfer of the document based on a valid contract.⁶⁴ The final category includes *securities made out to order*, which are transferable by delivery of the document together with an endorsement. In addition to these general rules, the Swiss Code of Obligations has extensive provisions for certain securities, including bills of exchange and promissory notes,⁶⁵ checks,⁶⁶ instruments similar to bills of exchange, promissory notes and other securities made out to order,⁶⁷ as well as documents of title to goods.⁶⁸

62. CO, art. 965 et seq.

63. *Id.* art. 974 et seq.

64. *Id.* art. 978 et seq.

65. *Id.* art. 990 et seq.

66. *Id.* art. 1100 et seq.

67. *Id.* art. 1145 et seq.

68. *Id.* art. 1153 et seq.

B. *Types of Securities*

On Swiss securities markets, a broad variety of securities are traded. Three major types can be distinguished, namely equity, debt and other instruments.

1. Equity Securities

Equity securities can confer on owners rights to, among other things, vote, receive dividends and share in liquidation proceeds. Registered shares are not freely negotiable and give full ownership rights to new owners only when the transfers are entered into the company's shareholder register.⁶⁹ Bearer shares are not issued in a specific name. For this reason they do not need to be registered and are easily negotiable. Preferred shares allow for different treatment among categories of stockholders.⁷⁰ In recent years, certificates of participation (*Partizipationsscheine*) have been issued with increasing frequency. They approximate non-voting shares since they are equity instruments without voting rights that are entitled only to share in earnings and liquidation proceeds. Another form of non-voting share is a dividend right certificate (*Genussschein*) which may, under certain conditions, be issued to incorporators or creditors in connection with a financial restructuring.⁷¹

2. Bonds

Bonds, of which there are numerous forms, are debt instruments giving the holder a right to interest as well as return of the principal. Mortgage bonds are bonds secured by real estate that grant holders a lien that is entered in the mortgage register. Convertible bonds are debt instruments with a right of conversion at a pre-determined ratio into an equity security. Debt securities also include warrants that grant the right to acquire additional equity instruments upon meeting certain predetermined conditions. The option certificate is normally printed on the coupon sheet and can be detached and traded separately on the stock exchanges. Special (but important) types of bonds are covered warrants which grant the same rights but require a cash payment by the holders.

3. Other Securities

Shares in investment funds are playing an increasingly important role in Swiss securities markets. Such shares represent a joint capital investment by numerous investors under the responsibility of a fund manager. Although legal instruments of ownership, they give investors only a

69. See *infra* note 73 and accompanying text.

70. An example of this is the payment of five dividends on the preferred shares before dividend payments to other shareholders.

71. CO, art. 657.

claim against the fund management.⁷²

Notes are also debt instruments that are not normally publicly issued but are usually distributed on a private basis to a select number of investors. Legally, holders have similar rights to bond holders.

Traded options and financial futures are not securities in the traditional sense. Traded options represent fungible rights to purchase or sell securities. Financial futures are fungible contracts with respect to securities.

4. Restrictions of Transfers of Registered Shares

A singular feature of the Swiss capital market is the degree to which registered shares can be and are under severe restrictions on transfer (*Vinkulierung*). Under current legal rules, the board of a company may refuse to enter a purported transfer in the stock register for any of the reasons stated in the Company's articles of incorporation. The three most important reasons for a refusal are typically contained in a company's Articles of Incorporation are the acquisition of shares by a competitor, the purchase of shares by a foreign individual or company, and purchases which bring the purchasers holdings over a given threshold, (e.g., purchases over three percent). Moreover, the registration of a new shareholder may, if appropriate provision is made in the articles of incorporation, be refused without disclosure of any reason for such refusal.⁷³ Refusal by a company to register a new stockholder has severe consequences for the stockholder's legal position. Under Swiss law his or her rights are separated into two categories (*Spaltungstheorie*). The first, participation rights (especially the voting right), remain with the seller (record holder) who theoretically can vote without having any economic interest. The new holder, however, gains the second category which includes all financial rights, in particular the right to receive dividends. Although the holder is the economic owner, he cannot participate in the Company's decision-making process. This *Spaltungstheorie*, created by the Swiss Supreme Court, has recently come under severe criticism.⁷⁴

In practice, almost all Swiss companies with registered shares have transfer restrictions. Many still grant the board power to refuse recordation of a transfer without any obligation to substantiate the grounds for such refusal. Lately, however, many larger corporations have liberalized their ability to, or propensity to, refuse recognition of transfers.

Vinkulierung has brought about an intensive debate in business and political circles. Many foreign companies and government agencies have

72. See *infra* notes 222-223 and accompanying text.

73. CO, art. 686.

74. The pending revision of Swiss corporation law will probably eliminate the *Spaltungstheorie* by providing that all rights (including financial rights) are transferable only upon registration. Cf. *Botschaft über die Revision des Aktienrechts* of Feb. 23, 1983, 158 et seq. [hereinafter *Botschaft*].

severely criticized the Swiss *Vinkulierung* rules. Domestic companies that have been active on the takeover scene abroad, now face the demand for reciprocity (i.e., to allow at home what they are doing abroad). *Vinkulierung* has also become one of the most hotly disputed issues in the ongoing revision of the company code. The new version will probably allow a *Vinkulierung* only when the reasons for a refusal are substantiated in the articles of incorporation. Moreover, it is very probable that public companies will be permitted to have only a severely limited number of transfer restrictions. It is quite possible that Swiss companies whose shares are publicly traded will only be allowed to introduce a percentage clause (i.e., a provision restricting a new shareholder's holdings to a certain percentage limit). The traditional foreign ownership clauses preventing foreign ownership of public companies will, in view of the ongoing European integration process, most likely be prohibited.

V. THE DISTRIBUTION OF SECURITIES

A. Introduction

The disclosure rules affecting the Swiss capital markets are relatively mild when compared with the obligations imposed upon offerings of securities in the United States. There are essentially four legal sources of registration and disclosure requirements in Switzerland. Statutory provisions are provided for in the CO, the *Bankengesetz* and the *Anlagefondsgesetz*. Article 631 of the CO requires some disclosure for newly incorporated companies issuing shares. Article 651 of the CO requires certain disclosures for Swiss corporations issuing additional stock. Article 1156 of the CO requires that certain information be made available in connection with a public offering of bonds. Article 8 of the *Bankengesetz* contains specific rules covering all public and private offerings made by a bank of foreign securities or on behalf of a foreign issuer. There are also specific registration and disclosure provisions relating to investment funds.⁷⁵

A second source of registration and disclosure rules can be found in the stock exchanges' regulations. There are general listing and prospectus delivery requirements, as well as specific prerequisites for the admission to listing of the securities of foreign issuers.

Finally, two Conventions of the Swiss Bankers' Association prescribe that certain disclosure be made in connection with certain securities offerings. The first is a specific Agreement on privately placed notes (Convention XIX); the other relates to unified conditions for issues by public debtors (*Grosses Syndikat für Emissionen inländischer öffentlich-rechtlicher Schuldner*).

B. Statutory Disclosure Requirements

Article 631 of the CO requires that a prospectus be published when

75. See *infra* notes 214, 227, 241, 243 and accompanying text.

shares are publicly offered in connection with the incorporation of a Swiss company. This is a relatively unusual occurrence since the shares of new corporations are not often directly offered to the public but are first underwritten on a firm commitment basis by a bank or a bank syndicate. The disclosure requirements are not at all extensive. They cover only information regarding the organization of the company, the nature of any assets received in exchange for stock, specific benefits granted to the incorporators and the terms of the subscription offer.⁷⁶ The law also provides that a "special prospectus may be dispensed with if the subscription certificates contain the names of all founders and the information prescribed in this article."⁷⁷

According to Article 651 of the CO, existing companies issuing new shares must publish a prospectus that is somewhat more extensive than that required of a new company. It must include, among other items, information regarding the past operations of the company including a balance sheet and statement of profit and loss for the past year, the last auditor's report, the dividend history, data on loans and debt securities, and assets received in exchange for stock.⁷⁸ Again, no special prospectus

76. In detail, the prospectus must set forth (Article 631):

1. Specific clauses of the Articles of Incorporation required by law to be included as well as the clauses that must appear in the articles of incorporation in order to be valid.
2. Nature of the assets received in exchange for stock, acquisition of assets immediately after incorporation and special benefits for the incorporators, if any.
3. The essential elements of the report of the incorporators, as required by Article 630, CO.
4. Date until which a subscription is binding.
5. Places where the subscriptions may be made.
6. Issue price of the shares.
7. Amount to be paid in on shares prior to the incorporation meeting of the subscribers.
8. Places where payments for the shares may be made.

77. *Id.*

78. In detail, the prospectus must disclose the following information (Article 651):

1. Date of registration of the company in the Commercial Register.
2. Name and registered office of the company.
3. Amount and structure of the equity capital, indicating par value of shares, types and classes of shares as well as preferential rights.
4. Profit-sharing certificates and their respective rights.
5. Members of the board and auditors.
6. Balance sheet and profit and loss statement of the last year together with the auditors' report.
7. Dividends paid during the last 5 years or, if the company existed for less than 5 years, since the incorporation.
8. Debt securities issued by the company.
9. The resolution authorizing the new issue of shares including the aggregate amount, par value, offering price, as well as number and type of the new shares.
10. Assets received in exchange for stock, acquisition of assets immediately after the issuance as well as any preferential rights.

is required if the information called for is contained in the subscription form.⁷⁹ Whereas Articles 631 and 651 of the CO apply only to companies incorporated in Switzerland, Article 1156 of the CO covers the issuance of bonds by Swiss as well as by foreign debtors. Basically, the provisions of Article 651 that relate to the issuance of new stock apply by analogy to a public offering of bonds. Article 1156 further states that the "prospectus must contain the detailed information concerning the loan, especially the interest terms, terms of repayment, special security provided for the bonds, and the representation, if any, of the bond creditors."⁸⁰

C. *Distribution of Prospectus*

Neither Articles 631 and 651 of the CO, which cover the issuance of stock, nor Article 1156 of the CO which addresses the public offering of bonds, define in detail how the required prospectuses are to be distributed. Commentators generally agree that the prospectus must have at least the same distribution as the report of founders, which must be available at all places at which shares or bonds can be purchased (*Zeichnungsstelle*).⁸¹ A separate prospectus may be dispensed with if the subscription certificates contain the names of all founders and the information prescribed by Article 631, section 2 of the CO.⁸² In the interest of a successful stock or bond offering, issuers will normally go beyond the legal requirements. They may either make loose copies of the prospectus itself available or publish these documents or parts thereof in a daily newspaper. Some commentators have expressed their views that these voluntary disclosures should also meet the legal information requirements of Articles 631, 651 and 1156 of the CO.⁸³

D. *Listing Requirements*

Securities must meet certain requirements before they can be accepted for trading on the Swiss stock exchanges. These conditions are detailed in the listing regulations issued by the Swiss Stock Exchange Association. The listing requirements of Zurich and Basle are almost identical.⁸⁴ The following discussion concentrates on the rules of the Zurich stock exchange.

11. Date from which the new shares are entitled to dividends as well as restrictions of the right to receive dividends and preferential rights.

12. Date until which the subscription is binding.

79. *Id.*

80. CO, art. 1156.

81. P. FORSTMOSER, *SCHWEIZERISCHES AKTIENRECHT*, vol. I/1 267 (1981) (citing other sources).

82. CO, art. 631. *See also* CO, art. 651.

83. Forstmoser, *supra* note 81, 267.

84. The listing requirements can be found in § 2, et seq., *Kotierungsreglement des Effektenbörsenvereins Zürich* [hereinafter *Kotierungsreglement Zürich*]; *Kotierungsreglement Basel*, *supra* note 20, § 2 et seq.; Article 4, et seq., *Règlement pour l'admission de valeurs à la côte de la Bourse de Genève* [hereinafter *Règlement pour l'admission*].

A listing application must be sponsored by a member of the relevant stock exchange.⁸⁵ In addition, a specific admission procedure with a particular quotation request must be followed.⁸⁶ Normally, securities will be accepted for listing that have achieved a wide market among the investing public.⁸⁷

To be listed, the issuer must meet certain requirements regarding past disclosures and agree to make certain future disclosures. It must also have a certain level of paid-in equity capital.⁸⁸ To be listed, the securities must meet certain requirements relating to nominal value or total market capitalization, exercise of financial aggregate right, transfer modalities and evidence of ownership.⁸⁹

E. *Listing Prospectus*

The Zurich, Basle and Geneva stock exchanges have similar requirements for preparation and delivery of prospectuses for newly listed securities.⁹⁰ The following discussion focuses on the Zurich stock exchange provisions. These provisions contain two general rules, namely that the prospectus as well as the listing advertisement must constitute fair disclosure⁹¹ and that the prospectus should allow an evaluation of the listed

85. *Kotierungsreglement Zürich*, *supra* note 84, §4.

86. *Id.* § 4 et seq.

87. *Id.* § 1.

88. *Id.* § 2 lists five conditions:

1. The candidate must have made available accounting figures for the last five years.
2. The company is obliged to publish every year an audited balance sheet and statement of profits and losses as well as a business report.
3. The paid-in equity capital must total a minimum of SFr. 5 million for domestic and SFr. 10 million for foreign corporations.
4. The provisions are applicable by analogy if the issuer is a state, a local community or another public institution.
5. The requirements may be waived if a third party guarantees fully the obligations of the issuer.

89. *Id.* § 3, stipulates four different conditions:

1. The security must have either a minimum aggregate nominal value or a minimum total market capitalization (aggregate market value). For Swiss companies, the figures are SFr. 10 million and SFr. 25 million, respectively. For foreign companies they are SFr. 20 million and 50 million respectively.
2. The denomination of the shares must correspond with a unit under the *Börsenordnung*.
3. For all debt securities as well as for all securities of Swiss issuers the payment of dividends, capital repayments, the exercise of preemptive rights and similar financial claims must be possible without fees at a bank that is member of the Zurich stock exchange.
4. The issuer must have clear rules with respect to the transfer of the shares on the stock exchange as well as the certification on ownership.

90. Prospectus requirements can be found in *id.* § 7 et seq.; *Kotierungsreglement Basel*, *supra* note 20, §7 et seq.; *Règlement pour l'admission*, *supra* note 84, art. 4 et seq.

91. *Kotierungsreglement Zürich*, *supra* note 84, § 7.2.

security by investors.⁹² The listing prospectus must be made available, without fee, by the sponsoring member of the stock exchange in either German, French, Italian or English.⁹³ Instead of a prospectus, issuers may publish in German in a Zurich newspaper a listing advertisement (*Kotierungsinserat*) containing limited information about the issuer and the securities to be listed.⁹⁴ The listing advertisement must indicate that a prospectus is available and that it is the only document relevant for the stock exchange admission.⁹⁵

The prospectus must contain information about the issuer as well as about the issued securities. Issuer-related information requirements include, among other items, information related to the issuer's legal identity and economic activities, capital and voting structure, board, management, auditors, dividends, issued bonds, accounting principles, annual financial statements, and important subsidiaries.⁹⁶ The security-oriented information that the prospectus must contain includes a description of the legal basis of the security issuance, and a description of the security itself (including voting rights). Information must also be included con-

92. *Id.* § 8.1.

93. *Id.*

94. *Id.* §§ 7.1 and 9.1. The listing advertisement must contain information about the name, domicile and activity of the issuer, the name of the auditors, specified financial data as well as information on dividends paid in the last 5 years or since incorporation. Moreover, detailed data is required with respect to the issued security (including dividend and other rights), payment services in Switzerland, information concerning unusual aspects of the securities and information concerning certain procedures. *See id.* §§ 9.2 and 9.3.

95. *Id.* § 9.4.

96. The *Kotierungsreglement Zürich*, *id.* § 8.2 requires the following information:

1. Information about the legal identity of the issuer (name, domicile, date of incorporation, etc.) and description of its activities including any quotation on other stock exchanges.
2. Description of the capital of the issuer (including total amount and structure of the capital, reserves and other equity) as well as details on preemptive and other preferential rights or claims.
3. Voting rights.
4. Members of the supervisory organ (board), and management and auditors.
5. Dividends paid in the last five years and other similar payments.
6. Summary data on public bonds (currency, amount, due date) with a description of guarantees and privileges.
7. Accounting principles and accounting year.
8. Last audited consolidated balance sheet and profit and loss statement as well as report of the auditors.
9. All subsidiaries whose assets equal at least five percent of the assets of the issuer or SFr. 100 million (with information concerning the participation and capital structure of these subsidiaries)
10. Last quarterly or semi-annual report, if the period covered by the last audited financial statement is more than six months removed.

cerning the place of payment, the type and nature of any guarantees and specified procedural requirements.⁹⁷

F. Public Offering

Although the requirements of Articles 631 and 651 of the CO (issuance of stock in a Swiss company) and the provisions of Article 1156 (issuance of bonds by any issuer) apply only in a public offering of securities, they contain no definition of such term. No major case law has developed to address this issue. Modern commentators, however, largely agree that public offering under Swiss law should have a meaning similar to that developed internationally.⁹⁸ A public offering is characterized by the extension of subscription offers to an unlimited circle of investors who are not known on an individual or personal basis to the issuer.⁹⁹ Whether an offering is a public offering depends largely upon the relationship between the offerees and the issuer or underwriters. Of significance is the manner in which the offeror seeks to contact the potential investors. Utilization of media with large audiences (like television, newspaper ads, etc.) would cause the offer to be deemed public. The same would be true for an overly aggressive advertising campaign that addressed the public at large.¹⁰⁰ Other aspects of the offering such as the par value of the securi-

97. *Id.* §8.3 requires the prospectus to contain the following information:

1. The legal basis of the securities issued and, if the issuer is a foreign company, the applicable law and jurisdiction.
2. A description of the security (including, among other information, its type, rights, total amount, and transfer restrictions).
3. For securities that are shares, a description of voting rights and other payment obligations (if the capital has not been entirely paid in); if the securities are bonds and similar securities, a complete listing of the borrowing conditions (including conversion and option rights).
4. A designation of the place of payment in Zurich.
5. Description of the type and nature of any guarantee.
6. The obligation to publish timely all information with respect to the security in a newspaper that is regularly published in Zurich.
7. Mention of the admission request and of other stock exchanges on which the security is already quoted or an admission request is pending.

98. For an international perspective, see, e.g., Hopt, *Schweizerisches Kapitalmarktrecht - Begriff, Aufgaben und aktuelle Probleme*, 38 WIRTSCHAFT UND RECHT 101, 118 (1986).

99. The fact that the number or circle of offerees is somewhat limited, may not preclude characterization as a public offering. Accordingly, even subscription offers by a large bank to its existing clients (if the number is large), may be considered a public solicitation. Cf. CAMENZIND, PROSPEKTZWANG UND PROSPEKTHAFTUNG BEI ÖFFENTLICHEN ANLEIHENS OblIGATIONEN UND NOTES 20 (1989); Hopt, *supra* note 98, at 118.

100. For more details (with extensive citations of the relevant literature) see F. TAISCH, PRIVATPLACIERUNGEN 17 et seq. (1987); Schuster, in KOLLOQUIUM SCHWEIZERISCHES KAPITALMARKTRECHT 199 (1987); CAMENZIND, *supra* note 99, at 19 et seq.

ties or the total amount of the issue may also be considered.¹⁰¹

Firm underwritings by banks or bank consortia play a major role in Swiss capital markets. Many offerings of stocks and bonds are firmly underwritten by banks that sell the securities afterwards to the public. This raises the issue of whether the sale by the underwriter to the public should be treated as a private or as a public offering.

The vast majority of commentators distinguish in this respect between an offering of stock and an offering of bonds. A purchase of stock by a bank on a firm underwriting basis with a subsequent sale of the shares to the public, is considered by most commentators to be a private placement not requiring a prospectus.¹⁰² The situation is viewed differently if one or more banks underwrite an issuance of bonds as firm underwriters. The subsequent resale of the debt instruments is viewed as a public offering. Consequently, such a transaction requires a prospectus under Article 1156 of the CO.¹⁰³

G. *Private Placement of Notes*

In commercial practice, notes are privately placed debt instruments with maturity dates of between two to eight years from the date of issuance, as opposed to listed bonds which have a maturity date between eight and twelve years. Notes are distributed without any public advertisements by a bank consortium and are not traded on stock exchanges. Notes are sold in relatively large minimum denominations (SFr. 50,000 and more) to institutional and other sophisticated investors known to the distributing banks.¹⁰⁴

Notes play an important role in the Swiss capital markets; especially for foreign issuers. In 1988, 260 private placements of notes by foreign debtors were made with an aggregate offering price of SFr. 20.8 billion. In the same period, only 144 regular bond issues were made by foreign companies totalling SFr. 18.7 billion.¹⁰⁵

The issuance of notes has been the subject of controversy. The Swiss Nationalbank allowed the sale of notes for the first time in 1968 but placed many restrictions on such sales. In 1986, a significant liberalization

101. CAMENZIND, *supra* note 99, at 20. *See also* (in an international perspective) Hopt, *supra* note 98, at 118.

102. *See, e.g.*, P. FORSTMOSER, *supra* note 81 at 289 et seq.; CAMENZIND, *supra* note 99, at 58.

103. MEIER-HAYOZ AND VON DER CRONE, WERTPAPIERRECHT 286 (1981); A. ERB, DER PROSPEKT UND DIE PROSPEKTHAFTUNG BEI ANLEIHENSEMISSIONEN AM SCHWEIZERISCHEN KAPITALMARKT 135 (1986); CAMENZIND, *supra* note 99, at 57.

104. Private notes have gained much attention in the financial and legal communities. For a good description of capital market considerations as well as legal problems, see TAISCH, *supra* note 100 and CAMENZIND, *supra* note 99. *See also* Merz & de Beer, *Umfassendere Informationspflichten bei Notes-Emissionen*, 59 SCHWEIZERISCHE AKTIENGESELLSCHAFT 137 (1987).

105. *Banken im Wettbewerb*, *supra* note 29, at 67.

of the market for notes occurred which resulted in their placement to a broader circle of investors. There were, however, no rules protecting investors. Under pressure from the Swiss Nationalbank, the Federal Department of Finance and Customs and the Federal Banking Commission, the Bankers' Association adopted effective as of May 1, 1987, an Agreement on Notes of Foreign Debtors (Convention XIX).

Convention XIX has as its primary purpose the protection of purchasers of notes of foreign debtors by requiring disclosure about the issuer and the securities both before and after private placement of the notes. It covers sales of notes (i.e., direct placements by syndicate banks to their own clients). The Convention prohibits price quotations of notes on stock exchanges and requires a minimum denomination of SFr. 50,000. For notes with a smaller par value, the provision of Article 1156 of the CO are applicable.¹⁰⁶

The most important rules of the Convention require the lead underwriter to put together a prospectus.¹⁰⁷ This disclosure document must meet the requirements of Article 1156 of the CO. The prospectus must disclose additional information with respect to the loan conditions, financial information, the names of guarantors, ratings, etc.¹⁰⁸ The prospectus is not publicly distributed, but every potential investor can require the delivery of this prospectus from members of the underwriting syndicate.¹⁰⁹

The legal future of notes is uncertain at this time. In its broad investigation of the banking sector, the Cartel Commission criticized Convention XIX. Although the Commission welcomed, as a matter of principle, the self-regulatory investor protection Convention XIX represents, it recommended elimination of the provisions relating to minimum denominations and the prohibition of quotations on the stock exchanges.¹¹⁰ The

106. Convention XIX, *supra* note 31, art. 1.

107. *Id.* art. 2.

108. *Id.* art. 3 requires the following additional disclosures:

1. Summary of the note conditions, including option and conversion rights.
2. Information on the latest business developments if the issue is made more than six months after the last annual statement.
3. Publication of the names of all guarantors.
4. Citation to the source of the disclosed information.
5. Indication of existing ratings for the securities published by international rating institutions.
6. Specific information if the notes are tied to the issuance of shares.
7. The information that the leading underwriter has obligated the issuer to deliver to him until the maturity date of the notes all business reports, reports of the auditors as well as other relevant company documents.

109. *Id.* art. 4.

110. VSK 1989/3, *supra* note 28, 37 f.

banks accepted the Commission's suggestion regarding quotation on stock exchanges, but insisted on preservation of the minimum denomination requirement in order to preserve segmentation of the market as well as product differentiation.¹¹¹ As already mentioned,¹¹² it is generally expected that the Department of Finance and Customs will transform the recommendations of the Commission into strict orders. Banks would then have the possibility of recourse to the Swiss Supreme Court.

H. *Specific Rules for Foreign Issuers*

There are two key legal rules in Switzerland that affect foreign issues. The first is statutory and requires authorization for certain transactions involving movement of capital to or from foreign countries. The other is self-regulatory and prescribes a specific admission procedure for foreign securities on Swiss Stock Exchanges.

Article 8 of the *Bankengesetz* imposes a requirement on banks and finance companies to notify the Nationalbank, and to receive authorization for specific transactions with foreign debtors.¹¹³ The purpose of the provision is to influence capital exports for reasons of public policy. The Nationalbank may intervene in transactions when it is "in the interest of the national currency, the development of the interest rates on the money and capital markets, or the economic welfare of the nation."¹¹⁴ The following transactions fall within the information and approval requirements:

1. Loans to foreign borrowers, whether the whole bond issue or only a portion of it is taken firmly, either as an investment of the bank itself or for public subscription, or whether it is taken on commission for placement;
2. Purchase and issuance of shares of foreign companies, unless these transactions are made pursuant to the exercise of an option;
3. Credits and investments abroad, whether they are made by granting a loan for twelve months or more, or by purchasing foreign prescriptions or treasury bills for twelve months or longer;
4. Participation in the first placement of debt certificates issued by a foreign principal with a maturity of not less than twelve months.¹¹⁵

Article 8 does not apply to transactions that involve less than SFr.

111. *Banken im Wettbewerb*, *supra* note 29, at 64 et seq.

112. See *supra* note 35 and accompanying text.

113. A similar provision can be found in *Anlagefondsgesetz*, *supra* note 5, art. 48. In the case of significant economic problems, the Nationalbank may (after discussion with the *Bundesrat*) prohibit the purchase of foreign securities and real estate for the account of investment funds.

114. *Bankengesetz*, *supra* note 4, art. 8.3. Broader justifications, e.g., general considerations of foreign policy, are not permitted.

115. *Id.* art. 8.2.

10,000,000.¹¹⁶ While these provisions may appear to create substantial barriers for international capital movements, this is not the case in practice. Switzerland has maintained a traditionally liberal approach towards international capital transactions. Accordingly, the Nationalbank is unlikely to invoke its power under Article 8. This is evidenced by a report the OECD published in 1989. It confirmed the liberal attitude of Switzerland and stressed, in particular, that Article 8 does not in fact create any major obstacles to international capital transactions, at least as far as the OECD countries are concerned.¹¹⁷

As has been discussed already,¹¹⁸ there is also an admission procedure for foreign securities that has been established on a self-regulatory basis by the Swiss stock exchanges. Its main purpose is to assure investor protection by guaranteeing fair disclosure and by evaluating the quality of the securities the issuer seeks to list. The admission criteria, as outlined in the new Reglementation of 1987,¹¹⁹ contain disclosure requirements that are almost identical to the general admission rules of the Swiss stock exchanges.¹²⁰ Additionally, the Directives for Decisions of the Admission Office evaluate the quality and solvency of the issuer. The following criteria are taken into consideration:

1. General evaluation of the issuer.
2. Country risk and transferability.
3. Capital market suitability in the home country.
4. Safety for the investors.
5. Marketability of the issue.
6. Fair disclosure.

In its practice, the Admission Office also requires that Swiss law govern and that disputes be adjudicated by Swiss courts. The Admission Office has refused to list a significant number of candidates in the last couple of years.

The entire admission procedure for foreign securities has been criticized by various parties. As has been mentioned already, the Cartel Commission has recommended a completely new approach.¹²¹ In addition, many Swiss commentators have criticized the unequal treatment of Swiss and foreign securities in view of the internationalization of the securities

116. *Id.* art. 8.5. For transactions falling under category 4, the provision of art. 8 apply if the amount of the debt certificates is expected to exceed SFr. 3 million in a period of one year.

117. *See Neue Zürcher Zeitung*, Nr. 259, Nov. 7, 1989.

118. *See supra* note 36 and accompanying text.

119. Reglementation Concerning the Admission of Foreign Securities for Trading and Quotation on Swiss Stock Exchanges (*Reglement über die Zulassung von ausländischen Wertpapieren zum Handel und zur Kotierung an den Schweizer Börsen*) of May 13, 1987 [hereinafter *Zulassungsreglement*].

120. *See id.* § 204 stating simply that prospectus and advertisements shall follow the general admission rules of the stock exchanges.

121. *See supra* note 35 and accompanying text.

markets and the European integration process.¹²² The admission regime has also been criticized by foreign observers, including the OECD in its 1989 report on the Swiss capital transfer policy.¹²³

I. *Continuous Disclosure*

1. Statutory Rules

The CO and other laws affecting the securities markets contain no general disclosure even for publicly held companies. The CO merely grants inspection rights to shareholders and creditors in certain instances. According to Article 696 of the CO, the profit and loss statement and the balance sheet, together with the auditors' report and the management's business report, must be open for inspection not less than ten days prior to the annual general meetings of stockholders at the company's main office as well as at its branches. In addition, these documents must be available for a period of one year for inspection, and each stockholder has the right to request a copy of the profit and loss statement and of the balance sheet.¹²⁴ Upon request of a creditor, the company must provide him or her with a profit and loss account and a balance sheet as approved by the stockholders, both made available at the commercial register.¹²⁵

This complete lack of any disclosure rules, particularly in view of developing international standards, is outdated. More stringent reporting and accounting provisions are major topics of debate in the context of the pending revision of the company law portion of the CO. The Federal Council proposed in its new draft disclosure rules requiring that annual and consolidated statements be published by companies that have issued bonds, whose shares are quoted on a stock exchange or which meet two of the following elements: balance sheet total of SFr. 50 million; total turnover of SFr. 100 million; or number of employees greater than 500.¹²⁶ This proposal has been heatedly disputed in the Parliament and it is difficult to predict which disclosure concept will ultimately prevail.

The accounting and disclosure provisions for banks are far more stringent than those imposed upon companies.¹²⁷ Banks must prepare annual financial statements consisting of a balance sheet and a profit and loss statement. In addition, institutions with total assets exceeding SFr. 50 million must prepare an interim balance sheet at the end of the first six months of a financial period. Those with assets exceeding SFr. 200 million must prepare interim balance sheets at the end of the first three

122. One particularly prominent voice is, for example, the President of the Nationalbank. See Lusser, *Finanz und Wirtschaft*, No. 75, Sept. 24, 1988, at 5.

123. *Neue Zürcher Zeitung*, *supra* note 117.

124. CO, art. 696.

125. *Id.* art. 704.

126. Article 7(h) of the new draft. See also *Botschaft*, *supra* note 74, at 76 et seq.

127. See in particular, *Bankengesetz*, *supra* note 4, art. 6 and *Bankenverordnung*, *supra* note 6, art. 23 et seq.

financial quarters.¹²⁸ The annual financial statements as well as the interim balance sheets must be published or otherwise made accessible to the public.¹²⁹ While the annual financial statements must be published in the *Swiss Commercial Gazette*, a Swiss newspaper or in a printed or mimeographed annual business report, the interim balance sheet must appear in the *Swiss Commercial Gazette*, a Swiss newspaper, or in a printed or mimeographed synopsis that may be published by a bank association.¹³⁰

2. Self-Regulatory Rules

Admission rules of the important stock exchanges require corporations whose shares are publicly traded to make available annual statements and business reports. As a condition to listing, candidates must agree to publish annually a business report that can be obtained from the introducing stock exchange member.¹³¹ This member guarantees in his request that the issuer will make available a business report and that the member will inform the public about any changes to the by-laws or about other important events.¹³²

Disclosure rules of a self-regulatory nature can also be found in Convention XIX covering notes issued by foreign debtors. The introductory prospectus must indicate that the lead underwriter obtained the agreement from the debtor to provide it with business reports, auditors' reports, interim statements and information regarding guarantees.¹³³

3. Voluntary Disclosure

All things considered, the disclosure regime in Switzerland is considerably less demanding than those of other countries. Many mid-sized and large firms have developed disclosure policies which go far beyond the legal requirements. Most larger companies send an annual business report including financial statements to their shareholders. They also make such information publicly available. Many voluntary improvements have also been made with respect to the quality of the financial data prepared by companies. This results in part from the fact that many Swiss companies are active abroad and are influenced by the more rigorous disclosure standards of the host countries.¹³⁴ Despite these positive developments, the overall disclosure level of Swiss companies is considerably below that of many foreign countries.

128. *Bankengesetz*, *supra* note 4, §§ 1 and 3.

129. *Id.* art. 6.4.

130. *Bankenverordnung*, *supra* note 6, art. 27.

131. *See, e.g., Kotierungsreglement Zurich*, *supra* note 84, art. 2.2.

132. *Id.* art. 5.

133. Convention XIX, *supra* note 31, art. 3(g).

134. For a good description of recent developments, *see* D. BAUDENBACHER-TANDLER, SCHUTZ VOR NEUEN ANLEGERRISIKEN 88 et seq. (1988); *see also* CH. J. MEIER-SCHATZ, WIRTSCHAFTSRECHT UND UNTERNEHMENSPUBLIZITÄT 168 et seq. (1989).

VI. FEDERAL FRAUD AND CRIMINAL PROVISIONS

A. *Civil Liability Provisions (Overview)*

Swiss law imposes civil law liability for fraud and other violations of corporate and securities laws. The most important provisions of Swiss law in this respect are Articles 752 and 1156 of the CO which dictate certain obligations in connection with the public issuance of shares and bonds. Article 39 of the *Bankengesetz* specifies a rule of civil liability in connection with the issuance of shares and other securities by banks. Article 754 of the CO mandates certain responsibilities regarding financial statements and other company disclosures. Factual situations not governed by these specific provisions may nevertheless be actionable under general contract law (Article 97, et seq.) or tort law (Article 41, et seq.). This is the case, for example, for the issuance of shares by foreign companies and the issuance of private notes or liabilities in connection with stock exchange admission prospectuses.

B. *Criminal Law*

A number of the provisions of the federal Swiss Criminal Code ("CC"), may apply to certain acts taken in connection with securities transactions. The most important are:

- Article 152 — Imposing liability for untrue statements by commercial companies in public communications or shareholder reports.¹³⁵
- Article 158 — Imposing liability for improper inducement to speculation by taking advantage of another's inexperience in stock exchange dealings.¹³⁶
- Article 251 — Imposing liability for forgery.¹³⁷

135. *Schweizerisches Strafgesetzbuch* [hereinafter CC]. CC, art. 152 (False Business Declarations) punishes anyone who, as a founder, co-owner, manager, director, trustee, auditor or liquidator of a company makes untrue statements of significant importance in public information or in reports to the shareholder assembly.

136. *Id.* art. 158 (inducing speculation) states: "Whoever, with intent of material advantage for himself or another, exploits the inexperience of another on the stock market or his thoughtlessness to induce him to speculate in stock or goods knowing or able to know that the speculation is in obvious disproportion to his resources, shall be confined in the prison or fined."

137. *Id.* art. 251 (forgery) states:

Whoever with the intent of injuring the property or other rights of another, or to obtain an unlawful profit for himself or another falsifies or tampers with a document, uses the original signature or mark of another to produce a false document, or falsely deposes a fact of legal importance or causes it to be deposed, [or] uses for deception a document of this sort produced by another shall be sentenced to the penitentiary for not over five years or to the prison.

In case the forgery or misuse concerns a public register (or) document, a hand-written will, bonds, drafts, or other negotiable papers, the penalty shall be confinement in the penitentiary for not over five years or in the prison for not less than six months.

In addition, a number of other CC rules may be applicable, such as Article 140 (embezzlement),¹³⁸ Article 148 (fraud),¹³⁹ Article 159 (unfaithful management),¹⁴⁰ Articles 163 and 165 (fraudulent bankruptcy or bankruptcy as a result of gross negligence),¹⁴¹ and Article 166 (violation of bookkeeping obligations).¹⁴²

There are also criminal sanctions for violating certain provisions of the *Bankengesetz*, including, among others, exercising a banking activity without a license and making false assertions or omissions in the annual accounts.¹⁴³ In addition, the *Anlagefondsgesetz* imposes criminal sanctions on anyone who grossly contravenes the statute (e.g., by acting without the necessary authorization) or who commits other minor offenses.¹⁴⁴ In addition to these federal offenses, criminal liability may arise on the basis of cantonal laws. Under the Zurich *Wertpapiergesetz*, for instance, persons may be punished for violating its provisions or the ordinance

In particularly minor cases, the court may impose a prison sentence or a fine.

138. *Id.* art. 140 (embezzlement) states:

Whoever embezzles a movable object belonging to another [but] entrusted to him, with the felonious intent of his own or another's profit, or whoever converts entrusted goods, particularly money, fraudulently to his or another's profit, shall be confined in the prison for not over five years.

Whoever commits the offense in his capacity as a member of an authority, as an official, guardian, custodian, professional trustee or manager or in the exercise of a vocation, trade or business for which he has been officially licensed, shall be confined in the penitentiary for not over ten years or in the prison for not less than one month.

Embezzlement from a relative or a member of the same family shall be prosecuted only on petition.

139. *Id.* art. 148 (fraud) states:

Any person who, with intent to make an unlawful profit for himself or another, shall fraudulently mislead another person by falsely representing or concealing facts or shall fraudulently use the error of another and thus cause the deceived person to act detrimentally against his own or another's property, shall be confined in the penitentiary for not more than five years or in the prison. The offender shall be punishable with a penitentiary term of not over ten years and fined if he makes a business of committing frauds. Defrauding a relative or a member of [one's] own family shall be prosecuted on petition only.

140. *Id.* art. 159 (unfaithful management) states:

Whoever dissipates the resources of another person entrusted to him by law or contract shall be confined in the prison. If the offender acted from selfish motives, he shall be confined in the prison for not over five years and fined.

Unfaithful management to the disadvantage of a relative or a member of the [same] family shall be prosecuted on petition only.

141. *Id.* art. 163, punishes fraudulent bankruptcies in which debtors diminish or destroy their assets or mislead receivers and creditors with respect to their assets. *Id.* art. 165, covers debtors who fall into bankruptcy because of a gross recklessness, excessive speculation or extremely gross negligence.

142. *Id.* art. 166, makes it a criminal offense to fail to comply with accounting procedures that are required by law and thereafter to fall into bankruptcy.

143. *Bankengesetz*, *supra* note 4, arts. 46-50.

144. *Anlagefondsgesetz*, *supra* note 5, art. 49/50.

promulgated thereunder.¹⁴⁵

Unquestionably, the most important criminal provision relating to the securities market is Article 161 of the CC, the new insider rule, as discussed below.¹⁴⁶

C. *Private Remedies in Connection with a Prospectus*

1. Introduction

As already mentioned,¹⁴⁷ Swiss law neither requires the registration of public securities offerings nor does it provide for a federal securities commission. Apart from criminal prosecutions, private remedies are the sole enforcement device with respect to false or misleading information in prospectuses.

The legal bases for these private actions are Articles 752 and 1156 of the CO. Article 752 addresses prospectuses, circulars or similar notifications in connection with the issuance of shares and bonds.¹⁴⁸ Article 1156, which overlaps somewhat with Article 752, covers bond prospectuses.¹⁴⁹ There have been some discussions concerning the relationship between the two rules. According to a new Supreme Court decision and to the dominant opinion of commentators, both provisions apply in parallel if their statutory requirements are met.¹⁵⁰

2. Scope of Application

Article 752 covers all forms of direct and indirect public offerings of shares and bonds. In Switzerland, public offerings are often firmly underwritten by a bank consortium and afterwards distributed to the investing public. Although in this case the law does not require a formal prospectus, Article 752 applies to all documents distributed in connection with such an indirect public issuance. In addition, Article 752 applies not only to the issuance of shares and bonds, but also to the issuance of profit

145. *Zürich Wertpapiergesetz*, *supra* note 16, art. 39.

146. *See infra* notes 171-177 and accompanying text.

147. *See supra* note 3 and accompanying text.

148. CO, art. 752 reads as follows:

If, on the occasion of the formation of a company, or of the issuance of shares or bonds, there have been made or divulged statements in a prospectus, or in circulars, or similar notifications, which are incorrect or do not comply with the legal requirements, anyone who has cooperated intentionally or negligently in this connection will be liable to the individual stockholders or bond holders for damage caused thereby.

149. Article 1156, ¶ 3 states: "If bonds are issued without a prospectus complying with these provisions, or if the prospectus contains incorrect information or information not in accordance with the legal requirements, the persons who intentionally or negligently took part are liable jointly and severally for damages."

150. *See, e.g.*, P. FORSTMOSER, *DIE AKTIENRECHTLICHE VERANTWORTLICHKEIT* 278 (2nd ed. 1987).

sharing certificates or participation bonds.¹⁵¹

Article 1156 also governs the offering, on a firm understanding basis, of bonds. In such circumstances, bonds of a company are first purchased directly by banks or other financial institutions in order to place them with the public. Under these circumstances, Article 1156 (unlike Article 752) requires that a formal prospectus be distributed.¹⁵²

Neither Article 752 nor Article 1156 imposes liability for prospectuses delivered solely in compliance with stock exchange regulations for admission of securities to public trading.¹⁵³ There are no statutory liability rules applicable to stock exchange admission documents. The provisions of Articles 752 and 1156 apply only when the stock exchange admission prospectus is simultaneously used in connection with a public offering of the same securities.

Articles 752 and 1156 have a broad scope of application. Not only are formal prospectuses (whether legally required or not) covered by this rule but also "circulars, or similar notifications," including all forms of advertising and information intended to attract investors and to inform them about the company.¹⁵⁴ The same is true for cases in which no prospectus was issued or no other information whatsoever was made and in which the public was deceived by the company's silence.

3. Who Can Assert a Claim?

According to the text of Articles 752 and 1156, a private action can be brought by shareholders and bondholders who were injured by a violation of these sections. Actions may also be brought, however, by owners of option rights on the stocks or bonds as well as holders of profit sharing certificates or participation bonds.

There has been a long-standing discussion among commentators as to whether only shareholders and bondholders who buy securities *directly* from the company in a public offering may bring a suit or whether subsequent acquirors also have a private remedy. The better view is that *all* security holders may bring suit as long as there is a causal relationship between the incorrect or incomplete information and the damage suffered by the individual owner.¹⁵⁵

4. Against Whom Can a Claim be Asserted?

According to Article 752, "anyone who has cooperated intentionally

151. For a description of these securities types, see *supra* note 71 and accompanying text.

152. See *supra* notes 81-83 and accompanying text.

153. The discussion on the stock exchange admission prospectus, see *supra* notes 90-97 and accompanying text.

154. These include, for example, newspaper ads, subscription bulletins, oral advertisements, etc.

155. See, e.g., (with further sources) FORSTMOSER, *supra* note 150, at 285.

or negligently in . . . connection" with a public offering in which incorrect or incomplete information is given, is liable. This formula addresses all persons who participated in the production or distribution of prospectuses, circulars and all other documents or information addressed to the investing public. A private action may especially be brought against signatories of prospectuses and circulars, directors and officers, auditors, banks and similar institutions, as well as all sorts of experts and advisors (including lawyers).

5. Materiality

The text of Article 752 prohibits "statements . . . which are incorrect or do not comply with the legal requirements." According to case law and commentators, this provision applies to many factual circumstances like the non-issuance of a legally required prospectus, the distribution of incomplete or incorrect data and the nondisclosure of material information. Moreover, Articles 752 and 1156 apply also when the information given is true but misleads the public in one way or another or if the information contains unduly optimistic statements.

Both provisions require a causal relationship between the damages to the investor and the violation of the disclosure rules. If the investors would have lost their money even if all information in the prospectus would have been true, Articles 752 and 1156 do not apply. Accordingly, plaintiff has to prove that the investment decision was also influenced by the information in the prospectus and that he or she would not have purchased the security if he or she would have had a different and complete picture of the company or had known that the prospectus contained incomplete or untrue data. So far, courts have not set very high standards with respect to the evidence of such a causal relationship.¹⁵⁶ The prospectus liability rules do not apply when the investor would have purchased the securities despite his or her knowledge of the incorrect information or had indeed known the incomplete or untrue data.¹⁵⁷

A special problem arises when no prospectus has been published at all.¹⁵⁸ In this case, a hypothetical relationship has to be construed between the violation of information rules and the damages. There is no explicit case law addressing the issue. However, it is probably safe to rely on the relatively generous standard of the Supreme Court with respect to materiality. Courts would probably argue that investors would not have purchased the securities if a complete and correct prospectus had been published.¹⁵⁹

156. See (with further sources) CAMENZIND, *supra* note 99, at 107 et seq. *But see also* FORSTMOSER, *supra* note 81, at 99, quoting two Supreme Court decisions addressing the issue in a broader context.

157. CAMENZIND, *supra* note 99, at 108.

158. *Cf., e.g.*, P. Widmer, *Ko-Referat zum ZfU-Seminar vom*, 21./22. Jan., KILCHBERG-ZÜRICH 1988, 5.

159. *Accord* CAMENZIND, *supra* note 99, at 108.

6. Public Offerings by Foreign Companies

As far as public issues of shares are concerned, Article 752 of the CO applies only to corporations incorporated in Switzerland. This does not mean that foreign entities that distribute their equity securities to the Swiss public have no duties. They can, however, only be prosecuted on the basis of the general tort rules of Article 41 of the CO.

Public offerings of bonds are regulated. Article 1156 clearly addresses all forms of public offerings of bonds made in Switzerland. The legal domicile of the issuing company does not affect liability. Swiss and foreign companies are, accordingly, responsible for correct and complete information under this provision.

D. Other Private Remedies

In a number of circumstances securities information may be disseminated to the investing public but not be subject to the ordinary prospectus liability rules discussed above. Some of the more important regulatory gaps shall be briefly sketched.

Articles 752 and 1156 of the CO are not applicable to *private placements of notes*. Although some commentators have asked that the provisions of these Articles be applied to privately placed notes by analogy,¹⁶⁰ the majority of commentators are against such an approach.¹⁶¹ In addition, there is no case law applying the ordinary prospectus rules for shares and bonds to private note placements. As already discussed,¹⁶² Convention XIX establishes a prospectus duty in connection with privately placed notes, but it does not grant causes of action to investors.

Purchasers of privately placed notes are therefore left with traditional contract and tort remedies. Contractual causes of action, however, are available only in limited situations and are subject to significant enforcement problems.¹⁶³ As a result, modern commentators increasingly postulate a broader liability theory based on a general trust relationship.¹⁶⁴ Arguably, such a trust approach should be enlarged towards a broader concept of professional liability that would require, in a manner similar to the American "shingle theory," that all distributors of investor-related information must cause such information to meet certain minimum standards.¹⁶⁵ To date, courts have been reluctant to adopt innova-

160. Hopt, *Schweizerisches Kapitalmarktrecht - Begriff, Aufgaben und aktuelle Probleme*, 38 WIRTSCHAFT UND RECHT 101-119 (1986).

161. See, e.g., TAISCH, *supra* note 100, at 76.

162. See *supra* note 108 and accompanying text.

163. See R.H. WEBER, *DOMESTIC PETROLEUM UND BANKENHAFTUNG* 28 et seq. (1987); TAISCH, *supra* note 100, 88 et seq.

164. See TAISCH, *supra* note 100, at 94. See generally U. KAISER, *DIE ZIVILRECHTLICHE HAFTUNG FÜR RAT, AUSKUNFT, EMPFEHLUNG UND GUTACHTEN* (1987).

165. For the theoretical development of such a concept, see MEIER-SCHATZ, *ÜBER DIE PRIVATRECHTLICHE HAFTUNG FÜR RAT UND ANLAGERAT* (1990, forthcoming).

tive concepts of liability in general and in particular with respect to the private placement of notes.

The same limited contract and tort remedies are also available in connection with prospectuses required by stock exchanges for the listing of securities.¹⁶⁶ Normally, such admission procedures do not coincide with the initial public offering of shares or bonds. Accordingly, Articles 752 and 1156 do not apply. If the admission prospectus is also the relevant information document for the public offering of new securities, the ordinary prospectus liability rules apply.¹⁶⁷

The prospectus liability rules also have no application to the disclosure of periodic financial statements. In Switzerland, such statements are not required to be filed with a governmental agency. Violations of accounting rules and the distribution of inaccurate or misleading financial or other corporate information may, however, constitute a breach of general fiduciary duties under Article 754 of the CO.¹⁶⁸ In such cases, private causes of action are, of course, primarily brought against the company's auditors. Ultimately, however, members of the board as well as officers remain liable for the distribution of inaccurate or misleading financial statements.

E. *Special Rules for Banks*

Article 39 of the *Bankengesetz* contains a special prospectus liability rule for banks.¹⁶⁹ This liability provision is triggered when false or illegal statements or information are distributed in connection with the issuance of shares, authorized investment certificates, participation certificates or bonds. The range of documents for which liability may be imposed under this rule is broad. It applies not only to prospectuses but also to circulars and similar documents, including advertising materials and oral presentations. It also applies to the failure to deliver any prospectus at all. Article 39 of the *Bankengesetz* applies to all persons who intentionally or negligently cooperate in the production or distribution of the information (e.g., underwriters, experts, auditors, and legal advisors). Legal actions may be brought by all shareholders or bondholders, including those who acquired

166. See *supra* notes 90-97 and accompanying text.

167. CAMENZIND, *supra* note 99, at 89; FORSTMOSER, *supra* note 150, at 248, 279.

168. Article 754 states: "All persons appointed directors, managers, or auditors are liable to the company as well as to the individual stockholders and creditors of the company, for the damage caused, intentionally or negligently, by a default in their duties."

169. The text of Article 39 reads as follows:

Whoever, on the occasion of the establishment of a bank, or of the issue of shares, of authorized investment certificates, of participation certificates or of bank bonds has, in prospectuses, in circular letters or in similar documents, made or divulged untrue assertions or statements contrary to the requirements of the law, intentionally or negligently, shall be liable for the damages caused to its associate (shareholder, partners of limited liability companies, cooperative members) or bond holder.

Bankengesetz, *supra* note 4, art. 39.

their securities after the original issuance, provided there is a causal relationship between the purchase of the securities and the wrong or misleading information.

In addition, the Federal Banking Commission has recently played a much more active regulatory role with respect to the supervision of bank management by attempting to enforce some basic principles of fair trading. Article 3, paragraph 2(c) of the *Bankengesetz* requires that bank officers and directors must assure the proper conduct of the bank's business. In several cases, the Banking Commission requested corrective actions from bank managements with respect to certain business transactions.¹⁷⁰

F. Insider Regulation

1. Introduction

Since July 1, 1988, Switzerland has had a new criminal insider provision (Article 161 of the CC). This insider rule has a relatively long and complex legislative history. Before its enactment, the prosecution of insider trading suffered from two major deficiencies. First, insider information was only protected if it qualified as a business secret. Second, only the disclosure by an insider to a third person could be prosecuted and not the misuse of the confidential information by the insider himself. After intensive academic and political debates which went on for almost fifteen years, Article 161 was finally enacted.¹⁷¹

2. Structural Elements of Article 161

The basic principle of Article 161¹⁷² is well established: Neither an

170. See, e.g., Forstmoser, *Effektenhandel durch Insider*, 45 SCHWEIZERISCHE AKTIENGESELLSCHAFT 133 (1973); Nobel, *Das Insider-Geschäft*, 79 SCHWEIZERISCHE JURISTENZEITUNG 124 (1983).

171. For a brief review of the legislative history see Forstmoser, *Insiderstrafrecht, Die neue schweizerische Strafnorm gegen Insider-Transaktionen*, 60 SCHWEIZERISCHE AKTIENGESELLSCHAFT 122, 123 et seq. (1988).

172. The text of CC, art. 161 (misuse of knowledge of confidential facts) is as follows:

1. Any person, who as a member of a board of directors, the management, an auditing body or an agent of a company limited by shares or of a company controlling or depending on such a company, be it a member of a public authority or of civil service, be it any person rendering assistance to one of the aforementioned persons, who obtains a pecuniary benefit for himself or any other person by misusing the knowledge of a confidential fact, or who informs a third party of such a fact, and, this fact, when becoming known, will in a foreseeable manner considerably influence the market price of shares, other securities or of comparable ledger securities of a company or of options referring to the aforementioned stocks and securities, traded on a Swiss stock exchange or prebourse market, shall be subject to punishment by prison up to 3 years or by fine.

2. Any person who gains directly or indirectly such confidential facts by a person referred to in subsection 1 and obtains a pecuniary benefit for himself or

insider nor a tippee should misuse informational advantages by trading in securities for financial gain. Insiders may be corporate representatives like directors, managers or auditors, or persons acting for such persons such as attorneys or other advisors. Moreover, the legal text mentions members of a governmental body or agency, a public servant or any person rendering assistance to such persons. A tippee is an external recipient of secret data if he or she, either directly or indirectly, gets the information from an insider and if he or she knew or should have known that this information was illegally disclosed.

The elements of a criminal offense are met when an insider or a tippee knows a confidential fact and understands that its disclosure would substantially affect the market prices of the security. In addition, the insider must intentionally use this information for personal gain or disclose it to a third party for the purpose of obtaining a profit.¹⁷³

The requirements of Article 161 are only met when inside information is disclosed and used with respect to shares, participation certificates, bonds, debentures or other negotiable instruments or rights issued by Swiss or foreign companies listed on an official stock exchange or an official secondary market. Accordingly, transactions which occur on the over-the-counter market are not covered.¹⁷⁴ While "insider" and "tippee" are relatively broadly defined in the statute, the definition of insider information is not. Article 161 requires that it be foreseeable that the disclosure would have a substantial effect on prices. It refers, for example, to the imminent issuance of new participation rights or to events of similar importance. Much of the new insider rules' regulatory stringency will depend upon the judicial interpretation of this legislative definition of insider information. Commentators so far agree that the statute's language may not be interpreted too narrowly and that it covers information like surprisingly negative financial statements or unexpected progress in the

any other person by misusing this information shall be subject to punishment by prison up to 1 year or by fine.

3. Facts within the meaning of subsections 1 and 2 are the imminent issue of new participation rights, changes in the combination of companies or similar circumstances of comparable importance.

4. In the event of a projected change in the combination of two companies, subsections 1-3 shall apply to both companies.

5. Subsections 1-4 shall apply correspondingly, if the misuse of the knowledge of a confidential fact relates to parts, other securities, ledger securities or corresponding options of a cooperative or a foreign company.

Important first comments on the new insider law are Forstmoser, *supra* note 171; Krauskopf, *Die neue Insider-Norm*, 38 WIRTSCHAFT UND RECHT 166 (1986); N. SCHMID, SCHWEIZERISCHES INSIDER-STRAFRECHT (1988). See also BOTSCHAFT UBER DIE ÄNDERUNG DES SCHWEIZERISCHEN STRAFGESETZBUCHES (INSIDER-GESCHAFTE) (1985).

173. The term "profit" includes also the avoidance of price-losses.

174. As long as securities are traded on stock exchanges or official secondary markets, transactions in such securities are also within purview of Article 161 when they occur outside these markets. This is important since much of the trading in publicly traded securities occurs off the stock exchanges.

field of research and development or product development.¹⁷⁵

Insider transactions are only a criminal act when the abuse of information occurs intentionally. While insiders risk imprisonment of up to three years or a fine, tippees face imprisonment of up to only one year or a fine. These criminal sanctions are all applied *ex officio*. Moreover, a court may order that the illegal profits be turned over to the government.¹⁷⁶ Such profits may also be awarded to the injured parties.¹⁷⁷

3. Civil Liability

Article 161 of the CC does not provide for civil sanctions. General contract or tort rules may, however, provide remedies in certain circumstances. The remedies that might be available include, in particular, damages and rescission.

4. International Judicial Assistance

Before Article 161 of the CC was enacted, Switzerland had major difficulties with respect to international law enforcement cooperation, in particular with the U.S. Securities and Exchange Commission. Although a 1977 Treaty on Mutual Assistance in Criminal Matters¹⁷⁸ was in place, it was of limited usefulness in insider trading investigations because of its requirement that the criminal act in question be punishable in both countries.¹⁷⁹ Since most forms of insider trading were not punishable in Switzerland, many U.S. insider-transactions were completed over Swiss banking accounts that were protected under the Swiss secrecy laws. In 1982, the Swiss government signed a memorandum of understanding with the SEC.¹⁸⁰ At the same time, the Swiss banks entered into a self-regulatory agreement by which they undertook to accept orders for purchases or sales of U.S. securities only if the client signed a waiver of Swiss bank secrecy laws with respect to insider-transactions.¹⁸¹

Article 161 has solved many of these difficulties since insider-transactions are now a criminal offense in both Switzerland and the U.S. Problems, however, may still arise since the elements of the criminal pro-

175. See, e.g., Forstmoser, *supra* note 171, at 129; Krauskopf, *supra* note 174, at 230.

176. CC, art. 58.

177. *Id.* art. 60.

178. Treaty on Mutual Assistance in Criminal Matters, Jan. 23, 1977, (United States-Switzerland), 27 U.S.T. 2019, T.I.A.S. No. 8302.

179. *d.*, art. 8(2).

180. Memorandum of Understanding on Insider Trading, Aug. 31, 1982, (United States-Switzerland), 22 I.L.M. 1 (1983).

181. Agreement of the Swiss Banker's Association on the Misuse of Information, Aug. 31, 1982, 22 I.L.M. 7 (1983). This legal regime has caused an intensive criticism by and discussion in the political and academic community. For a comprehensive restatement, see P.C. HONEGGER, *AMERIKANISCHE OFFENLEGUNGSPFLICHTEN IM KONFLIKT MIT SCHWEIZERISCHEN GEHEIMHALTUNGSPFLICHTEN* (1986); J.M. Rapp, *Recent Developments in U.S. Insider Trading Prohibition and Swiss Secrecy Laws: Towards a Definitive Reconciliation?*, 5 INT'L TAX & BUS. LAW. 1 (1987).

visions in the two countries are not identical. To minimize such conflicts, the two countries promised each other in a Letter of Exchange of November 10, 1987, to grant mutual assistance not only in criminal matters, but also in certain civil and administrative law procedures related to insider transactions if they involve criminal-like sanctions.¹⁸²

VII. TAKEOVERS

A. Introduction

The worldwide wave of mergers and acquisitions has now reached Switzerland. Although hostile takeovers are not yet widespread,¹⁸³ some recent actions of offerors as well as target companies have opened a discussion regarding tender offer practices. At a very late stage in the current revision of the stock company law, an attempt was made to introduce specific statutory provisions on hostile takeovers. This motion was blocked and the new company code will probably not contain any provisions on this subject.

B. The Takeover Code

Effective as of September 1, 1989, a new Takeover Code was enacted on a self-regulatory basis. Adopted by the Swiss Association of Stock Exchanges, it is consistent with the traditional approach of private self-regulation that constitutes much of the Swiss capital market law. The Code itself has been significantly influenced by the London City Code on Takeovers and Mergers as well as by the proposal for a Thirteenth European Economic Community directive on takeovers.

The new Takeover Code¹⁸⁴ is intended to regulate public tender offers for securities of public companies to enable shareholders to make well-informed decisions and to prevent market manipulation.¹⁸⁵ It applies only to public offers for Swiss companies whose shares are traded on a stock exchange.¹⁸⁶ The Code's requirements relate primarily to public disclosure of significant information. Additionally, however, the Code contains a series of substantive and procedural rules. Among other goals, these rules were designed to assure the equal treatment of all sharehold-

182. Memorandum of Understanding between the Government of Switzerland and the Government of the United States of America on Mutual Assistance in Criminal Matters and Ancillary Administrative Proceedings, *published in* 140/II Bundesblatt 394 (1988) (German translation).

183. See for a description of some examples, e.g., M. STEINMANN, PRÄVENTIVE ABWEHRMASSNAHMEN ZUR VERHINDERUNG UNFREUNDLICHER ÜBERNAHMEN MIT MITTELL DES AKTIENRECHTS 29 (1989); H. ZIMMERMANN, M. BILL, R. DUBACHER, FINANZMARKT SCHWEIZ: STRUKTUREN IM WANDEL 129 (1989).

184. Association of Swiss Exchanges, Swiss Takeover Code [hereinafter TC]. See also A. HIRSCH & D. SIEGRIST, KOMMENTAR ZUM SCHWEIZERISCHEN ÜBERNAHMEKODEX (1989).

185. TC, *supra* note 184, art. 1.

186. *Id.* art. 2.

ers of the same class.¹⁸⁷

The Code lists a broad variety of items that must be disclosed to the shareholders and to the general public. The most important disclosure requirements relate to the identity of the offeror (including the identity of those acting in concert with it), details of the securities and the issuer including the minimum and maximum number of shares to be acquired, information regarding interests already held, details of the offeror's financing as well as of the price per share and the closing date of the offer.¹⁸⁸ Formally, an offer must, at a minimum, be published in a newspaper that is prescribed for the relevant securities by the stock exchanges' quotation rules.¹⁸⁹ The first banking day after the closing date of the offer, the offeror must announce publicly whether the offer has been successful and how many shares have been tendered.¹⁹⁰

More substantively, the Code contains a series of important procedural rules that affect the transactional structure of tender offers. An offer may only be accepted ten banking days after the initial publication. Moreover, the offer must remain open for at least one month thereafter.¹⁹¹ An amended offer may only be made in the event of a counteroffer or of the introduction of a defensive measure.¹⁹² When a counteroffer is made, shareholders have a right of withdrawal.¹⁹³ Partial offers are possible, but all shareholders must be treated on a pro-rata basis. In addition, the code states that if the offeror, after the offer is closed, has more than fifty percent of the voting rights, he must satisfy fully all shareholders wishing to tender.¹⁹⁴ Finally, the Code contains a rule against price manipulation. In particular, an offeror may not sell any of the same securities for which an outstanding tender offer is in effect.¹⁹⁵

The application of the new Swiss Takeover Code is supervised by the Self-Regulatory Commission for Regulation of the Association of Swiss Stock Exchanges. The Commission has no statutory powers. Tender offerors falling within the Code must file the tender offer with the Commission which must examine it for compliance with the Code's requirements within eight banking days after the filing is made.¹⁹⁶ The strongest indication that the Code will be followed is the fact that all stock exchange

187. *Id.* art. 3.1.

188. *Id.* art. 4.

189. *Id.* art. 3.3.

190. *Id.* art. 3.6. If an offer has been successful, the offeror must, in addition, extend it for ten banking days after the publication of the offer's result. *Id.* art. 3.7.

191. However, not more than two months, unless a counter-offer is published. *Id.* art. 3.4.

192. Or if the offeror himself increases the consideration or extends the offering period (within the two months limit). *Id.* art. 3.5.

193. *Id.* art. 3.5.

194. *Id.* art. 3.8.

195. *Id.* art. 5.4. After the closing date, the offeror may not publish a new offer for one year unless it is a counter-offer. *Id.* art. 3.9.

196. *Id.* art. 9 in connection with art. 5.2.

members, who are the most important participants in the takeover market, have agreed to comply with the Code's provisions.¹⁹⁷ Furthermore, the Code requires the accountants of the offeror to file a report with the Commission. This report must be filed simultaneously with the tender offeror's report and relates to compliance with the Code rules and does not address the substantive fairness of the offeror's price.¹⁹⁸

The enactment of the Takeover Code has generally been welcomed by commentators from the viewpoint of public policy. It remains to be seen whether this self-regulatory structure has the sufficient strength to be effective. Moreover, the Code has some severe deficiencies. Since no disclosure obligations with respect to substantial share ownership are required, creeping takeovers are still possible. Moreover, the Code appears to favor targets. Target companies are under no obligation to disclose any information, including financial statements, that might facilitate a shareholder's decision to tender. Furthermore, it does not touch the wide discretion of target management with respect to defensive measures.

C. *Defensive Steps*

To date, relatively few hostile tender offers have been made in Switzerland.¹⁹⁹ Although no unfriendly attack has been directly successful, many targets have sold out to white knights. While there are many reasons for the lack of hostile tender offers in Switzerland, one is certainly the corporate culture which still considers hostile offers a violation of business ethics. In addition, management of target companies have adopted a wide variety of defensive measures.

Certainly, the most important defensive tactic is the share transfer restrictions (*Vinkulierung*) discussed above.²⁰⁰ Quite an impressive array of other pre- and post-offer measures are also feasible.²⁰¹ Among those adopted most frequently by public companies are lock-up clauses,²⁰² placement of newly-issued shares in friendly hands, and voting restrictions.

It remains to be seen whether this extremely liberal attitude towards target management defenses can survive in the near future. Switzerland is currently negotiating with the European Economic Community ("EEC") a broad new treaty on a Common European Economic Area. It may well be that Switzerland will be forced to conform closely to the emerging

197. *Id.* art. 7.

198. *Id.* arts. 5.2 and 5.3.

199. *See supra* note 181.

200. *See supra* note 73 and accompanying text.

201. For overviews of potential defensive tactics, see Meier-Schatz, *Aktienrechtliche Verteidigungsvorkehrungen gegen unerwünschte Unternehmensübernahmen*, 60 SCHWEIZERISCHE AKTIENGESELLSCHAFT 106, 107 (1988); A. KUY, *DER VERWALTUNGSRAT IM ÜBERNAHMEKAMPF* 63 (1989); STEINMANN, *supra* note 181, at 49.

202. For example, high supermajority provisions for changes of the by-laws especially with respect to the *Vinkulierung* or to changes of the board composition.

EEC company law standards. In this event, some defensive measures, in particular the *Vinkulierung* may be eliminated.²⁰³ A number of Swiss companies have already adapted to this new climate by, for example, eliminating their share transfer restrictions for foreigners.

VIII. INVESTMENT FUNDS

A. Introduction

Investment funds play an important role in the Swiss finance and investment markets. In 1985, there were 148 investment funds with total assets of SFr. 22.06 billion.²⁰⁴ Unlike U.S. mutual funds organized as corporations, Swiss investment funds have a contractual structure. They are by law open-end funds in the sense that investors may at any time resell their certificates to the fund management.²⁰⁵ The law allows only investment in securities and real estate, but not in title documents for merchandise.²⁰⁶ Investment funds appear in many forms. They are structured according to type of investment,²⁰⁷ investment strategy,²⁰⁸ geographic or industry focus,²⁰⁹ or currency.²¹⁰ The first appearance of investment funds in Switzerland dates back to 1930. In historical terms, their legal regulation occurred relatively late. In 1967, the *Anlagefondsgesetz* as well as the *Anlagefondsverordnung* (Implementing Ordinance) were enacted, followed in 1971 by the *Auslandsfondsverordnung* (Ordinance on Foreign Investment Funds).²¹¹

B. Domestic Investment Funds

1. *Anlagefondsgesetz* (including *Anlagefondsverordnung*)

The *Anlagefondsgesetz* defines an investment fund as a pool of as-

203. For example, a recent Task Force of the Swiss Government has already asked in its report for a harmonization of disclosure and defensive measure rules. (Recommendation 12).

204. For comparative figures, see GYGAX, ANLAGEFONDS; E. ALBISETTI, HANDBUCH DES GELD-, BANK- UND BÖRSENWESENS DER SCHWEIZ, (4th ed. 1987). Further information on economic background of Swiss investment funds may be found in A. VON ALBERTINI, GRUNDLAGENFORSCHUNG ZUM SCHWEIZERISCHEN ANLAGEFONDSGESETZ (1974); R. SIGG, ZUR METHODIK DER LEISTUNGSBEMESSUNG UND — ANALYSE BEIM AKTIENANLAGEFONDS (1979).

205. For a good description of the structural elements, see GYGAX, *supra* note 204, at 38. Recently, suggestions for a fundamental revision of the *Anlagefondsgesetz* have been made. A Task Force of all governmental parties proposed a strict separation of real estate and other funds as well as a mandatory quotation of funds above a certain size.

206. *Anlagefondsgesetz*, *supra* note 5, art. 6.

207. The most important forms are securities funds (share funds, bond funds, money market funds, mixed funds), real estate funds and mixed securities funds.

208. They are classified along the lines of investment risk as growth funds and pure income funds.

209. There may be a geographical concentration (Europe, North America, Pacific, Far East, etc.) or a concentration in one or several industrial or service sectors.

210. Some funds are structured around certain currencies.

211. Hereinafter *Auslandsfondsverordnung*.

sets contributed by investors on the basis of public solicitation for the purpose of a common capital investment and managed by the fund management for the account of the investors according to the principle of diversification of risk.²¹² The law applies to all funds whose management has its legal domicile in Switzerland.²¹³ The *Anlagefondsgesetz* has specific and stringent rules with respect to organization and operation of investment funds. They require authorization from the Federal Banking Commission, which is granted only to a bank as defined by the *Bankengesetz*.²¹⁴ The law requires a minimum equity capital, namely SFr. 1 million, or SFr. 2 million if the fund also engages in banking operations.²¹⁵ In addition, the fund management is required to maintain an adequate ratio between equity capital and total worth of the investment fund.²¹⁶ If the fund management is not a bank, the law requires a special custodian bank which also requires an authorization from the Federal Banking Commission.²¹⁷ The *Anlagefondsgesetz* contains strict investment guidelines. It allows investments only in securities and real estate.²¹⁸ Specific guidelines as to the fund's investment policy must be stipulated in detail in the fund regulations.²¹⁹ In addition, the law mandates basic diversification provisions. Not more than seven and a half percent of the total assets of the fund may be invested in the same company.²²⁰ Participations in any single enterprise may never exceed five percent of the voting rights. If several investment funds are managed by the same management (or by associated managements), the aggregate maximum limit of voting rights is ten percent.²²¹

As already mentioned, Swiss investment funds are legally based on collective investment contracts. In such a contract, the fund management is obliged to let the investor participate in the fund in proportion to his

212. *Anlagefondsgesetz*, *supra* note 5, art. 2. Good introductions into the Swiss investment fund law are found in P. FORSTMOSER, *ZUM SCHWEIZERISCHEN ANLAGEFONDSGESETZ* (1972); K. AMONN, *DAS BUNDESGESETZ ÜBER DIE ANLAGEFONDS* (1972). A more detailed commentary is J.B. SCHUSTER, *ANLAGEFONDSGESETZ*, (2nd ed. 1975). According to the latest information from the *Bankenkommission*, a general revision of the *Anlagefondsgesetz* is planned.

213. *Anlagefondsgesetz*, *supra* note 5, art. 1.

214. Also, to a corporation or to a cooperative having as its exclusive object and purpose the management of investment funds. *Id.* art. 3, ¶¶ 1 and 2.

215. *Id.* art. 3, ¶ 3.

216. *Id.* art. 4. Detailed rules can be found in *Anlagefondsverordnung*, art. 7 et seq.

217. *Anlagefondsgesetz*, *supra* note 5, art. 5.

218. Investments may not be made in title documents for merchandise, unit share certificates of another investment fund managed by the same or by a fund management associated with it, or in other securities issued by the fund management. *Id.* art. 6.

219. See the detailed list in *Anlagefondsverordnung*, *supra* note 5, art. 10.

220. This amount may be increased up to 10% by way of subsequent calls. *Anlagefondsgesetz*, *supra* note 5, art. 7, ¶¶ 1 and 3.

221. *Id.* ¶ 2. These diversification restrictions do not, of course, apply to real estate investment funds. *Id.* ¶ 4. It is important to note that the *Anlagefondsgesetz* contains, in addition, a series of special provisions concerning real estate investment funds. *Id.* art. 31 et seq.

payments and to manage for remuneration the fund in accordance with the provisions of the fund regulations and the law.²²² The investment contract is contained in the fund regulations adopted by each fund. The content of such regulation is regulated by the *Anlagefondsgesetz*, which requires, among other items, provisions on the name and domicile of the fund, its investment policy guidelines, its utilization of net profits and capital gains, and its publications.²²³

The fund itself is managed by the fund management which has a wide range of legal rights and duties. Beside the relevant investment decisions²²⁴ and the safe keeping of the fund assets,²²⁵ the most important duties include a general duty of loyalty²²⁶ and extensive bookkeeping and reporting obligations which include the publication of annual financial statements.²²⁷ The investors themselves are provided with a series of individual rights.²²⁸ The most important among them is the right of withdrawal which allows each investor to withdraw at any time from the collective investment contract and to require payment in cash of his share in the investment fund in return for the unit share certificate.²²⁹ In addition, investors may require certain information and have the right to recover damages from the fund management if it violates its obligations.²³⁰ Other sections of the *Anlagefondsgesetz* prescribe a special audit procedure²³¹ as well as the fund's supervision (including withdrawal of authorization) by the Federal Banking Commission.²³² Finally, the Act contains a series of penal provisions which make specified actions in connection with investment funds criminal offenses.²³³

2. Stock Exchange Regulations

The stock exchanges of Zurich and Basle have specific private rules with respect to investment fund certificates. The Zurich rules,²³⁴ for instance, state as a principle that certificates of investment funds subject to

222. *Id.* art. 8, ¶ 1.

223. *Id.* art. 11. For more detailed regulations, see also *Anlagefondsverordnung*, *supra* note 5, art. 10 et seq.

224. See *Anlagefondsgesetz*, *supra* note 5, art. 12.

225. *Id.* art. 13.

226. *Id.* art. 14.

227. *Id.* art. 15. Very specific rules (including particular provisions for real estate funds) are provided for in *Anlagefondsverordnung*, *supra* note 5, art. 14 et seq.

228. *Anlagefondsgesetz*, *supra* note 5, art. 20 et seq.

229. *Id.* art. 21, ¶ 1. The redemption price shall be calculated as of the day of payment in accordance with the same principles as the issue price. *Id.* ¶ 3. The Federal Banking Commission may, in exceptional circumstances, grant the fund management a limited extension of time for the repayment of the certificates. *Id.* ¶ 4.

230. *Id.* arts. 23, 25 et seq.

231. *Id.* art. 37 et seq.

232. *Id.* art. 40 et seq.

233. For a detailed catalogue, see *id.* arts. 49 & 50.

234. *Reglement über die Kotierung und den Handel von Anteilscheinen von Anlagefonds* of Apr. 17, 1974 [hereinafter *Anlagefondsreglement*].

the *Anlagefondsgesetz* may be officially traded and quoted on the Zurich securities exchange.²³⁵ The fund, however, must have a net asset value of at least SFr. 50 million at the time of initial quotation. Should this value later sink below SFr. 20 million, the official trading will cease at the end of the then current year.²³⁶ Listed funds have the obligation to make certain reports and to give certain information to the stock exchange authorities.²³⁷ This includes daily disclosure of the prices at which the certificates are sold and repurchased.²³⁸

The Basle stock exchange has a legal regime that is very similar to the one of Zurich.²³⁹ It also defines the conditions for listing and rights of investors especially with respect to information and disclosure rights. The stock exchange of Geneva does not have any specific rules relating to investment funds.

C. *Foreign Investment Funds*

Foreign investment funds are separately administered pools of assets that are administered by a fund management having its domicile abroad. The term also includes investment funds incorporated or organized in any other manner under foreign law which otherwise correspond to the definition under Swiss law and give the investor a right against the company itself or a company affiliated with it for the payment of his share.²⁴⁰ Any public solicitation in or from Switzerland of certificates in a foreign investment fund, as well as the conclusion of contracts aiming at a later acquisition of such certificates, require the authorization of the Federal Banking Commission.²⁴¹ Such authorizations are only granted to a bank with legal domicile in Switzerland or to a Swiss branch of a foreign bank.²⁴²

In addition, the fund regulations or the by-laws of such a foreign investment fund must meet minimal requirements with respect to management, investment policy, credits and assignments of property and rights, open-end character, and auditing and reporting requirements.²⁴³ Foreign investment funds are also subject to certain disclosure rules. They must make annual statements consisting, among other things, of a statement of assets and liabilities at market value, a profit and loss statement, information concerning the utilization of net profits and capital gains as well

235. *Id.* ¶ 2.

236. *Id.* ¶ 3.

237. *Id.* ¶ 5.

238. *Id.* ¶ 6.

239. *Richtlinien über die Kotierung von Anlagefonds-Anteilscheinen an der Basler Effektenbörse* of November 30, 1971.

240. *Auslandfondsverordnung*, *supra* note 212, art. 1, ¶ 1.

241. *Id.* art. 2. "Public solicitation" is defined in art. 1 as any solicitation which is not exclusively directed to a narrowly limited number of persons (e.g., solicitation by prospectus, printed advertisements, posters, circulars, at bank counters).

242. *Id.* art. 3, also requiring a minimum capital of SFr. 2,000,000.

243. See the extensive list in *id.* art. 4.

as a report of the auditors.²⁴⁴ All documents, including fund regulations, by-laws, offering prospectuses, investment plan contracts, etc., must be drawn up or translated into one of the official Swiss languages.²⁴⁵

Foreign investment funds must, as a matter of principle, have a representative bank in Switzerland.²⁴⁶ The Swiss representative bank is responsible for all solicitations and publications of the fund, for the distribution of the investment plan contracts and the reports that must be delivered to the Swiss Nationalbank.²⁴⁷ The Federal Banking Commission, as supervisory authority, may require that appropriate security be provided by the foreign investment fund if the rights of the investors appear to be in jeopardy.²⁴⁸ It may also revoke a foreign investment fund's authorization if, among other reasons, the initial prerequisites are no longer met, the required security is not provided, or false or misleading statements have been made.²⁴⁹

IX. BROKER-DEALERS AND INVESTMENT ADVISORS

A. *Broker-Dealers*

There are no special rules at the federal level regulating the activities of broker-dealers. Most broker-dealers are, however, banks or finance companies²⁵⁰ whose structure and behavior are closely supervised by the Federal Banking Commission.

Special provisions exist in cantonal stock exchange laws. The Zurich *Wertpapiergesetz*, for instance, states that whoever intends to professionally purchase or sell securities or act as an intermediary therefore, on or off the stock exchange, requires an official license.²⁵¹ Such licenses are only granted to persons of good civil standing, of good reputation and with the necessary expert knowledge.²⁵² Moreover, the licensee must have its legal domicile or a place of business in the canton of Zurich.²⁵³ If the business conduct of broker-dealers does not comply with sound commercial standards, the license may be withdrawn.²⁵⁴

244. *Id.* art. 6.

245. *Id.* art. 7.

246. *Id.* art. 8.

247. *Id.* art. 9 et seq.

248. *Id.* art. 14, with a list of circumstances that indicate such an immediate danger for investors.

249. *Id.* art. 15.

250. *See supra* note 58 and accompanying text.

251. This license is granted by the Department of Economics after obtaining opinions from the Stock Exchange Commission, the Stock Exchange Commissioner's Office and the Board of the Stock Exchange Association. *Wertpapiergesetz*, *supra* note 16, ¶ 2.

252. *Id.* ¶ 31/1. If a license is granted to a company, a representative is to be designated who is subject to the provisions of the law in the same manner as the company itself. *Id.* ¶ 3½.

253. *Id.* ¶ 3/4.

254. *Id.* ¶ 4 The licensee has to pay an annual cantonal fee and to make a tangible bond deposit with the Department of Finance. *Id.* ¶ 6.

The Basle stock exchange has similar, but somewhat more stringent and detailed rules. Broker-dealer activities require a license.²⁵⁵ The *Börsengesetz* stipulates a series of prerequisites, including the existence of an adequate infrastructure and organization as well as professional background and reputation.²⁵⁶ The *Börsengesetz* also includes a list of duties, whose violation is punishable by administrative sanctions.²⁵⁷

The Geneva stock exchange, as a private institution, does not have specific broker-dealer-related provisions.

B. *Investment Advisors*

Switzerland has no federal or cantonal legal rules addressed specifically at investment advisors.²⁵⁸ Since many advisory services are furnished by banks,²⁵⁹ the Federal Banking Commission exercises at least indirect control of these activities. In addition, investment advisory activities are, of course, governed by ordinary civil law provisions. To the extent advice is given within a contractual framework, the rules on mandate law apply.²⁶⁰ Under specific circumstances, publicly spread investment tips may be captured by tort law rules or, as newer concepts dictate, by a specific professional responsibility concept.²⁶¹

X. CONCLUSION

Compared to countries with similarly sophisticated capital markets, Switzerland has relatively little regulation of market activities. This should change in the near future due to an emerging consensus in Switzerland regarding the need for a federal stock exchange law. Additional changes will likely be brought about by the antitrust concerns that have been raised by the Swiss Cartel Commission, by attempts to harmonize the Swiss capital market law with the law of the European Community and by pending revisions to the Swiss Federal Code of Obligations.

255. *Börsengesetz*, *supra* note 20, ¶ 1.

256. *Id.* ¶ 3.

257. *Id.* ¶¶ 5, 6.

258. This may change in the near future. The special task force (*See supra* note 3) recommended considering legislation covering the activities of investment advisors.

259. *See supra* note 58 and accompanying text.

260. CO, art. 354 et seq.

261. *See for more details and sources, MEIER-SCHATZ, supra* note 165.