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Cover Page Footnote

International Law; Commercial Law; Law

The Swiss Securities Exchange Act and Investment Fund Act: A New Regulatory Framework for the Swiss Capital Markets

Thomas P. Bischoff†

I. Introduction

The regulatory and market environment of the Swiss capital markets will undergo important changes in 1995. On the regulatory side, a Federal Securities Exchanges and Securities Trading Act (Securities Exchange Act, or SEA)¹ has passed the Senate (Conseil des États) in its fall 1994 session² and the House of Representatives (Conseil National) in its spring 1995 session³ for the final second reading. The Houses of Parliament have reached agreement on all issues, and the last textual differences have been cleared.⁴ The SEA is expected to become effective in spring, 1996. In addition, Parliament has already enacted a completely overhauled Investment Fund Act (IFA), which has been effective since January 1, 1995.⁵ On the market side, globalization of the financial markets and their participants has forced the existing three stock exchanges of Zurich, Geneva, and Basle to merge into a single

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¹ Loi fédérale sur les bourses et le commerce des valeurs mobilières (Loi sur les bourses, LBYM) of 24 March 1995. See RECUEIL OFFICIEL DES LOIS FÉDÉRALES 1995, 400-16 [hereinafter ROLF] (ROLF, the official record of the federal laws of Switzerland, is issued in chronological order); Botschaft zu einem Bundesgesetz ueber die Boersen und den Effektenhandel (Boersengesetz, BEHG). See also Message concernant une loi fédérale sur les bourses et le commerce des valeurs mobilières du 24 février 1993 [Explanatory Report of the Federal Government on the SEA, February 24, 1993], FF I 1269 (1993) [hereinafter Explanatory Report].

² For a discussion of the hearings of the Senate on September 21, 1994, see Amtliches Bulletin der Bundesversammlung, Staenderat III 837-39 (1994).

³ For a discussion of the hearings of the House of Representatives on March 14, 1994, 7th Sess., see Amtliches Bulletin der Bundesversammlung, Nationalrat, Doc. No. 93.025 (provisional draft issue).

⁴ All references made to the draft law refer to the text as passed by the Senate in its second reading, as amended and modified by the House of Representatives in its spring 1995 session. On March 21, 1995, the Senate cleared any textual differences by adopting the final textual modifications made by the House of Representatives. For the Report of the Senate's session, see Neue Zuercher Zeitung, No. 68, Mar. 2, 1995, at 17.

⁵ Loi fédérale sur les fonds de placement [Investment Fund Act of March 18, 1994], FF II 303 (1994) [hereinafter IFA]. See ROLF 1994, 2523; see also Message concernant la révision de la loi fédérale sur les fonds de placement [Explanatory Report on the Investment Fund Act], FF II 189 (1993) [hereinafter IFA Explanatory Report].

national exchange, the Swiss electronic stock exchange (Elektronische Boerse Schweiz, or EBS). EBS is supported and owned by the recently incorporated Swiss Stock Exchange Association (SSE).⁶ Migration from ring to electronic trading is expected to start on June 2, 1995, and full operation is scheduled for July 28, 1995.⁷ Technically, this system will allow incorporation of SOFFEX trading which will be phased in at a second stage.⁸ As the new SEA will most likely not be effective when the EBS becomes operative, the supervisory authorities of the Canton of Zurich, which under present law is responsible for the Zurich stock exchange, will assume the task of supervisory authority over the EBS until the SEA becomes effective.⁹

In contrast to the legal environment in the United States, regulation of stock exchanges has been the province of the Cantons (States) in Switzerland, whereas company law was unified long ago on the federal level. The cantonal stock exchange laws will now be superseded by the SEA, which will provide basic federal authority for regulation, licensing, and supervision of securities exchanges and broker-dealers.¹⁰ The SEA also provides for disclosure of major shareholdings in listed companies and contains regulations on tender offers (takeovers).¹¹ As a novelty on the European Continent, the SEA introduces an obligation to make an offer to purchase all outstanding voting capital once a certain threshold of control has been passed.¹² However, the SEA will only cover the secondary markets, i.e. securities trading on or off exchange (over-the-counter) subsequent to original issuance as well as secondary "grey markets."¹³ At present, primary markets are regulated

⁶ The SSE was incorporated on May 26, 1993. HANDBUCH DER SCHWEIZ, ZULASSUNGSSTELLE, sec. I (1993). Its founding members include the stock exchanges of Zurich, Basle, and Geneva. *Id.* Legally, it is an association formed under Article 60 of the Swiss Civil Code. *See id.* at art. I, Articles of Association. Its articles of association are published in the handbook issued by the Zurich Stock Exchange. *See* Effektenboersenverein Zurich, Handbuch der Zuercher Boerse (1994).

⁷ Initially, migration was planned to begin on March 24, 1995, and full operation to begin in May 1995. *See* Neue Zuercher Zeitung, No. 169, July 22, 1994, at 27. However, for technical reasons, several weeks of delay have occurred. *Id.* An initial trial will be held on May 6, 1995, in which more than 1,100 EBS-traders will participate. *See* NEUE ZUERCHER ZEITUNG, No. 22, Jan. 27, 1995, at 23. *See* generally EBS-The Future of the Stock Exchange in Switzerland 11-20 (Association Tripartites Bourses ed., 1993), for a discussion of the complicated migration and transformation procedure.

⁸ SOFFEX, the Swiss Options and Financial Futures Exchange, is incorporated as a Swiss limited liability company. It is wholly owned by the SSE. *See* 1993 Soffex Ann. Rep. 5. The rules and regulations of SOFFEX are set out in its manual which is periodically updated. *See* SOFFEX, RULES AND REGULATIONS (Jan. ed. 1994).

⁹ *See* Neue Zuercher Zeitung, No. 22, Jan. 22, 1995, at 22.

¹⁰ *See infra* part II.

¹¹ *See infra* part III.B.

¹² *See infra* part III.B.3.

¹³ The boundaries between primary and secondary markets have become blurred, as new issues may be traded on the exchange even before the end of the subscription period. As a result of the practice on the Euromarket today, most of the new issues in Switzerland are traded on the grey market. *See generally* JEAN-BAPTISTE ZUFFREY, LA RÉGLEMENTATION DES SYSTÈMES SUR LES MARCHÉS FINANCIERS SECONDAIRES 263 (1994). According to the Explanatory

to a certain extent by the Code of Obligations (Code, or C),¹⁴ the Federal Banking Act (FBA),¹⁵ the Federal Banking Ordinance (FBO)¹⁶ and its rules and regulations as promulgated by the Federal Banking Commission (FBC), the National Bank Act, and the rules and regulations of the Swiss National Bank.¹⁷ The Code of Obligations has recently been modified by additional disclosure and auditing

Report, the SEA clearly extends to the grey market. See Explanatory Report, *supra* note 1, at 1284.

¹⁴ Of particular concern is the requirement of the issuance of a prospectus where the subscription of shares or bonds is being offered to the public. BUNDESGESETZ BETREFFEND DIE ERGANZUNG DES SCHWEIZERISCHEN ZIVILGESETZBUCHES [CODE OF OBLIGATIONS, CO] arts. 652a, 1156-86. The provisions relating to the public issue of bonds are not very detailed. *Id.* The requirement of the Code for publishing a prospectus must be distinguished from the establishment of a prospectus for purposes of listing the securities, as set forth by the new SEA. See *infra* part IV. For a discussion of the current requirements of the Code of Obligations, see generally CHRISTIAN A. CAMENZIND, PROSPEKTZWANG UND PROSPEKTHAFTUNG BEI OEFFENTLICHEN ANLEIHENS OBLIGATIONEN UND NOTES 50-64, 80-125 (1989); Rolf Watter, *Prospekt(haft)pflicht heute und morgen*, 1992 PRATIQUE JURIDIQUE ACTUELLE (PJA) 48; DANIEL DAENIKER, ANLEIGERSCHUTZ BEI OBLIGATIONENANLEIHEN 14-15 (1992). Furthermore, it should be noted that with respect to the issue of equity, the Code's provisions only apply to Swiss companies that are incorporated in Switzerland, not to public issues of shares of foreign companies. See PETER FORSTMOSE, SCHWEIZERISCHES AKTIENRECHT 267 (1981). The Code's provisions governing the public issue of bonds and debt obligations, however, apply to issues of both domestic and foreign companies. See ANDREAS ROHR, GRUNDZUEGE DES EMISSIONSRECHTS 191 (1990).

¹⁵ Loi fédérale sur les banques et les caisses d'épargne [Federal Banking and Savings Bank Act of November 8, 1934], RS 952.0 [hereinafter FBA]. The FBA has recently been amended. See FBC Bulletin, No. 24, 1994; see also ROLF 1995, I 246. Swiss banks act as universal banks; that is, they may engage in both commercial and investment banking activities. See FBA, at art. 1 (large definition of banking activities); see also URS EMCH ET AL., DAS SCHWEIZERISCHE BANKGESCHAFT 22 (4th ed. 1993). Banks that are licensed under the FBA, therefore, hold the biggest share in the Swiss primary markets. Explanatory Report, *supra* note 1, at 1283. Thus, banking regulations affect both the primary and secondary markets. The regulations applicable to licensing of banks, banking supervision, minimum capital, own-fund requirements, and accounting and auditing are thought to provide creditor protection and indirect protection of investors. See generally THOMAS WERLEN, KONZEPTIONELLE GRUNDLAGEN DES SCHWEIZERISCHEN KAPITALMARKTRECHTS 112-13, 125-26 (1994). In addition, Art. 8 of the FBA, amended as of January 1, 1995, empowers the federal government to subject capital export (public debt issues by foreign issuers) to regulation if exceptional circumstances so require. FBA, *supra*, RS 902.0, at art. 8. Such measures would be taken only in emergency situations. The former requirement of general authorization of Swiss-franc issues by foreign debtors has been abolished and has been replaced by an obligation to notify for statistical purposes any public issue of debt obligations (i.e., by domestic and foreign debtors). This obligation was introduced by the Swiss National Bank pursuant to its powers under Art. 7(5) of the FBA, amended as of January 1, 1995. See Circular of the Swiss National Bank, Jan. 10, 1995 (effective Feb. 1, 1995). The requirement that the lead manager of a Swiss-franc denominated issue must be a Swiss bank as defined in the FBA is still effective. See FBC BULLETIN, No. 3, 1994.

¹⁶ Ordonnance de la CFB sur les banques et les caisses d'épargne [Implementing Ordinance of Federal Banking and Savings Bank Act of May 17, 1972], RS 952.02 [hereinafter FBO], modified as of December 12, 1994, see ROLF I at 253 (1995). The FBO's provisions with respect to accounting and auditing also have been amended recently. See FBC Bulletin No. 26 (1995).

¹⁷ See Loi sur la Banque nationale [National Bank Act of December 23, 1953] (amended on Dec. 15, 1978), RS 951.1 (of specific importance are arts. 16g & 16h which relate to control of issues to regulate interest rates; at present, no such regulations have been issued). See generally ANDREAS ROHR, *supra* note 14 at 78-92 (1990).

requirements for listed companies. The revised Code also narrowed the availability of transfer restrictions for shares in such companies.¹⁸

The SEA will only provide the regulatory framework, thus requiring that broad rule-making and discretionary powers be delegated to the Federal Government and the FBC. The FBC will also act as supervisory authority. The underlying reasoning is that only the supervisory bodies, not the legislature, are able to respond quickly to market developments. Those rule-making and discretionary powers should facilitate efficient surveillance and regulation in view of the Act's purposes of guaranteeing fair, honest, and transparent markets and maintaining public trust and confidence in the integrity of the marketplace.¹⁹ A major theme in this context is *self-regulation* by the market participants under the general aegis of the FBC.²⁰ Compared with the Government's draft version, the Houses of Parliament have considerably strengthened the principle of self-regulation and limited the Government's rule-making power.

The Exchanges will be free to choose their structure and form of trading and will have the power to issue rules for membership and listing of securities. The SSE's admission board (Swiss Office for the Admission of Securities, or SOAS)²¹ is currently promulgating new listing rules, which will have to be submitted to the FBC within three months after the SEA becomes effective.²²

The legislature applied a similar technique when it enacted the IFA, which provides the regulatory framework for Swiss and foreign investment funds and the marketing of units of such funds in Switzerland. The general regulations set out in the IFA are complemented by more detailed rules in the underlying Ordinance. The Ordinance provides, inter alia, detailed requirements for the formation and management of funds, the conditions which license applicants (such as fund managers, custodian or depositary banks, distributors, and auditors) must meet, detailed provisions that define the permitted investments and set out the investment restrictions for each fund category, and provisions relating to reporting, publication, valuation, and accounting.²³ The regulations on accounting and auditing are further detailed in a

¹⁸ See *infra* part III.A.

¹⁹ The Government's draft proposal listed both protection of investors and a guarantee of fair and efficient markets as purposes of the Act. See Explanatory Report, *supra* note 1, at 1381-82. Since investors are best protected by fair, efficient and transparent markets, Parliament has eliminated the former as a primary purpose of the Act. See also WERLEN, *supra* note 15, at 193-213 (1994).

²⁰ See SEA, *supra* note 1, at art. 32; FBA, *supra* note 15, at art. 23.

²¹ Swiss Office for the Admission of Securities [hereinafter SAB].

²² See SEA, *supra* note 1, at art. 49. The FBC will have to render its decision within one year after the implementation of the SEA. See *generally infra* part IV.

²³ Ordonnance sur les fonds de placement [Ordinance on the Investment Fund Act of October 23, 1994], ROLF 1994, 2547 [hereinafter Ordinance I]. For a discussion of the IFA, see *generally infra* part V.

separate Ordinance issued by the FBC.²⁴

In Part II, an overview of the new Securities Exchange Act in its draft form and a discussion of its Sections I to III relating to stock exchanges and broker-dealers will be presented. Part III outlines Sections IV and V of the SEA that encompass the regulations governing disclosure of major holdings and takeovers. In Part IV, the draft proposals of the Swiss Admission Board (SAB) that concern new rules for the listing of securities shall be discussed. Finally, Part V is dedicated to the new Investment Fund Act and the marketing of units or shares of foreign schemes in Switzerland.

II. The Securities Exchange Act of Switzerland

A. Applicable Definitions

The scope of the SEA is determined by the definitions of *securities*, *stock exchanges*, and *broker-dealers*.²⁵ Securities are very broadly defined under the U.S. Securities Act of 1933.²⁶ Via the test enunciated by the Supreme Court of the United States in *SEC v. W.J. Howey Co.*,²⁷ securities include virtually all investment contracts (such as notes and commodities, and even managed brokerage accounts according to some courts),²⁸ except those made for commercial or banking purposes.²⁹ Similarly, the U.K. Financial Services Act of 1986 contains an extensive and rather complicated definition of investments.³⁰ In contrast, the SEA defines *securities* rather briefly as any standardized, fungible, and negotiable rights or instruments, whether or not embodied in a document, that are designed for mass trading.³¹ Thus, the definition includes, apart from traditional investment vehicles, futures, options, and other derivatives (except derivatives traded on the OTC market),

²⁴ Ordonnance de la CFB sur les fonds de placement [Ordinance of the FBC on the Investment Fund Act of October 27, 1994], ROLF 1994, 3125 [hereinafter FBC Ordinance].

²⁵ See SEA, *supra* note 1, at art. 2.

²⁶ 15 U.S.C. § 77b(1) (1988). See also 15 U.S.C. § 78c(a)(10) (1988).

²⁷ *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99, 301 (1946).

²⁸ Whether a brokerage account comes under the definition depends on whether there is a common enterprise and whether the broker provides a service rather than an investment contract. See THOMAS L. HAZEN, *THE LAW OF SECURITIES REGULATION* sec. 1.5 (2d ed. 1990 & Supp. 1994). However, courts are split over this issue. See, e.g., *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974); see also, e.g., Lewis Lowenfels & Alan Bromberg, *What Is a Security Under the Federal Securities Laws?*, 56 ALB. L. REV. 473 (1993). *Contra* Mordaunt v. Incomco, 686 F.2d 815 (9th Cir. 1982).

²⁹ Under the *Howey* test, it is crucial whether the investor expects profits *solely* from the efforts of others. *W.J. Howey Co.*, 328 U.S. at 298-99. The requirement that profits be secured solely from the efforts of others has been diluted subsequently to the requirement that profits come *primarily* or *substantially* from others. See THOMAS L. HAZEN, *supra* note 28 § 1.5 (2d ed. 1990 & Supp. 1994). For a recent definition of notes as securities, see *Reves v. Ernst & Young*, 494 U.S. 56, 63-65 (1990) (holding that a presumption arises that a note is a security). See also Janet Kerr & Karen M. Eisenhauer, *Reves Revisited*, PEPP. L. REV. 1123 (1992).

³⁰ See Financial Services Act of 1986, part I, sec. 1(1) & Schedule 1 (U.K.). See also, e.g., ROBERT R. PENNINGTON, *THE LAW OF THE INVESTMENT MARKETS* 57-61 (1990).

³¹ See SEA, *supra* note 1, at art. 2(a).

but not the underlying foreign exchange, precious metals, or commodities.³²

An *exchange* is defined as any institution or organized marketplace the purpose of which is serving as a platform for the trading (which, in SEA terms, is the simultaneous exchange of offer and demand) of securities among broker-dealers and the settlement of such trades.³³ The Government may extend the Act to any exchange-like institution, such as telephonic trading systems, or may exempt exchanges or exchange-like institutions if the purposes of the Act do not mandate regulation.³⁴

A *broker-dealer* is defined as (i) any individual, partnership, or legal person; (ii) who is professionally³⁵ engaged in the business of effecting securities transactions on the secondary markets for the account of others or for his own account in view of resale within a short term; and (iii) who publicly offers the subscription of securities on the primary market, or issues itself and publicly offers derivatives for sale.³⁶ This definition includes dealers and any professionals who act as principals, such as arbitrageurs, specialists, and market makers. In contrast, the EC Investment Services Directive (ISD)³⁷ applies principally to legal persons who render investment services for third parties.³⁸ However, if an investment firm is subject to the ISD under this definition, its proprietary trading is also considered an investment service in terms of and subject to regulation under the Directive.³⁹ Unlike the ISD,⁴⁰ the SEA does not apply to discretionary portfolio management exercised on a client-by-client basis; but, it does extend to management of

³² See Explanatory Report, *supra* note 1, at 1296. Derivatives traded over the counter (OTC Market) are not standardized, but shaped according to the client's specific needs. They are thus not securities in terms of the Act. This follows from the author's interpretation of art. 2(a) SEA and the Explanatory Report, *id.* 1295.

³³ See SEA, *supra* note 1, at art. 2(b). The definition must be understood in a technical sense; that is, the question is whether there is an organized market with some type of trading infrastructure. See Explanatory Report, *supra* note 1, at 1296.

³⁴ See SEA, *supra* note 1, at art. 3(5). In particular, the SEA might apply to electronic trade confirmation systems (ETC), under which a broker enters the terms and data of a trade into the electronic system for automatic approval or dismissal by the client. See also Explanatory Report, *supra* note 1, at 1399. TRAX, SEQUEL, and OASIS GLOBAL, which soon will be bridged among each other, are examples of electronic trade confirmation systems. See NEUE ZUERCHER ZEITUNG, No. 236, Oct. 19, 1994, at 13. The globalization of those systems and the markets in general will require greater international co-operation among regulators.

³⁵ For a definition of professional commercial activity, see Article 52 Ordonnance sur le registre du Commerce [Federal Ordinance on the Commercial Register of June 7, 1937], RS 221.441.

³⁶ See SEA, *supra* note 1, at art. 2(c).

³⁷ Council Directive 93/22 of May 10, 1993 on Investment Services in the Securities Field, 1993 O.J. (L 141) 27 [hereinafter ISD].

³⁸ See *id.* at art. 1(3).

³⁹ See *id.* at art. 1(2), annex A(2) & B.

⁴⁰ See *id.* at annex A(3). See also, e.g., Pauline Ashall, *The Investment Services Directive: What Was the Conflict All About?*, in E.C. Financial Market Regulation and Company Law 91, 94 (Mads Andenas & Stephen Kenyon-Slade eds., 1993).

pooled funds.⁴¹ Both the SEA and ISD cover marketing of investment fund units by intermediaries, except that the ISD does not apply to units issued by schemes which are not UCITS in terms of the EC UCITS Directive.⁴² Finally, the SEA definition of broker-dealer also encompasses non-bank investment banks, investment firms, and investment houses or distributors who underwrite and/or place issues.⁴³

The SEA will apply to all broker-dealers, irrespective of whether they have direct access to a stock exchange or whether they act only indirectly through an institution admitted at an exchange. In addition, the Government may subject professional proprietary traders (such as institutional investors or multinational companies), which trade directly off exchange without relying on a broker-dealer, to certain reporting requirements.⁴⁴ The ISD, on the other hand, does not apply to such traders.⁴⁵ However, institutional investors who professionally trade through broker-dealers for long-term investment purposes only (such as pension funds or multinational companies) do not qualify as broker-dealers under the SEA. Given these rather general distinctions, much will depend on further detailing by the Government in its Ordinance.

B. Securities Exchanges

Any exchange will need a license from the supervisory authority. This license will be granted if: (i) the exchange's organization and its rules and regulations warrant compliance with the Act; (ii) its executives and employees' professional qualification and integrity warrant compliance with the Act and the rules and regulations of both their professional organization and the exchange; and (iii) its executives and executive branches meet the minimum requirements which the Government may enact by way of ordinance.⁴⁶ Applicants who meet these requirements have a vested right to obtain a license. Members of

⁴¹ See Explanatory Report, *supra* note 1, at 1297.

⁴² For a discussion of the UCITS Directive, see *infra* part V.A.

⁴³ The FBO had been extended to such institutions in 1989. See FBO, *supra* note 16, at art. 2(c). As these firms will be subject to the SEA, it is expected that this provision will be repealed after the effective date of the SEA. See Explanatory Report, *supra* note 1, at 1298.

⁴⁴ These reporting requirements will only be defined in the Ordinance. See SEA, *supra* note 1, at art. 15(2)k(4). If such companies or institutions are subject to the SEA, approved auditors will be necessary to examine the company's compliance with its reporting obligation, and such companies will have a duty to disclose such information upon request to the FBC. See SEA, *supra* note 1, at art. 15(4).

⁴⁵ See ISD, *supra* note 37, at art. 2(2) (listing, *inter alia*, (i) insurance companies, (ii) firms which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, (iii) firms that provide investment services consisting exclusively in the administration of employee-participation schemes, (iv) collective investment undertakings, and (v) persons whose main business is trading in commodities amongst themselves or with producers or professional users of such products).

⁴⁶ See SEA, *supra* note 1, at art. 3(a)-(c).

an exchange do not need to be licensed broker-dealers.⁴⁷ The SEA neither provides for a stock exchange monopoly nor requires the market participants to trade over an exchange. It does not limit the number of exchanges and expressly mentions licensing of foreign exchanges, which licensing may, however, be conditioned on reciprocity. Special rules will be drafted by the Government for admission of foreign exchanges without registered offices or physical installations in Switzerland, such as foreign electronic or telephonic trading systems.⁴⁸ Thus, this intention to regulate cross-border trading will necessitate cooperation with foreign supervisory authorities.⁴⁹

According to the principle of self-regulation, the SEA only requires that an exchange have an operational, administrative and managerial structure and organization which match its size and objectives and that the exchange provides for adequate self-regulatory control mechanisms for its operations and the supervision of its members. These structures, rules, and self-regulatory mechanisms must be submitted to the FBC for examination and approval. The SEA allows the exchanges to choose freely their trading system and simply requires that it be transparent and efficient. To this end, the SEA imposes a number of recording, reporting, and publication requirements.⁵⁰ Se-

⁴⁷ Article 7(2) of the Government's draft provided that only licensed broker-dealers could be members of an Exchange. Parliament eliminated this requirement.

⁴⁸ See SEA, *supra* note 1, at arts. 3(4), 35. For example, the International Securities Markets Association (ISMA) has been given the status of a Designated Investment Exchange as defined by Section 36 of the UK Financial Services Act of 1986. ISMA is a self-regulatory association for the international securities markets, particularly Eurobond markets, with its seat in Switzerland. See A PROFILE FOR THE FUTURE 10-11 (ISMA ed. 1992). Its operative arm is the London based ISMA Ltd., which has developed a real time trade confirmation, affirmation, risk management and regulatory reporting system (TRAX). See *supra* note 34. Thus, if the Government decided to extend the SEA to exchange-like institutions, ISMA Ltd. would be a candidate for licensing of a foreign exchange pursuant to Article 3(4) of the SEA.

⁴⁹ The SEA also contains a section pertaining to assistance given to foreign authorities by the FBC. Compared to the Government's proposal, Parliament has further limited the FBC's power to grant such assistance to foreign authorities. Accordingly, information may only be provided if: (i) it is directly necessary for the supervision of foreign broker-dealers in their jurisdiction; (ii) the foreign authority is bound by local law to secrecy in its office and to professional secrecy; (iii) the foreign authority agrees not to disclose the information to other authorities without prior consent of the FBC, unless a treaty or agreement between Switzerland and the foreign country generally provides for such disclosure; and (iv) no information may be provided to foreign criminal investigative authorities if such information could not be disclosed pursuant to the laws and treaties providing for legal assistance in criminal matters. See SEA, *supra* note 1, at art. 36. Finally, no information may be forwarded where, upon a prima facie showing, a person is not involved in the matter under investigation. See *id.* at art. 36 (as passed by both Houses of Parliament). Switzerland and the United States have, in the framework of the treaty on mutual assistance in criminal matters, entered into an agreement pursuant to which Switzerland will also grant assistance in ancillary administrative proceedings relating to the offer, sale, and purchase of securities, derivatives, and commodities. Echange de lettres du 3 novembre 1993 entre la Suisse et les Etats-Unis [Exchange of Diplomatic Letters], Nov. 3, 1993, RS 0.351.933.66. The granting of assistance has thus been extended to proceedings of the Commodity Futures Trading Commission. See *id.*

⁵⁰ See SEA, *supra* note 1, at arts. 4-6. In particular, an exchange must provide for a system for chronological recording of all transactions. Accordingly, prices, volume of trading and other price-related information must be published regularly.

curities and price lists must contain a separate section for companies which are not subject to the takeover provisions of the Act or which have increased the threshold for that purpose above 33 $\frac{1}{3}$ %.⁵¹ The supervision of day-to-day operations is placed in the sole responsibility of the exchange. It must notify the FBC of any potential breach of the law, rules, or regulations, which may then give rise to an investigation.⁵² An exchange must also set out its rules for membership, which must not be discriminatory.⁵³ It has to submit rules for the listing of securities, delisting, and suspension of trade, which rules by law must satisfy internationally accepted standards.⁵⁴ The decisions on admission or exclusion of membership and listing of securities, respectively, may be appealed to an independent review board which every exchange must establish. The board's decisions are subject to judicial review by the ordinary civil courts.⁵⁵

The Government's proposal to empower exchanges to oblige their members to trade exclusively over their systems has been struck by Parliament. Reportedly, the SSE will, however, oblige its EBS members on a private law basis to effect trades of up to Sfr. 200,000 (US\$ 150,000) for shares and other equity instruments and Sfr. 100,000 (US\$ 75,000) for debt instruments through EBS. Traditionally, the over-the-counter (OTC) market has been of great importance in Switzerland. Market transparency will considerably depend on the extent to which and how the reporting systems of the exchanges will account for these trades.

C. Broker-Dealers

A broker-dealer will need authorization, whether or not he has a seat on an exchange.⁵⁶ The grant of a license will be conditioned on

⁵¹ See *infra* part III.B.3.

⁵² See SEA, *supra* note 1, at art. 6. These market control mechanisms must be fashioned in such a manner as to allow for efficient investigation into cases of insider dealing, unlawful price manipulation, and other breaches of the law.

⁵³ An exchange may, however, establish different categories of membership which depend upon the role and function of the member. See Explanatory Report, *supra* note 1, at 1302. SOFFEX, for example, grants exchange licenses and clearing licenses which are divided into sub-categories. See SOFFEX, General Rules and Regulations, Rule 1.2.1-1.2.8 (1992).

⁵⁴ See SEA, *supra* note 1, at art. 8. The reference to international standards particularly concerns rules of disclosure and publication of information. It may be expected that the SOAS will borrow substantially from the EC Admissions Directive when enacting its admission (listing) rules. See Council Directive 79/279 of March 5, 1979 Coordinating the Conditions for Admission of Securities to Official Stock Exchange Listing, 1979 O.J. (L 66) 21 [hereinafter Admissions Directive]. See *infra* part IV.

⁵⁵ See SEA, *supra* note 1, at art. 9.

⁵⁶ Whereas broker-dealers obtain a single or unitary license, licenses are accorded for specific services under the ISD. See ISD, *supra* note 37, at art. 3. For a comparison of the conditions under the SEA and the ISD, see Rolf Watter, *Wertpapierfirmen und Wertpapierdienstleistungen im Entwurf zum Boersengesetz und im EG-Recht - eine Uebersicht*, 1994 Pratique Juridique Actuelle (PJA) 294.

sufficient organization to warrant compliance with the law, minimum capital (or, for individuals, payment of security), and adequate qualification and reputation warranting blameless business conduct. The requirement of good standing and reputation also applies to the controlling shareholders of broker-dealer companies. Where a broker-dealer is part of a financial group, the FBC may also condition its granting of a license on adequate consolidated supervision over and acquisition of a business license by the group in its home jurisdiction.⁵⁷ Again, details will be set out in the Ordinance, which will also provide rules on the licensing of foreign broker-dealers who have neither a seat on an exchange nor an establishment in Switzerland. Licenses will be granted on a reciprocal basis.

Like exchanges, broker-dealers must thus provide for sufficient self-regulation and control both with respect to their internal organization and the handling of client matters. The SEA expressly lists some basic rules of conduct that give rise to civil liability if violated. These rules of conduct are client-related and reflect the mostly self-evident principles of agency law, such as the obligation to exercise orders with due care and diligence, the duty of loyalty and good faith (including disclosure of conflicts of interest), and the duty properly to inform clients, particularly as to the risks involved in a transaction.⁵⁸ Parliament has eliminated the provisions which would have required broker-dealers to issue general conditions of contract and to submit them for approval to the FBC.

Apart from minimum capital requirements, the SEA obliges broker-dealers to have sufficient funds of their own and to maintain sound risk-spreading on a consolidated basis. Again, detailed requirements will be set out in the Ordinance.⁵⁹ Given the fact that Swiss capital adequacy requirements for banks are the highest in the world, competitive regulation would warrant orientation on the EC Capital Adequacy Directive (which provides for risk-based minimum levels for various market risks) rather than on the FBA.⁶⁰ However, the recent cases of

⁵⁷ See SEA, *supra* note 1, at art. 10.

⁵⁸ See *id.* at art. 11.

⁵⁹ See *id.* at arts. 12-14.

⁶⁰ See Council Directive 93/6 of March 15, 1993 on the Capital Adequacy of Investment Firms and Credit Institutions, 1993 O.J. (L 141) 1 [hereinafter CAD]. Capital will be needed under the CAD with respect to position risks, settlement and counterparty risks, foreign exchange risks, and large exposures. See generally Ashall, *supra* note 40, at 92. The regulators will also monitor interest rate risks. *Id.* Because of the initial intention to standardize the capital regulatory regime for investment firms, a great conflict existed prior to the EC member states' agreement upon the ISD and the CAD. *Id.* This would have resulted in a capital regulatory regime for investment firms similar to the one established by the banking directives (the Own Funds Directive, the Solvency Ratio Directive, and the Large Exposures Directive), which impose quite stringent capital requirements. *Id.* Traditionally, investment firms have a rather small capital base as a result of the type of activities in which they participate. *Id.* However, in many countries, investment firms and banks compete with each other. *Id.* Therefore, equal standards had to be established where both types of institutions would compete on the same markets, particularly with regard to market risks. *Id.* As stated above, the

turmoil on the derivatives market (failure of Barings Bank) may have bolstered the case for more stringent capital and own-funds requirements for market risks.⁶¹ Finally, broker-dealers are obliged to establish records of all orders received and transactions effected. Additional filing and disclosure requirements will be issued by the FBC.⁶² Detailed accounting rules will be enacted by the Government from which rules banks subject to regulation under the FBA will be exempted. Broker-dealers must publish their annual accounts or make them otherwise available to the public. They must be audited by independent, specially qualified and authorized auditors (such as those approved under the FBA). Such auditors will assume an extensive policing role and directly report to the FBC.⁶³

III. Disclosure of Major Holdings and Takeover Regulations

A. Disclosure of Major Holdings

Since 1992, corporate law has required the disclosure of major holdings in shareholding companies that have shares listed on or off an exchange. Under the Code of Obligations, a company must publish in the annex to its annual accounts the names and the holdings of shareholders (or groups of shareholders) bound by voting right agreements which either exceed five percent of the total voting right capital or any lower percentage of registered shares as determined in its articles of incorporation, if the company knows or is bound to know those shareholders.⁶⁴ However, the shareholders do not appear to have a duty to inform the company about their holding, and the provision is not accompanied by any sanction.⁶⁵ To provide greater transparency, the Code's accounting provisions have also been amended, and groups

CAD now imposes capital requirements for certain market risks relating to activities that come within the definition found in the "Trading Book." *Id.* This definition has been kept broad so that the capital requirements apply both to investment firms and banks for risks arising out of the activities so defined in the "Trading Book." *Id.* This excludes application of the more onerous capital requirements to investment firms in this area. See generally *id.*; Bond et al., *Capital Markets*, in *FINANCIAL SERVICES IN EUROPE* 33-34 (D. Cambell & M. Moore eds., 1993).

⁶¹ Cf. Hearings held by the Swiss House of Representatives on the subject on March 14, 1995, 7th Sess. See Bulletin officiel/Conseil National, No. 93.025, Mar. 14, 1995 (draft record) (discussing the new guidelines on risk management of derivatives issued by the Basle Committee and the International Organization for Off-Securities Commissioners currently examined by Swiss National Bank and FBC).

⁶² See SEA, *supra* note 1, at art. 15.

⁶³ See *id.* at arts. 18, 19.

⁶⁴ See CO art. 663c(1).

⁶⁵ See CO art. 663c. In contrast to Article 20 of the SEA, Article 663c of the CO institutes an obligation on the company, not an obligation on the shareholder. On the one hand, this obligation is more comprehensive than the obligation of Article 20 of the SEA, as it does not provide for group exemptions; but, on the other hand, it is less inclusive than Article 20 of the SEA, because it does not extend to persons who act in concert. For a discussion of article 663c CO, see generally, Peter Forstmoser, *OR 663c—ein wenig transparentes Transparenzgebot*, in *ASPEKTE DES WIRTSCHAFTSRECHTS* 69 (H.U. Walder et al. eds., 1994).

of companies must report their financial statements on a consolidated basis.⁶⁶ The amendments to the Code also reduced the admissibility of restrictions on the transfer of registered shares which are listed. Under prior law, a company's board of directors could refuse registration of acquirors of registered shares as shareholders in its shareholders' register without giving any reasons.⁶⁷ Under the revised provisions, listed companies may no longer refuse registration of a shareholder for any reason. Rather, only two types of restrictions are permitted that the company must, in addition, expressly include in its articles of incorporation: (i) the possibility to impose limits on the percentage of registered shares which an individual (or group of shareholders acting in concert) may hold and (ii) the refusal of registration as a shareholder where an applicant does not expressly declare to hold the shares in his own name and for his own account.⁶⁸

The SEA will introduce more comprehensive disclosure requirements, which, in contrast to the EC Transparency Directive, concern only *shareholding* companies.⁶⁹ Any individual who, acting directly, indirectly, or in concert with others, acquires or disposes of, for his own account, shares of a company incorporated in Switzerland that has shares (voting and non-voting) at least partially listed on a Swiss Exchange, must disclose his holding to the company and the exchange, if it reaches, exceeds, or falls below the thresholds of 5, 10, 20, 33¹/₃, 50, or 66²/₃% of the total voting rights of the company. In this respect, the Swiss legislature has largely borrowed from the EC Transparency Directive and less from the U.S. and English models.⁷⁰ The requirement of

⁶⁶ See generally CO arts. 662a, 663 - 663b. See also CO arts. 663e-663h (regarding groups of companies and their obligation to produce consolidated accounts).

⁶⁷ See former CO art. 686(2) (1937); Walter R. Schlupe, *Vinkulierung, in SCHWEIZ. AKTIENGESELLSCHAFT* 122, 125 (1976).

⁶⁸ See CO art. 685d(1)-(2). These limitations do not apply where the acquisition is made through succession or dissolution of a marital property regime. See CO art. 685d(2). In addition, the final provisions of the Code of Obligations (Article 4) provide that registration may be refused on the ground that after such registration, the Company might no longer be able to provide evidence of Swiss domination (which is still required by some laws, such as the Lex Friedrich that limits the purchase by foreigners of real estate in Switzerland). See Bundesgesetz ueber den Erwerb von Grundstuecken durch Personen im Ausland [Lex Friedrich of December 16, 1983], RS 211.412.41, at art. 6(2). For purposes of calculating the percentage limitations, the company may either include all types of shares or rely exclusively on the total number of outstanding registered shares. See generally Shelby du Pasquier & Matthias Oertle, *Kommentar zum Schweizerischen Privatrecht, Obligationenrecht II* 676-683 (H. Honsell et al. eds., 1993).

⁶⁹ See SEA, *supra* note 1, at art. 20; Council Directive 88/627 of December 12, 1988 on the Information to be Published when a Major Holding in a Listed Company is Acquired or Disposed of, 1988 O.J. (L 348) 62 [hereinafter Transparency Directive].

⁷⁰ The Transparency Directive provides for thresholds of 10%, 20%, 50% and 66²/₃%. The member states may also introduce thresholds of 25% instead of 20% or 33¹/₃%, or 75% instead of 66²/₃%. See Transparency Directive, *supra* note 69, at art. 4(1). Under the U.S. Securities Exchange Act of 1934 (Williams Act), direct or indirect holdings of 5% and more of the share capital in each class of shares must be disclosed within a ten-day window. See 15 U.S.C. § 78m(d) (1988) (requiring that persons acquiring more than 5% of certain classes of securities file a report with the SEC). See also 17 C.F.R. § 240.13d-101 (1994) (setting out the

disclosure under the SEA also applies to groups of shareholders who are contractually or otherwise bound. However, such shareholders must comply with the requirement as a group only by disclosing the total holding, the identity of the individual members of the group (but not their individual holdings), the type of agreement by which they are bound, and the identity of their representatives.⁷¹ Thus, modifications within the group need not be reported as long as the group's holding as such is kept stable. The group notification is particularly designed for small or family holdings, but it will also relieve groups of companies from separately notifying the holdings of each of their subsidiaries. It should be noted, however, that Art. 663c of the Code of Obligations does not provide for such a group exemption. Since the Code does not include any direct sanction, however, some listed companies may be expected not to disclose the composition of the group in the annex to their annual financial statements despite the wording of Art. 663c, since such disclosure will not be required under the SEA's provisions.⁷² The EC Transparency Directive also does not provide for such a general group exemption; but, it does exempt persons or entities who are members of a group of undertakings (which are required under the Consolidated Accounts Directive⁷³ to draw up consolidated accounts) from making the declaration of disclosure, if a disclosure is made by its parent or by its own parent undertaking (where its parent is itself a subsidiary.)⁷⁴

For purposes of computation under the SEA's provisions, the conversion of non-voting shares or profit-sharing certificates into voting shares and the exercise of convertibles or analogous rights are equivalent to an acquisition.⁷⁵ Any potential acquirer may request the FBC for a ruling on the existence or non-existence of an eventual disclosure obligation.⁷⁶

The company must publish all information received on the composition and modification of such holdings.⁷⁷ If either the company

form that must be filed with the SEC). Individuals or entities acting in concert are considered as one person for this purpose. See 15 U.S.C. § 78m(d)(3) (1988). Furthermore, any additional purchase of 2% made within a period of 12 months must be disclosed. See 15 U.S.C. § 78m(d)(6)(B) (1988). In the United Kingdom, a disclosure obligation exists with respect to an interest of 3% or more in the shares of a *shareholding company* irrespective of whether its shares are listed. Such interest must be disclosed within two days after reaching the threshold. See Companies Act, 1985, secs. 198-202 (Eng.); Companies Act, 1989, sec. 134 (Eng.). For a discussion of the complicated and detailed English regulation, see GRAHAM STEDMAN, TAKEOVERS 152-62 (1993).

⁷¹ See SEA, *supra* note 1, at arts. 20(3)(a)-(d).

⁷² One would expect the legislature to repeal this provision once the SEA becomes effective. However, no action has been undertaken yet or is planned in this sense.

⁷³ See Directive on Consolidated Accounts 83/349 of May 16, 1983 (Consolidated Accounts Directive or 7th Company Directive), 1983 O.J. (L 193/1) 1.

⁷⁴ See Transparency Directive, *supra* note 69, at art. 6.

⁷⁵ See SEA, *supra* note 1, at art. 20(2).

⁷⁶ See *id.* at art. 20(6).

⁷⁷ See *id.* at art. 21.

or exchange has reason to believe that these obligations have been violated, it must notify the FBC.⁷⁸ Offenders are criminally liable and may be fined up to a maximum amount of twice the purchase or sales price. The fine is calculated on the basis of the difference between the holding after acquisition or sale and the last notified threshold amount.⁷⁹ The Act does not, however, provide specific civil remedies for aggrieved investors.

It is difficult to appraise these provisions presently as the FBC (upon recommendation of the Takeover Commission (TOC)) will have to set out detailed requirements regarding the scope of disclosure, the definitions of acquisition, disposal, convertibles and similar rights, the computation of voting rights,⁸⁰ and the periods within which notice must be filed by the shareholders and the company respectively.⁸¹ The difference between the SEA and the EC Transparency Directive in this regard could not be more striking: While the Directive contains a clear definition of "acquisition" and extensively lists the scenarios of control to which it extends,⁸² the SEA is unclear as to which kind of shareholder agreements constitute a controlling group. Given the purpose of the disclosure requirement, it may be expected that the terms acquisition/disposal comprise any form of transfer (including gratuitous transfers) of voting rights.⁸³ Furthermore, it remains to be seen whether the obligation is already triggered when shareholders enter into a shareholding agreement without acquiring shares in addition to those which they already hold or control. In the author's view, the purpose of the disclosure requirement would mandate that the obligation be triggered upon signing of the agree-

⁷⁸ See *id.* at art. 20(4).

⁷⁹ See *id.* at art. 39.

⁸⁰ Several important questions remain unanswered. For example, if a company has acquired a part of its own outstanding shares, it has not been decided whether these shares must be taken into account. A company may acquire up to 10% of its own shares, and, in conjunction with the purchase of registered shares with restricted transfer, up to 20% of its own shares, the voting rights of which will then be suspended. See CO art. 659a. It is also unclear how to treat shares held by subsidiaries. A subsidiary is a company of which the parent controls 50% or more of its voting rights. The voting rights of shares of the parent company held by such a subsidiary are suspended. See CO art. 659b.

⁸¹ Under the Transparency Directive, a shareholder must give notice of his holding to the company and the competent authorities of the state of its incorporation within seven calendar days, and the company must publish it within nine calendar days after such notification. See Transparency Directive, *supra* note 69, at arts. 4(1), 10(1). If such short deadlines are chosen, the TOC should define the kind of knowledge that a shareholder had or should have had about his holding, since a shareholder might not always be informed as quickly as required about the holdings of the companies which he controls.

⁸² See Transparency Directive, *supra* note 69, at arts. 2, 7. See also generally ERIK WERLAUFF, EC COMPANY LAW 285-88 (1993).

⁸³ Cf. Transparency Directive, *supra* note 69, at art. 2. For example, the granting of a life interest on shares would be considered an acquisition, as it is the beneficiary that may exercise the voting rights. See CO art. 690(2); cf. Transparency Directive, *supra* note 69, at art. 7(1)(6). In contrast, the pledging of shares cannot be considered a form of disposal, since the voting rights remain with the pledgor. See CODE CIVIL [C. CIV.] art. 905 (Swiss Civil Code) [hereinafter Cc].

ment, but the same should not apply for the obligation to make a bid.⁸⁴ Finally, one would expect that such shareholders will only be considered as acting in concert if their agreement concerns the exercise of their voting rights; shareholders who simply vote together on certain issues should not normally be held to have acted in concert.⁸⁵ It would also have been worthwhile for a more effective prevention of market manipulations by insiders to oblige officers and directors of listed companies to disclose periodically their holdings and trading, irrespective of the applicable thresholds, as it is the case under U.S. law.⁸⁶ Yet, Parliament has not even contemplated including such a requirement.⁸⁷

B. Takeover Regulations

1. In General

In 1989, the Association of Swiss Exchanges (ASE) adopted the Swiss Take-Over Code (STOC) to insure fair play by the market participants and to enable shareholders and the target company to make an informed decision upon a public offer.⁸⁸ The STOC instituted for these purposes a Commission for Regulation as a self-regulatory body of the industry. The STOC was supplemented in May 1993 by the Swiss Code Governing Public Offers for Debt Securities that was issued by the ASE and the Swiss Banker's Association.⁸⁹ The drafters of the STOC borrowed substantially from the City Code on Takeovers and Mergers.⁹⁰ The City Code, without having the force of law, has been widely respected and is at least indirectly accompanied by sanctions.⁹¹

The STOC applies only to exchanges and banks, but not to third party offerors. It does not regulate private offers and is not accompanied by sanctions. While several cases where minority shareholders

⁸⁴ See *infra* part III.B.3.

⁸⁵ See The City Code on Takeover and Mergers, note 2 on Rule 9.1 (1990), published in WEINBERG AND BLANK ON TAKE-OVERS AND MERGERS, part 7a (L. Rabinowitz et al. eds., 5th ed. 1991) [hereinafter City Code].

⁸⁶ See 15 U.S.C. § 78q (1988 & Supp. V 1993) (setting out the periodic filing obligations under Section 16(a) of the Securities Exchange Act of 1934).

⁸⁷ For a comparative discussion of such requirements, see M. SENN, AUSKUNFTS-BEGEHREN AUSLAENDISCHER GESELLSCHAFTEN UEBER DIE AKTIONAERSEIGENSCHAFT UND SCHWEIZERISCHE GEHEIMHALTUNGSPFLICHTEN 232 (1992).

⁸⁸ The Swiss Take-Over Code (STOC) is published in the handbook of the Zurich Stock Exchange. See *Aktien-Kodex*, in HANDBUCH DER ZUERCHER BOERSE (1994) [hereinafter STOC]. A translation into English can be found in ALFRED DUFOUR & GERARD HERTIG, LES PRISES DE PARTICIPATIONS: L'EXEMPLE DES OFFRES PUBLIQUES D'ACHAT 760 (1990) (however, this version does not include some modifications made in 1992 and 1994).

⁸⁹ See *Obligationen-Kodex*, in HANDBUCH DER ZUERCHER BOERSE (1994).

⁹⁰ See also Alain Hirsch & D. Siegrist, Comments on the Swiss Take-over Code, cmt. a.3 (1990).

⁹¹ The failure of compliance with the Code may lead to withdrawal of authorization by SROs and by the Securities Investment Board. For a discussion of the various SROs, see INTERNATIONAL FINANCING LIBRARY, SECURITIES REGULATION IN THE U.K. 33-39 (Freshfields ed., 1987).

had been treated in a grossly unfair manner had occurred since its inception, the investment community appears largely to have complied with the STOC in the last couple of years.⁹² Nevertheless, it will be superseded by the SEA's provisions on disclosure of major holdings and takeover bids, meaning that the self-regulatory mechanisms will be replaced by federal law. While the Government's draft proposal would have afforded most of the regulatory powers to public authorities, Parliament has again shifted the focus and considerably strengthened the self-regulatory mechanisms by delegating supervisory powers to self-regulatory organizations (SROs), as discussed below. In its spring 1995 session, the Speaker of the Commission of the House of Representatives specifically referred to the regulations of the City Code as the rules governing takeovers on the Londoner City as one of the major competitors of the Swiss exchanges; Switzerland, he said, should have regulations analogous to those of the City as regards fairness on the markets.⁹³ The House of Representatives therefore followed the advice of its Commission and adopted the provisions on takeovers despite last-minute efforts to strike them off.⁹⁴

2. Public Takeover Bids

First, as to public takeover bids, the Houses of Parliament resolved to introduce a Takeover Commission (TOC). The TOC is to consist of representatives of broker-dealers of listed companies and representatives of investors to be nominated by the FBC.⁹⁵ Second, the TOC will be entitled to propose detailed regulations to be approved by the FBC regarding the disclosure and the takeover provisions of the SEA.⁹⁶ The TOC will furthermore act as a first-level supervisory body and, as such, will have the necessary investigative powers.⁹⁷ It will act infor-

⁹² For a recent survey in English of cases reviewed by the Commission for Regulation, see SWISS REVIEW OF BUSINESS LAW 130 (1994). Recently, there has been some English critique regarding the acquisition of the Fust company by Jelmoli, since the owner of Fust was given a substantial premium. See Thomas Lustenberger, in NEUE ZUERCHER ZEITUNG, No. 222, Sept. 23, 1994, at 29. The SEA will allow for a premium of 25%. See *infra* part III.B.3.

⁹³ See Bulletin Officiel/Conseil National, No. 93.025, Mar. 14, 1995, at 1-2 (draft version).

⁹⁴ In its January 1995 session, the House of Representatives sent the draft proposal back to the Commission for review of Article 30 and the takeover regulations contained therein on the grounds that the proposed EC Takeover Directive would not be adopted in the near future because of disagreement between the UK and Germany on the issue. The House of Representatives has now agreed on the Senate's version, and the Senate has in turn accepted the wording as proposed by the House of Representatives in its spring 1995 session (hearings of March 21, 1995). See Bulletin Officiel/Conseil National, No. 93.025, Mar. 14, 1995, at 5 (draft version discussing the hearings of the House of Representatives); Neue Zuercher Zeitung, No. 68, Mar. 22, 1995, at 17 (discussing the Senate's hearings).

⁹⁵ See SEA, *supra* note 1, at art. 22bis.

⁹⁶ See *id.* at art. 22bis(2) (setting forth the regulations issued by TOC subject to approval by FBC); *id.* at art. 20(5) (providing for the issue of regulations regarding disclosure by FBC upon request by TOC); *id.* at art. 30(5) (providing for the issue of detailed regulations by FBC on takeovers upon request by TOC).

⁹⁷ See *id.* at art. 22bis(3).

mally and seek voluntary compliance with the law and its regulations through recommendations. If a party fails to comply voluntarily, the TOC may refer the case to the FBC which may issue a formal decision. This decision will be subject to appeal before an independent Takeover Review Commission.⁹⁸

The takeover provisions of Section Five of the SEA generally apply to all public tender offers (takeover bids) for securities of companies incorporated in Switzerland (target companies) that have their securities at least partially listed on a Swiss Exchange. This section applies to all forms of companies, including cooperatives.⁹⁹ The term "securities" comprises, in this context, unlike the amended proposal for an EC Takeover Directive,¹⁰⁰ voting and non-voting shares, profit-sharing certificates, convertibles, options, warrants, and other transferable instruments conferring the right to purchase voting or non-voting shares traded on or off exchange.¹⁰¹ These provisions apply both to friendly and unfriendly bids, but do not apply to "creeping tender offers,"¹⁰² except where an obligation to make a bid exists. While the Act speaks of offers to purchase, the term must be deemed to include offers providing for payment in other securities (i.e., an exchange for other shares) as under the Draft Takeover Directive.¹⁰³

The offeror must publish a prospectus that is required to contain

⁹⁸ See *id.* at arts. 22bis(3)-(4), 37(3).

⁹⁹ For example, several of the listed insurance companies are incorporated as co-operatives, such as the Rentenanstalt (Swiss Life Insurance Co.), Zurich. See ARTHUR MEIER-HEYOZ & PETER FORSTMOSER, GRUNDRISS DES SCHWEIZERISCHEN GESELLSCHAFTSRECHTS 383 (7th ed. 1993).

¹⁰⁰ See Amended Proposal for a Thirteenth Council Directive on Company Law Concerning Takeovers and Other General Bids, 1990 O.J. (C240/7) of September 26, 1990, 7 [hereinafter Draft Takeover Directive]. The proposal has met resistance from many sides and no decision could be reached on it in the Council of Ministers. See Peter Wiesner, *Stand des europäischen Unternehmensrechts*, EUR. J. BUS. L. 588, 589 (1994). The Commission is currently reconsidering it in view of the principle of subordination to national law, since the actual version would not likely ever pass the Council of Ministers. *Id.* For an English critique of the proposal, see Stephen Kenyon-Slade & Mads Andenas, *The Proposed Thirteenth Directive on Takeovers: Unravelling the United Kingdom's Self Regulatory Success?*, in E.C. FINANCIAL MARKET REGULATION AND COMPANY LAW 149 (Mads Andenas & Stephen Kenyon-Slade eds., 1993); Len Sealy, *The Draft Thirteenth E.C. Directive on Takeovers*, in E.C. FINANCIAL MARKET REGULATION AND COMPANY LAW 135 (Mads Andenas & Stephen Kenyon-Slade eds., 1993). See also Jan Wouters, *Towards a Level Playing Field for Takeovers in the European Community? An Analysis of the Proposed Thirteenth Directive in Light of American Experiences*, 30 COMMON MKT. L. REV. 267 (1993) (comparing EC proposal with U.S. legislation and practice).

¹⁰¹ See SEA, *supra* note 1, at arts. 2(d), 22 (defining security for purposes of the takeover provisions of Section 5); *id.* at art. 30(1). The House of Representatives has accepted this term of "titres cotés en bourse" in its spring 1995 session. See Bulletin Officiel/Conseil National, No. 93.025, Mar. 14, 1995, at 5 (draft version).

¹⁰² In the case of a creeping tender offer, the acquirer purchases the shares both directly and indirectly through affiliated entities or strawmen on the stock exchange over an extended period of time. See RUDOLF TSCHAENI, UNTERNEHMENSUEBERNAHMEN NACH SCHWEIZER RECHT 227-28 (2d. ed. 1991).

¹⁰³ This follows from the definition of public tender offer found in Article 2(d) of the SEA, which also comprises the exchange of securities. SEA, *supra* note 1, at art. 2(d). See also Draft Takeover Directive, *supra* note 100, at art. 2.

the information necessary to enable the addressees of the bid to make an informed decision on the offer. Detailed requirements with respect to the contents of the prospectus, notice of the bid prior to its publication, conditions of the offer, its revocation and modification, the offer period, and rules guaranteeing equal treatment of addressees during the offer period will have to be set out in detail by the TOC.¹⁰⁴ Of course, much will depend on the information that such a prospectus will be required to contain. The TOC may be expected to draw from the experience acquired under the STOC and its detailed regulations for the drafting of its own rules. A brief look at those rules is thus worthwhile, despite the fact that they will be superseded by the SEA. The STOC requires that the offer memorandum include information on the offeror and those acting in concert with him, the disclosure of agreements with the target's directors, the details of and the minimum and maximum number of securities to be acquired, the price or other consideration offered per share, the details of the offeror's present holding, and the duration of the offer period.¹⁰⁵ However, unlike the City Code or the Draft Takeover Directive, the STOC does not require the offeror to provide information on its intention regarding the continuation of the target's operations and business, its employees, and the long-term commercial justification for the proposed offer.¹⁰⁶ Such vital information should, in the author's view, be presented to permit the present owners to make a truly informed decision.

The SEA obliges the offeror to treat all holders of the same type of securities equally. Thus, if the offeror purchases shares above the offer price during the offer period, the offer must be increased accordingly (best price rule).¹⁰⁷ In the case of a partial offer, it would follow that acceptances must be treated pro rata if not all of them can be satisfied.¹⁰⁸ The offer as such may only be subject to conditions that the offeror himself cannot influence, such as the acquisition of governmental authorizations or the approval of an increase in capital by the shareholders.¹⁰⁹ The offeror must submit the offer prior to publication to approved auditors or a broker-dealer for review, whereas the Draft Takeover Directive would require submission to the supervisory authority which could forbid publication or require correction of an

¹⁰⁴ See SEA, *supra* note 1, at art. 22bis(2) (as introduced by the House of Representatives).

¹⁰⁵ See STOC, *supra* note 88, at arts. 4.1-4.6. See also Hirsch & Siegrist, *supra* note 90, cmt. at Rules 4-4.6.

¹⁰⁶ Compare STOC, *supra* note 88, at arts. 4.1-4.6 with City Code, *supra* note 85, Rules 24.1 & 24.2; Draft Takeover Directive, *supra* note 100, at arts. 10, 10(1).

¹⁰⁷ See Explanatory Report, *supra* note 1, at 1312. See also Hirsch & Siegrist, *supra* note 90, cmt. at Rule 3.1; Draft Takeover Directive, *supra* note 100, at art. 16.

¹⁰⁸ Cf. STOC, *supra* note 88, Rule 3.8.

¹⁰⁹ The City Code does not allow such conditioning where the offer is for more than 50% of the voting rights. See City Code, *supra* note 85, Rule 10 (voluntary offers), Rule 9.3 (mandatory offers), and Rule 13 (relating to EC Council Directive 4064/89 regarding merger control).

inadequate offer.¹¹⁰ The offeror must also publish the result of the tender after expiration of the offer period. If the conditions of the offer have been met, the offeror must extend the offer period for those offerees who have not accepted the offer at that time. The obligations imposed on the offeror also apply to those with whom the offeror is acting in concert.¹¹¹

The board of directors of the target company must submit a report to the holders of its securities and set out its opinion regarding the offer. It must then publish this report.¹¹² Again, detailed reporting requirements will have to be issued by the TOC. After publication of the offer and until its result is made public, the board of the target may not engage in transactions which would have the effect of altering significantly the assets or liabilities of the company.¹¹³ For example, prohibited transactions would logically include the issuance of new securities, the purchase by the company of its own shares, the issuance of authorized capital and its placement with a white knight, and the sale of crown jewels.¹¹⁴ In contrast, decisions of the shareholders' meeting are not subject to such limitations.¹¹⁵ The crux for offerors is that listed Swiss companies may continue to limit, in their articles of incorporation, a shareholder's direct or indirect holding.¹¹⁶ A company may also include specific quotas for the modification of its articles of incorporation. An offeror cannot require the holding of a shareholders meeting after having made his offer, unless he already controls a minimum of ten percent of the total voting rights pursuant to ordinary company law.¹¹⁷

This may prove to be too time consuming in the midst of a takeover battle, quite apart from the difficulty of garnering any qualified majority, which may be required for striking such clauses from the articles of incorporation. The SEA does not provide for the lifting of such restrictions in case of a public offer. It may, therefore, be virtually impossible to launch a *hostile* bid successfully, where the target company has included such restrictions in its articles of incorporation.

¹¹⁰ Compare SEA, *supra* note 1, at art. 23 with Draft Takeover Directive, *supra* note 100, at arts. 6(2), 7(3).

¹¹¹ See generally SEA, *supra* note 1, at arts. 23-26.

¹¹² See SEA, *supra* note 1, at art. 27(1); cf. Draft Takeover Directive, *supra* note 100, at art. 14.

¹¹³ See SEA, *supra* note 1, at art. 27(2); cf. Draft Takeover Directive, *supra* note 100, at art. 8.

¹¹⁴ In contrast, Rule 6.1 of the STOC allows the target's board and management to take any defensive measures they wish to undertake. STOC, *supra* note 88, Rule 6.1.

¹¹⁵ Cf. Draft Takeover Directive, *supra* note 100, at art. 8.

¹¹⁶ See *supra* note 68 and accompanying text.

¹¹⁷ Rule 6.2 of the STOC provides that an offeror who has acquired more than 10% of the *share* capital (not voting rights), including acceptances received from current shareholders, may request the convening of a shareholders meeting which the board of directors of the target company must call as soon as possible. This applies even where the board rejected the registration of the bidder's registered shares in the company's share register. STOC, *supra* note 88, Rule 6.2.

Finally, the bidder or any other person who controls, directly, indirectly, or in concert with others, five percent or more of the voting rights of the target or of another company that has its securities offered in exchange, must throughout the offer period notify the TOC and the exchange of any purchase or sale of the securities of such company.¹¹⁸ The TOC may subject other holders of securities of the *target* company to the same disclosure requirement.¹¹⁹ However, unlike under the EC Draft Takeover Directive,¹²⁰ the requirement does not apply to other holders of securities of the *bidding* company.

3. *Obligation to Make a Bid*

Whoever acquires, directly, indirectly, or in concert with others,¹²¹ securities of the target company which when added to any existing holding give him voting rights which exceed $33\frac{1}{3}\%$ of the total voting rights of the target,¹²² must make a bid to acquire all the securities of the target that are then listed on the exchange.¹²³ The target may, however, increase the threshold to 49% of its total voting rights in its articles of incorporation.¹²⁴ Upon the effective date of the Act, an obligation to make a bid also applies to persons who control more than $33\frac{1}{3}\%$, but less than 50% of a company's total voting rights, if their holdings exceed the 50% threshold upon acquisition of additional shares.¹²⁵

The bidding price must be equivalent to the price quoted at the exchange and may not be lower by more than 25% of the highest price which the bidder paid for securities of the target within the last twelve months.¹²⁶ A bidder who controls 98% of the voting rights after expi-

¹¹⁸ See SEA, *supra* note 1, at arts. 29(1), 29(2).

¹¹⁹ See *id.* at art. 29(3); in this context, *cf.* City Code, *supra* note 85, Rule 4.2 (prohibiting offeror and concerted parties to sell securities in target during offer period), Rule 4.1 (prohibiting insiders to deal in securities during offer period), and Rule 8.1 (requiring public disclosure of dealing by offeror in target's securities during offer period).

¹²⁰ See Draft Takeover Directive, *supra* note 100, at art. 17.

¹²¹ In this context, *cf.* City Code, *supra* note 85, notes on Rule 9.1. See also T. Peter Lee, *Takeover Regulation in the United Kingdom*, in *LES PRISES DE PARTICIPATIONS: L'ÉXEMPLE DES OFFRES PUBLIQUES D'ACHAT* 280, 287 (Alfred Dufour & Gerard Hertig eds., 1990); STEDMAN, *supra* note 70, at 191-92.

¹²² Parliament has made it clear that for purposes of computation of the threshold, more specifically, the calculation of the denominator, all controlled voting rights must be taken into account, irrespective of whether these rights can be exercised or not. See Bulletin officiel/Conseil National, No. 93.025, 7th Sess., Mar. 14, 1995, at 2. Thus, where the target company holds its own shares, those shares will be taken into account despite the fact that the voting rights connected therewith will be suspended. *Id.*

¹²³ See SEA, *supra* note 1, at art. 30(1) (more than $33\frac{1}{3}\%$); *cf.* Draft Takeover Directive, *supra* note 100, at art. 4(a) ($33\frac{1}{3}\%$). Under the City Code, the offer is mandatory at a level of 30% already. See City Code, *supra* note 85, Rule 9.1. The STOC had set this limit to 50% only. See STOC, *supra* note 88, Rule 3.8.

¹²⁴ See SEA, *supra* note 1, at art. 30(1) (introduced by the House of Representatives and accepted by the Senate).

¹²⁵ See *id.* at art. 51.

¹²⁶ See *id.* at art. 30(3). In contrast, the Draft Takeover Directive, *supra* note 100, con-

ration of the offer period may, within a three-month period, petition the competent court to cancel the remaining 2%. The company then reissues these securities to the bidder against payment of the offer price which it will hold for the account of the former owners.¹²⁷

The obligation to make a bid exists in principle irrespective of the manner in which the obligor acquired the securities. Nevertheless, exemptions apply if the voting rights were acquired through donation, succession, distribution of assets of an estate, marital property, or forceful execution.¹²⁸ The Catalogue of exemptions has been extended by the House of Representatives and approved by the Senate. Thus, exemptions may apply if transfers within a group of shareholders occur and the obligation to make a bid is triggered because the number of outstanding shares is reduced.¹²⁹ In particular, Parliament also took over some of the exemptions provided in the City Code, such as the exemption where the obligation is triggered due to a gratuitous issue of shares or the use of preferred rights of subscription upon an increase of the share capital and the exemption in case of rescue of a failing company and where the threshold is reached or exceeded only temporarily.¹³⁰ The FBC may grant additional exemptions or revoke an exemption where it would result in an unfair treatment of all shareholders.¹³¹ The voting rights of a shareholder who violates the

tains no provisions on the price, whereas the City Code requires that it be not less than the highest price paid by the offeror or any person acting in concert with it for shares of the respective class within the preceding 12 months. See City Code, *supra* note 85, Rule 9.5(a).

¹²⁷ See SEA, *supra* note 1, at art. 31. The Explanatory Report, *supra* note 1, does not indicate a reason for the choice of the 98% threshold for a forced buy-out. The experts had suggested a 95% threshold. It should be noted that the German Law on Group of Companies provides for such forced buy-out of minority shareholders once the parent company controls 95% of the share capital. See Aktiengesetz art. 320, Bundesgesetzblatt, BGBl I 1089 (1965) (Official record of German Laws).

¹²⁸ See also Draft Takeover Directive, *supra* note 100, at arts. 4, 5 (providing for similar exemptions).

¹²⁹ See Bulletin Officiel/Conseil National, No. 93.025, Mar. 14, 1995, at 2 (draft version).

¹³⁰ See *id.*; SEA, *supra* note 1, at art. 30(2). Cf. also City Code, *supra* note 85, note 11 on Rule 9.1 (setting forth the "Whitewash" proceeding); *id.* note 1 on Notes on Dispensations from Rule 9. Usually, the Panel will consider the dilution of a percentage held due to an increase in the share capital as triggering the obligation if the group or shareholder attempts to restore the previous level of control through purchases of shares. However, the obligation will be waived by the Panel, if there has been an independent vote at a shareholders' meeting. This also applies where a new issue of securities occurs as consideration for an acquisition. The City Code also provides exemptions in case of rescue operations and where the threshold is exceeded inadvertently only. See City Code, *supra* note 85, notes 3 & 4 on Notes on Dispensations from Rule 9. The EC Draft Takeover Directive also contains similar exemptions as those now introduced by the House of Representatives. Cf. Draft Takeover Directive, *supra* note 100, at art. 4(2c)(d) (exceeding threshold by not more than 3% does not trigger obligation if written undertaking to sell sufficient securities within one year); *id.* art. 4(2c)(g) (stating that the acquisition of additional shares through use of preferred subscription rights upon increase of sharecapital does not trigger threshold).

¹³¹ See SEA, *supra* note 1, at art. 30(2)-(3). The SEA particularly refers to the case of the sale within groups of shareholders. The FBC may authorize those shareholders to comply with the obligation as a group only. That the FBC shall have the power to revoke an exemption in a particular case was expressed by the Speaker of the Commission of the House of

provision on compulsory bidding may be suspended temporarily by court decision upon request by the FBC, the target, or one of the target's shareholders.¹³²

4. *Opting Out from the Obligation to Make a Bid*

Parliament has added a provision to Section Five of the Act which allows any company to introduce in its articles of incorporation, prior to listing, a provision exempting acquirors of its shares from the obligation to make a bid. Companies that have their securities already listed when the Act becomes effective may include such an opting-out clause in their articles within a one-year transition period.¹³³ The exemption is particularly designed for companies with large family holdings.¹³⁴ In addition, the shareholders' meeting may resolve to introduce such an opting-out clause in the company's articles even after listing has been obtained, except that the rights of the *existing* shareholders must not be affected.¹³⁵ An exchange must separately list companies with opting-out clauses to enable investors to make an informed decision on their investment. Investors are still at some risk, however, as companies can introduce such clauses later without the Act requiring a particular quorum.

IV. Listing of Securities

The SSE's admission board (SAB) is currently drafting new admission rules to comply with the provisions of the SEA.¹³⁶ The SAB also endeavored to draft rules compatible with EC law¹³⁷ in order to facili-

Representatives and accepted by the House, *see* Bulletin Officiel/Conseil National, No. 93.025, Mar. 14, 1995, at 2, 5 (draft version).

¹³² Article 30(6) of the SEA, which would have given a court the power to allocate the suspended voting rights proportionally to other shareholders was eliminated by Parliament. *See* Bulletin Officiel/Conseil National, No. 93.025, Mar. 14, 1995, at 2, 5 (draft version).

¹³³ *See* SEA, *supra* note 1, at arts. 22(2), 51bis.

¹³⁴ *Cf.* HANS KAUFMANN & BEAT KUNZ, SWISS SHARE OWNERSHIP (Bank J. Baer & Co. ed., 1991). The study by these authors covers 114 companies listed on or off exchange. Eleven companies did not disclose any information about major holdings. In more than seventy companies, there existed major holdings in the voting power controlled by families and other groups of shareholders. Only 19 companies, which nevertheless represented about 50% of the market capitalization, could be deemed as truly publicly held without being controlled by certain groups of shareholders.

¹³⁵ *See* SEA, *supra* note 1, at art. 22(2)-(3). In practice, the reference to the rights of existing shareholders means that such decision is subject to appeal within two months after the shareholders' meeting. *See* CO art. 706.

¹³⁶ *See* Swiss Admission Board, Révision du Règlement de Cotation (Consultative Paper, January 1995) [hereinafter SAB Draft Rules].

¹³⁷ *See* Council Directive 79/279 of March 5, 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing, 1979 O.J. (L 66) 21, *amended by* Council Directive 82/148 of March 3, 1982, 1982 O.J. (L 62) 22 [hereinafter Admissions Directive]; Council Directive 80/390 of March 17, 1980 Coordinating the Requirements for the Drawing Up, Scrutiny and Distribution of Listing Particulars to Be Published for the Admission of Securities to Official Stock Exchange Listing, 1980 O.J. (L 100) 1, *amended by* Council Directive 90/211 of April 23, 1990, 1990 O.J. (L 112) 24, *further amended by* Parlia-

tate mutual recognition of Listing Particulars and Prospectuses for purposes of listing of securities by Swiss issuers on the stock exchanges of EC member states.¹³⁸ As Switzerland is not an EC member state, however, agreements will in principle have to be reached with each individual EC country, whereas amongst EC members, mutual recognition of listing particulars and prospectuses will work automatically.¹³⁹ Generally, listing will require substantial disclosure of material information by the issuer; publication and reporting requirements, as well as continuing obligations, will be strengthened. Critics have pointed out that the new regime might be too onerous for small and middle-sized Swiss companies, but the SAB has clearly recognized the necessity to become "euro-compatible" (or, rather, euro-competitive).¹⁴⁰

To have its securities listed, an issuer of shares or similar rights, investment fund units or debt securities must have existed for at least three years before making the request for admission,¹⁴¹ have the required minimum capitalization and provide the necessary reports. Currently, minimum paid-in capital of an applicant must amount to Sfr. 5 million.¹⁴² In addition, the securities for which listing is requested must permit the development of a market.¹⁴³ The nominal amount of the issue must presently amount to Sfr. 10 million or represent a capitalization off exchange of at least Sfr. 25 million.¹⁴⁴ Additional lots of already quoted securities must amount to two million nominally and five million of market capitalization.¹⁴⁵

Pursuant to the new draft rules these amounts will be increased and replaced by the following regime: Instead of a required minimum capital, applicants must have their own funds of at least Sfr. 25 million.

ment and Council Directive 94/18 of May 30, 1994, 1994 O.J. (L 135) 27 [hereinafter Listing Particulars Directive 80/390].

¹³⁸ The need to enter into an agreement with each member state could be obviated if the EC were prepared to enter into an overall agreement with Switzerland. Article 25A of the Admissions Directive expressly provides for such a possibility. See Admissions Directive, *supra* note 137, at art. 25A.

¹³⁹ In the EC, mutual recognition has been recently facilitated, in particular additional listings of securities listed in one EC country in other EC countries. A new Directive, EC Directive 94/18 of May 30, 1994 even authorizes member states to provide exemptions in whole or in part from the obligation to publish listing particulars, if the transferable securities for which listing has been applied have already been listed officially in another member state for at least three years. Also, where the shares of a company have been traded for at least two years on a regulated secondary market, the company may be exempted from publishing listing particulars if it seeks listing on an official, regulated exchange in the country where its shares have already been traded on the second-tier market. See generally Lambrecht, *Mutual Recognition of Listing Particulars and Prospectuses and the New Possible Exemptions*, 1994 Int'l. Bus. L.J. 721.

¹⁴⁰ See SWISS ADMISSION BOARD, *Rapport Explicatif, in RÉVISION DU RÈGLEMENT DE COTATION 2-12 (1995)* [hereinafter SAB Explanatory Report].

¹⁴¹ See SAB Draft Rules, *supra* note 136, sec. 7; cf. Admissions Directive, *supra* note 137, at sched. A, Rule 3.

¹⁴² See SAB Admission Rules, art. 2.3 [hereinafter AR].

¹⁴³ See *id.* at art. 1.

¹⁴⁴ See *id.* at art. 3.1.

¹⁴⁵ See *id.* at art. 3.1. (as amended 1991).

Where the issuer is the parent of a group of companies, this requirement applies on a consolidated basis.¹⁴⁶ New issues of shares and other participation rights must still amount to a capitalization off exchange of at least Sfr. 25 million, or where similar rights of the same issuers are already listed (such as shares of another class), Sfr. 10 million.¹⁴⁷ The minimum issue of ordinary debt securities is Sfr. 20 million.¹⁴⁸ Specific rules will be issued with respect to derivatives: Where the underlying assets have not been issued by the issuer of the derivatives, which is usually the case, one of two requirements must be met: (i) The issue of the derivatives is Sfr. 10 million at least,¹⁴⁹ or (ii) the capitalization of the underlying assets is (a) Sfr. 100 million at least in case of debt securities as underlying assets and (b) Sfr. 50 million where these assets are shares or other participation rights issued by a Swiss company the securities of which are included in the Swiss Market Index (SMI) or (c) Sfr. 25 million where the underlying assets are shares or participation rights of a Swiss company not included in the SMI;¹⁵⁰ where the underlying assets are equity instruments issued by foreign issuers, the capitalization of these securities must amount to at least Sfr. 50 million.¹⁵¹ In case of options issued on equity, additional lots issued by the same issuer may be listed if the capitalization meets a minimum of Sfr. 2 million.¹⁵² All these minimum requirements do not apply where an earlier listed issue is simply increased later on.¹⁵³ Generally, the issue of securities must allow the development of a market, which is the reason why in case of equity instruments, at least twenty-five percent of the issue must be offered for subscription to the public, and where this minimum level is not reached, the issuer must make a showing that the development of a market can nevertheless be expected.¹⁵⁴ Where restrictions exist for the transfer of shares,¹⁵⁵ listing may be obtained where the issuer can establish that those restrictions are not likely to cause market interruptions.¹⁵⁶

The most important document will be the listing particulars which is discussed below. In addition, the issuer will have to publish a listing advertisement containing summary information for indication of the listing.¹⁵⁷ The issuer will also have to make a declaration to the SAB that no material adverse effects have occurred since the drawing up of

¹⁴⁶ See SAB Draft Rules, *supra* note 136, sec. 8.

¹⁴⁷ See *id.* sec. 14(a).

¹⁴⁸ See *id.* § 14(b).

¹⁴⁹ See *id.* § 14(c)(aa).

¹⁵⁰ See *id.* § 14(c)(aa)(1)-(3).

¹⁵¹ See *id.* § 14(c)(bb)(4).

¹⁵² See *id.* § 14(c)(bb)(4), para. 2.

¹⁵³ See *id.* § 15.

¹⁵⁴ See *id.* § 16(2).

¹⁵⁵ See *supra* note 70.

¹⁵⁶ See SAB Draft Rules, *supra* note 136, sec. 18(2)-(3).

¹⁵⁷ See *id.* §§ 49-52.

the listing particulars and the application. The issuer will also be required to publish any material events negatively affecting its financial position, and earnings and profits.¹⁵⁸ As registration requirements are less complex in Switzerland than in the United States, there will be no abridged listing procedure (so-called shelf registration).¹⁵⁹

The listing particulars (prospectus) will have to be much more detailed compared to present requirements to enable investors to make an informed assessment not only of the issuer's financial situation, its profits and losses, its development potentials, but also of the rights attaching to the securities to be listed, their transferability, and any restrictions on their negotiability.¹⁶⁰ Thus, all information on the issuer which may be material to an investor's decision to purchase the security will be contained in one document. Separate rules for the listing of securities by banks will exist, as will separate rules on accounting and consolidated accounting for insurance companies.¹⁶¹ Specific risks will have to be disclosed separately.

Similar to the regulation in other European jurisdictions, the prospectus is not a marketing document and its text will have to be worded accordingly. Specifically, the prospectus must contain the usual general information about the issuer and its capital¹⁶² and detailed information with respect to the shares or other participation rights, debt securities or derivatives¹⁶³ in respect of which application

¹⁵⁸ See *id.* §§ 35, 56(1)(c), 58(1)(d); SAB Explanatory Report, *supra* note 140, at 2-8. These rules will have to be measured, inter alia, against the comprehensive rules of the U.K. Regulation and the Yellow Book of the London Stock Exchange. For example, where material changes occur after listing, additional Listing Particulars must be published. See FSA, *supra* note 30, secs. 142(1), 147(1)-(3). For a discussion of the U.K. rules, see Pennington, *supra* note 30, secs. 7.16-7.19.

¹⁵⁹ See SAB Explanatory Report, *supra* note 140, at 2-21.

¹⁶⁰ Cf. Admissions Directive, *supra* note 137, at art. 4. See also *id.* at scheds. A-C (setting out the detailed minimum requirements). References herein will be made to Schedule A only.

¹⁶¹ It may be expected that the rules regarding the information to be provided by banks in terms of the FBA will largely follow the patterns laid out in the FBA and the FBO, the modified ordinance relating thereto.

¹⁶² General information about the issuer and its capital include inter alia: the amount and class of capital with details of its principal characteristics; the amount of capital to be paid; the authorized capital; the categories of persons having preferential subscription rights for additional portions of capital; a description of the operations during the three preceding years through which the capital was modified; the conditions imposed by the memorandum and articles of association governing changes in the capital and in the respective rights of the various classes of shares; whether such conditions are more stringent than is required by law, in particular any restrictions on the transferability of registered shares. See AR, *supra* note 142, at app. I, secs. 1.1, 1.3 (SAB Draft Rules for the Issue of Prospectus in case of Issues of Participation Rights) [hereinafter Appendix I]; Listing Particulars Directive, *supra* note 137, sched. A, secs. 3.1-3.2.9.

¹⁶³ There exists a specific set of rules in the form of appendices to the Admission Rules for each category of instruments, i.e. shares and other participation rights (Appendix I), debt securities (Appendix II) and derivatives (Appendix III). References herein are primarily made to Appendix I Rules. The SAB rules follow insofar the classification established in the Schedules A (shares) and B (debt securities) under the EC Listing Particulars Directive,

for official listing is made.¹⁶⁴ The information on the issuer must also comprise disclosure of major holdings (i.e. holdings greater than five percent)¹⁶⁵ of individuals or legal persons, a requirement which is likely to follow the patterns of the rules outlined above.¹⁶⁶ The Listing Particulars Directive also requires disclosure of material information on the (i) administration, management, and supervision of the issuer (such as the remuneration paid and benefits in kind granted) during the last completed financial year, (ii) each category or body of the management or administration and the shares held by and the options granted to such persons, and (iii) the nature and extent of their interests in transactions effected by the issuer during the preceding financial year.¹⁶⁷ The extent to which the SAB will require the issuers to produce such information, which traditionally has been kept tightly as a confidential business secret by Swiss companies, remains to be seen. The draft rules would limit such disclosure to the total holding of respective members of each category of a corporate body in the shares of the issuer in addition to their transactions with and loans outstanding to the issuer.¹⁶⁸

The listing particulars must further contain a summary of the issuer's principal activities and the main products sold and/or services performed. This summary includes a breakdown of the net turnover during the past three financial years by category of activity and geographical market, information about the location and size of its principal establishments,¹⁶⁹ summary information on the question of whether the issuer is dependent on any patents or licenses, industrial and commercial contracts or new manufacturing processes (where

which however, in contrast to the SAB rules, does not contain a particular schedule for derivatives.

¹⁶⁴ See Listing Particulars Directive, *supra* note 137, at sched. A, ch. 2 (shares) & sched. B, ch. 2.

¹⁶⁵ See Appendix I, *supra* note 162, at Rule 1.2.j(2); cf. CO arts. 663c, 685d(1). The level is thus much lower than the maximum level under the Listing Particulars Directive. See *infra* note 166.

¹⁶⁶ The Listing Particulars Directive defines a person with controlling stakes as any natural or legal persons who, directly or indirectly, severally and jointly, exercise or could exercise control over the issuer. In this definition, joint control means control exercised by more than one company or by more than one person having concluded an agreement which may lead to their adopting a common policy with respect to the issuer. See Listing Particulars Directive, *supra* note 137, at sched. A, Rules 3.2.6(1) & (2). The level of control of voting rights may be fixed as a maximum at 20% by the EC member states. See *id.* at Rule 3.2.7. Finally, the Listing Particulars require a brief description of the group and the issuer's position within it, if it is part of a group of undertakings. The issuer must also detail the number, book value and nominal value of its own shares which it holds or which is held by another company which it controls directly or indirectly, i.e. in which it has a direct or indirect holding of 50%, if such securities do not appear as a separate item on the balance sheet. See *id.* at Rule 3.2.9. This requirement is similar to Art. 659b of the CO. CO art. 659b.

¹⁶⁷ See Listing Particulars Directive, *supra* note 137, at sched. A, Rules 6.2.0 - 6.2.3.

¹⁶⁸ See Appendix I, *supra* note 162, at Rule 1.8.4(a)-(c).

¹⁶⁹ A principal establishment is any establishment which accounts for more than 10% of the turnover of production. See Appendix I, *supra* note 162, at Rule 1.4.1(c); cf. Listing Particulars Directive, *supra* note 137, at sched. A, Rule 4.1.2.

such factors are of fundamental importance to the issuer's business or profitability), material information on research and development of new products in the last three financial years, and a description, with figures, of the investment policy and interests to be acquired in other undertakings where a firm commitment has already been made.¹⁷⁰ Finally, detailed information must be provided on the issuer's assets and liabilities, its financial position, profits and losses, and its recent developments and prospects.¹⁷¹

Under both the Listing Particulars Directive and the SOAS draft rules, specific financial data must be disclosed with respect to undertakings in which the issuer holds, directly or indirectly, a participating interest of ten percent.¹⁷² The question is whether such information must also be disclosed up-stream, in particular where the holding in an undertaking is not listed itself. Such information might have been vital and saved many investors from painful experiences (such as the cases of OMNI Holding or Maxwell).¹⁷³ However, it is most likely that no such obligation will be issued as it might also apply to individuals. Similar to the Listing Particulars Directive, the persons responsible for the listing particulars and the auditing of the accounts must be indicated in the listing particulars, and they must sign and declare that, to the

¹⁷⁰ See Appendix I, *supra* note 162, at Rule 1.4.1 (requiring general information on type of business, net turnover of the last two business years, major production sites and ownership of real estate, indication of shelf areas and production sites if investing in natural resources, indication of major obligations regarding patents, licenses, know-how or industrial or financial contracts which might affect the independence of the company); *id.* at Rule 1.4.2 (pertaining to development of the business, new products and number of personnel employed within the last three business years); *id.* at Rule 1.5 (investment policy in the last three business years); *cf.* Listing Particulars, *supra* note 137, at sched. A, ch. 4.

¹⁷¹ See Appendix I, *supra* note 162, at Rule 1.6; *cf.* Listing Particulars Directive, *supra* note 137, at sched. A, chs. 5, 7.

¹⁷² Under the Listing Particulars Directive, the interest is determined if its book value represents at least 10% of the capital and reserves or accounts for at least the same percentage of the net profits or loss of the issuer, or in case of a group, if the book value of that interest represents at least 10% of the consolidated net assets or accounts for at least 10% of the consolidated net profit or loss of that group. See Listing Particulars Directive, *supra* note 137, at sched. A, Rule 5.2. The SAB rules are less complex and apply only in the case of unconsolidated participations the net asset value of which amounts at a minimum to 10% of the net assets or which represent 10% of the net profits or loss of the group. See Appendix I, *supra* note 162, at Rule 1.6(c). In addition, interests of at least 10% in the capital of other undertakings must be disclosed if such information is material for the admission for listing. See *id.*

¹⁷³ See Revision Kotierungsreglement-Preliminary Report (ed. SAB, April 1994) 10-11. OMNI Holding was a Swiss holding company built up by the Swiss investor Werner K. Rey. While the shares of some subsidiaries were listed, the shares of the holding were not. The conglomerate was a complex structure, which provided no transparency for investors, was heavily financed by debt, and finally faltered and went into bankruptcy in 1991. Criminal proceedings were initiated against Mr. Rey, who fled to the Bahamas in 1991, as a number of the transactions effected by and on behalf of the group appeared to be of doubtful legality. A large number of investors suffered losses in the hundreds of millions of Swiss francs. The Maxwell empire was a similarly complex and secretly built up conglomerate with the ultimate owner, Mr Maxwell, not being subject to such reporting requirements. Mr Maxwell died on his yacht, apparently through suicide, and left behind him a heap of debt, jobless employees and penniless investors.

best of their knowledge, the information for which they are responsible is in accordance with the facts and contains no material omissions.¹⁷⁴

V. Investment Fund Law

A. *In General*

The Swiss investment fund industry has been hampered by an outdated and rigid investment fund act and Swiss stamp tax legislation,¹⁷⁵ which was the reason why Swiss banks began to move to incorporate their funds in Luxembourg, as it does not levy stamp taxes on the issue of units or on the turnover of securities. Stamp taxes on the issue of units have now been abolished, but fund managers still qualify as traders for purposes of transfer taxes. Moreover, distribution to unit holders are subject to a thirty-five percent withholding tax, but withholdings may be substantially reduced under double tax treaties, if applicable.¹⁷⁶

The new Investment Fund Act (IFA) is designed to remedy the regulatory situation.¹⁷⁷ Its purpose is the protection of investors.¹⁷⁸ This goal is no longer to be achieved through rigid and narrow investment restrictions as under the old act, but rather, through increased market transparency to permit investors to make an informed decision on their investments. Transparency shall be established mainly through the imposition of reporting and publication requirements and the obligation to issue a prospectus.¹⁷⁹ Risk warnings in the prospectus and other marketing documents shall work as red lights for investors.¹⁸⁰ Investor protection shall also be guaranteed by requiring adequate fund organization and professional qualification of fund managers,¹⁸¹ rules on conflict of interest, and the requirement of inde-

¹⁷⁴ Such declaration does not by itself create a liability, since such liability is already instituted by Art. 1156(3) of the CO. See CO art. 1156(3). Nevertheless, the declaration may engender a shift of the burden of proof, where a breach of the obligation of due care and diligence as well as the causation between such violation and the loss have been established.

¹⁷⁵ Luxembourg funds managed by Swiss banks amount to more than Sfr. 160 bn, but the assets held by Swiss funds amount only to approx. 60 bn. See IFA Explanatory Report, *supra* note 5, at 265-67; Spinnler, *Das neue schweizerische Anlagefondsgesetz und das europäische Investmentgeschäft*, 1994 *Pratique Juridique Actuelle* (PJA) 284.

¹⁷⁶ Switzerland has entered into treaties with a large number of countries, including the United States to avoid or reduce double taxation. For an extensive overview of the treaties in force, see Administration Fédérale des Contributions, *Droit Fiscal International de la Suisse*, Part I (1993).

¹⁷⁷ For example, the very narrow and technical definition of investments in the old Act (Art. 6) did not permit issuance of money market instruments. See Spinnler, *supra* note 175, at 285.

¹⁷⁸ See IFA, *supra* note 5, at art. 1; IFA Explanatory Report, *supra* note 5, at 232.

¹⁷⁹ See IFA, *supra* note 5, at arts. 47 - 51.

¹⁸⁰ See IFA, *supra* note 5, at art. 35(6); Ordinance I, *supra* note 23, at art. 45 (pertaining to the category of "other funds").

¹⁸¹ See IFA, *supra* note 5, at arts. 9(4)-(5), 10; Ordinance I, *supra* note 23, at arts. 12-13.

pendence between fund managers¹⁸² and custodian banks.¹⁸³ Fund managers, custodian banks, professional distributors, and auditors will all need special licenses from the FBC,¹⁸⁴ which will continue to act as supervisory authority as under present law.¹⁸⁵ Any of these functionaries, the same as any distributor, representative of a foreign fund, auditor, or valuation expert, is subject to civil liability for any damage which he caused to an investor by violation of one of his duties, unless he can make a showing of absence of negligence or fault.¹⁸⁶

The IFA defines an investment fund (fund) as an undertaking that has the sole purpose of collectively investing capital raised through public solicitation and managed by the fund management for the account of the investors ordinarily on the principle of risk-spreading.¹⁸⁷ Public solicitation is any marketing which is not limited to a narrowly defined circle of persons. The legislature did not fix a specific number of persons for this purpose as is the case in other jurisdictions.¹⁸⁸ Thus, even marketing to an existing clientele may, in certain circumstances, be deemed to be public solicitation in terms of the Act.¹⁸⁹ In contrast to the EC UCITS Directive,¹⁹⁰ the IFA only applies

¹⁸² See IFA, *supra* note 5, at art. 9(6) (independence); *id.* at arts. 10(2), 12; Ordinance I, *supra* note 23, at art. 14 (duty of loyalty & avoidance of conflicts of interest: no commissions or retro-cession of commissions other than those provided by investment regulations; transactions on own behalf with fund, directly or through affiliates, exclusively on basis of market prices); *id.* at art. 13 (disclosure of interests or major holdings in fund manager).

¹⁸³ See IFA, *supra* note 5, at art. 20(1) (duty of loyalty towards investors); *id.* at art. 20(2) (due diligence and avoidance of conflict of interests: no commissions or retro-cession of commissions other than those provided by investment regulations; transactions on own behalf with fund, directly or through affiliates, exclusively on basis of market prices).

¹⁸⁴ See generally IFA, *supra* note 5, at art. 10(1) (fund manager); *id.* at art. 18 (custodian); *id.* at art. 22 (distributor); *id.* at art. 52 (auditors).

¹⁸⁵ See *id.* at art. 56.

¹⁸⁶ These persons are also fully liable for their agents, representatives or contractors, to whom they have entrusted the performance of their duties wholly or in part. Any limitation of such liability towards the investors is invalid. See IFA, *supra* note 5, at art. 65.

¹⁸⁷ See IFA, *supra* note 5, at art. 2(1). The element of risk-spreading had given rise to some confusion and over-extensive application of the existing act. See, e.g., ATF 98 Ib 42, ATF 110 II 74 (decisions of the Swiss Federal Tribunal pertaining to the element of risk-spreading). The requirement is, therefore, no longer a necessary element of the technical fund definition. See IFA Explanatory Report, *supra* note 5, at 232-33.

¹⁸⁸ See also, e.g., FSA, *supra* note 30, sec. 76(1)-(3) (prohibiting promotion of collective investment scheme, unless it is an authorized trust or recognized scheme, see Financial Services (Authorized Unit Trust Scheme) Regulations 1988); see also The Financial Services 1986 (Investment Advertisements) (Exemptions) Order 1988 (SI 1988/316) and subsequent orders 1990 (SI 1990/27), 1992 (SI 1992/274 & 813) (issued by the SIB pursuant to its powers under sec. 76 of the FSA).

¹⁸⁹ See IFA, *supra* note 5, at art. 2(2). This will depend on the nature and quality as well as the number of clients. If a large bank sent out marketing materials to thousands of its clients, such marketing would, of course, be considered a public solicitation. There also exists a rule of thumb as to which marketing to fewer than twenty persons will not be deemed a public solicitation. See IFA Explanatory Report, *supra* note 5, at 233. However, the IFA itself does not impose such limitation. Depending on the particular circumstances of a case, a much greater number of persons might be contacted without such activity being considered a public solicitation.

¹⁹⁰ See Art. 1(2) Council Directive 85/611 of December 20, 1985 on the Co-ordination of

to funds constituted in contractual form (i.e. on the basis of collective investment contract).¹⁹¹ Thus, funds cannot be constituted as trusts, companies, or limited partnerships. The incorporation of mere investment companies is, however, still permitted and such companies are not regulated under the IFA,¹⁹² but such undertakings must not be labeled as or be advertised or marketed under terms like "investment fund" or similar denominations which might give rise to confusion with funds.¹⁹³

The Government may, in addition, extend the IFA or some of its provisions to fund-like undertakings, or it may exempt certain undertakings from the Act wholly or in part where the purpose of investor protection does not require regulation.¹⁹⁴ In particular, it may apply certain provisions of the Act to internal collective portfolios of banks that, as such, are exempted from the Act.¹⁹⁵ The Ordinance I also extends the Act to so-called master-feeder constructions.¹⁹⁶ Given the fund's contractual form, its assets are owned by the fund manager in a fiduciary capacity on behalf of the investors. The assets must, therefore, be kept separate. By operation of law, they remain outside the fund manager's estate in case of his bankruptcy.¹⁹⁷

Any collective investment contract must provide for redemption

Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investments in Transferable Securities (UCITS), art. 1(2), 1985 O.J. (L 375/3) 1, amended by Council Directive 88/220 of March 22, 1988, 1988 O.J. (L 100/31). A Council proposal for a further amendment, which will extend the range of permitted investments, is expected to come into force this year. See Council Proposal for a Council Directive Amending Directive 375/3 on the Co-ordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investments in Transferable Securities, art. 1(2), 1993 O.J. (C 59) 14. [hereinafter UCITS Directive].

¹⁹¹ See IFA, *supra* note 5, at arts. 3(1), 6.

¹⁹² For example, simple shareholding companies (SA, AG) the purpose of which is investment in securities, are not regulated by the IFA. Under Swiss law, the shareholder has no right to have his share redeemed, i.e. the SA or AG is closed-ended, and thus not subject to the IFA. For a comparison see, e.g., Den Otter, *Anlegerschutz auf Kosten der Aktionärsrechte?*, in *Neue Zuercher Zeitung*, No. 25, Jan. 31, 1995, at B.10 (special issue on investment funds).

¹⁹³ The Federal Tribunal had upheld the FBC's extensive application of the old Act. See ATF 107 Ib 358. The limitation to contractual undertakings was, therefore, expressly spelled out in the new IFA. For a discussion of the prohibition to use the fund label, see IFA, *supra* note 5, at art 5; IFA Explanatory Report, *supra* note 5, at 207, 234.

¹⁹⁴ See IFA, *supra* note 5, at art. 3(4).

¹⁹⁵ See IFA, *supra* note 5, at art. 4; Ordinance I, *supra* note 23, at art. 3 (setting out specific requirements for internal collective portfolios).

¹⁹⁶ See Ordinance I, *supra* note 23, at art. 2(1). Master-feeder constructions, or in the name of its inventors and trademark owners, "hub-and-spoke" funds, work as follows: A number of banks or open-ended management companies (the "Feeders" or the "Spokes") collect monies from individual investors for the purpose of investment. The "spoke" then fully invests those monies in another open-ended management company (the "Master" or "Hub"). Shares of the "spoke" are sold to the public, but the shares of the "hub" are offered only to the one or several spokes. The investment activity takes place at the hub-level only. In the United States, this structure was used because it permitted use of different classes of shares for investing indirectly in a single portfolio of securities, a feature which was prohibited under the U.S. Investment Company Act. See Carr, *Adapting to a Thriving Market*, INT'L FIN. L. REV. 3 (Special Supp. 1992).

¹⁹⁷ See IFA, *supra* note 5, at art. 16.

of the units upon request by the investor. Hence, the IFA does not provide for closed-ended schemes.¹⁹⁸ The Government may grant exemptions from the closed-end requirement for certain categories of funds which consist of investments that may be illiquid or difficult to appraise. According to the Ordinance I, redemption may be restricted for such fund categories to four dealing days per year and, in particular cases, be restricted in time.¹⁹⁹ Redemption may be suspended in either exceptional cases, such as disruption or suspension of dealing in the securities in which the fund invests, or cases of extraordinary political, military, or economic occurrences in the countries where the fund invests necessitating such suspension.²⁰⁰

A fund must have a fund management (manager), a custodian bank, and auditors, which all must be licensed by the FBC. The manager must be a shareholding company incorporated in Switzerland, whose purpose must be exclusively the management of funds.²⁰¹ The IFA and the Ordinance I provide various requirements as to minimum initial capital and capital adequacy,²⁰² and disclosure and reporting.²⁰³ The manager must establish regulations regarding the management of the fund's assets. These regulations, which represent the actual charter of the fund, also set out the rights and obligations of investors, the custodian, and the manager.²⁰⁴ Specific qualifications are required for managers of high risk funds.²⁰⁵ The manager must issue a prospectus for each of its funds, keep separate books and accounts, and issue and

¹⁹⁸ See IFA, *supra* note 5, at art. 24(1); *cf.* UCITS Directive, *supra* note 190, at art. 37(1). A scheme is generally said to be closed-ended if the investor has no right to have his shares redeemed by the scheme or its affiliates upon his request. See Herbert, *Jersey*, INT'L FIN. L. REV. 47 (Special Supp. 1992) (report on Jersey investment fund laws).

¹⁹⁹ See IFA, *supra* note 5, at art. 24(2)-(3); Ordinance I, *supra* note 23, at art. 25.

²⁰⁰ See Ordinance I, *supra* note 23, at art. 26; *cf.* UCITS Directive, *supra* note 190, at art. 37(2)(a)-(b).

²⁰¹ See IFA, *supra* note 5, at art. 9(1); *cf.* UCITS Directive, *supra* note 190, at art. 6.

²⁰² See IFA, *supra* note 5, at arts. 9, 10, 13. According to the Ordinance, minimum capital is Sfr. 1 million. See Ordinance I, *supra* note 23, at art. 11. The manager's own funds must be equivalent to (i) 1% of the Fund's managed net asset value (NAV) not exceeding Sfr. 100 million, (ii) 0.75% of the NAV exceeding 100, but less than 500 million, and (iii) 0.50% of the NAV exceeding Sfr. 500 million. In no case do the manager's own assets have to be higher than Sfr. 10 million. *Id.* at arts. 15, 16; *cf.* FBO, *supra* note 16, at arts. 11, 12; UCITS Directive, *supra* note 190, at art. 5.

²⁰³ See IFA, *supra* note 5, at art. 10. According to Ordinance I, the board of directors must consist of at least three members. See Ordinance I, *supra* note 23, at art. 12. The names and addresses of the members of the board and the management must be reported to the FBC. Similarly, the manager must disclose to the FBC the particulars of any individual or legal person who controls, directly or indirectly, 10% of either the capital or voting rights of the manager or who otherwise has a material influence on its business. The disclosure obligations extend to persons who are economically affiliated and together control such percentage of the capital or voting rights. *Id.* at art. 13; *cf.* UCITS Directive, *supra* note 190, at art. 4(3).

²⁰⁴ See IFA, *supra* note 5, at arts. 7-8. For a Fund of funds, only one set of regulations will have to be drawn. See Ordinance I, *supra* note 23, at art. 8.

²⁰⁵ These qualifications of managers apply to the category of "other funds." See *infra* note 222 and accompanying text.

publish the annual reports, accounts, and the unit prices on a regular basis.²⁰⁶ It should be noted that only the fund regulations need FBC approval, not the prospectus, which must nevertheless be submitted to the supervisory authority.²⁰⁷

The custodian must be a bank in terms of the FBA. Its responsibilities include safe-keeping the assets (which it may hold within or outside Switzerland), controlling and making payments on behalf of the fund, issuing and redeeming units, and generally controlling the manager's investment decisions, its calculation of the net asset value, and its application of the fund's benefits.²⁰⁸ The managing directors of the manager and the custodian must each be independent from the other company.²⁰⁹ The Auditors must be specially qualified and approved by the FBC.²¹⁰ Professional Distributors of units will also need authorization from the FBC. Unlike under the old IFA, Distributors need no longer be banks in terms of the FBA.²¹¹ Pursuant to its special powers under Articles 43(2) and 53(4) of the IFA and Article 62(1) of the Ordinance I, the FBC has issued its own Ordinance (FBC Ordinance) which deals in detail with internal accounting standards and auditing and reporting by the auditors. It also contains detailed regulations on the use of derivatives and securities lending by UCITS and securities lending by other funds.²¹²

The IFA introduces three fund categories: (1) undertakings for

²⁰⁶ See IFA, *supra* note 5, at arts. 47-51; Ordinance I, *supra* note 23, at arts. 62-83. For a discussion of detailed internal accounting and auditing requirements and standards, see FBO, *supra* note 16, at arts. 26-49.

²⁰⁷ See IFA, *supra* note 5, at arts. 7(1), 50(3); cf. UCITS Directive, *supra* note 190, at art. 32. The prospectus must meet the standards of EC regulations. See IFA, *supra* note 5, at art. 50(2); cf. UCITS Directive, *supra* note 190, at arts. 27-33. The FBC retains the power to intervene and to require modifications of the prospectus on the basis of its general supervisory powers if the prospectus does not conform with IFA requirements. See IFA Explanatory Report, *supra* note 5, at 251. In addition, the manager will be subject to civil liability if the prospectus contains material false information or material omissions. See IFA, *supra* note 5, at art. 65.

²⁰⁸ See IFA, *supra* note 5, at arts. 17-20; cf. UCITS Directive, *supra* note 190, at arts. 7, 14. Where assets of the fund are placed with a third party in Switzerland or abroad, the name of such party must appear in the prospectus. See IFA Explanatory Report, *supra* note 5, at 239-40.

²⁰⁹ See IFA, *supra* note 5, at art. 9(6); cf. UCITS Directive, *supra* note 190, at art. 10 (stating the requirement of independence more clearly).

²¹⁰ See IFA, *supra* note 5, at art. 52. The auditors are bound by professional secrecy and may not inform the investors or even third parties about their activity and internal matters of the Fund or its manager. See IFA, *supra* note 5, at art. 54.

²¹¹ See IFA, *supra* note 5, at art. 22. The applicant may be an individual or a legal person. He must have several years of investment experience, be of good standing and provide for sufficient professional insurance coverage. There must exist a marketing or distributor agreement, set out in writing, among the manager, the custodian and the distributor. See Ordinance I, *supra* note 23, at art. 22(1)(f). The FBC may condition licensing of the applicant complying with the guidelines issued by the self-regulatory bodies of the industry. *Id.* at art. 22(3). Banks, as defined by the FBA, and insurance companies, as defined by the Federal Act on Supervision of Insurance Companies of June 23, 1978, RS 961.01, need no such license. *Id.* at art. 23.

²¹² See FBC Ordinance, *supra* note 24, at arts. 1-11 (derivatives, in particular options and

collective investments in transferable securities listed on an exchange or traded on another regular market place; (ii) real estate funds; and (iii) other funds. The first category comprises UCITS in terms of the EC Directive. The Swiss authorities borrowed from EC legislation with respect to the type of permitted investments, investment restrictions, and risk-spreading so as to facilitate the marketing of such funds in EC countries on a reciprocal basis.²¹³ The permitted type of investments and the investment restrictions of this category of Funds are therefore equivalent to those applicable to UCITS.²¹⁴

Real estate funds must directly invest in real estate. A real estate fund may only invest in real estate companies if it controls at least two-thirds of its capital or its voting rights.²¹⁵ The investors' community has frequently criticized the management of real estate funds, in particular with respect to the valuation and watering-down of the value of the units of existing unit holders upon new issues.²¹⁶ The IFA attempts to remedy at least some of these shortcomings through more detailed regulations on valuation, specifically by requiring funds to nominate an independent valuation board,²¹⁷ granting preference rights to existing unit holders upon the issue of new units,²¹⁸ and requiring the fund to hold sufficient liquidity for purposes of redemption.²¹⁹ In contrast, the unit holders' redemption rights will be restricted, given the fact that the fund's assets are placed in long-term investments which are financed short-term. Thus, redemption will only be possible at the end of the fund's financial year, upon twelve

futures); *id.* at arts. 12-24 (securities lending). The rules relating to securities lending issued for UCITS apply by analogy to "other funds." *See id.* at art. 25.

²¹³ *See* IFA, *supra* note 5, at arts. 32, 43(3) IFA; IFA Explanatory Report, *supra* note 5, at 220-22.

²¹⁴ *See* UCITS Directive, *supra* note 190, at arts. 19, 22, 23, 25 (the Swiss legislature has anticipated that the Council proposals of February 10, 1993 will become effective).

²¹⁵ *See* IFA, *supra* note 5, at art. 36(1)(b).

²¹⁶ The FBC had to intervene in a number of cases in the 1980s where the valuation of assets had been below market values. *See* Neue Zuercher Zeitung, No. 25, Jan. 31, 1995, at B.10 (special issue on investment funds). If new units had been issued on the basis of such unfair valuation, the value of the units of existing investors would be watered down. *See* Den Otter, *Das Bundesgesetz ueber den Anlagefonds*, in Schweiz, Juristische Kartothek (SJK), No. 1309, at 10.

²¹⁷ *See* IFA, *supra* note 5, at art. 39; Ordinance I, *supra* note 23, at art. 50.

²¹⁸ *See* IFA, *supra* note 5, at art. 41(1).

²¹⁹ *See* IFA, *supra* note 5, at art. 36(4); Ordinance I, *supra* note 23, at art. 48. Investment is restricted to real estate situated in Switzerland, housing and office buildings, as well as debt instruments directly secured by Swiss real estate for up to 10% of the net asset value. *See* IFA, *supra* note 5, at art. 36(1); Ordinance I, *supra* note 23, at art. 46(1)(a)-(e). Investment in real estate abroad, housing or office buildings, is permitted if valuation equivalent to Swiss standards is guaranteed. *See* Ordinance I, *supra* note 23, at art. 46(3). There are various restrictions relating to the type of property in which the Fund may invest as well as limits to insure risk spreading. For example, the Fund must invest in at least ten different parcels of land, and investment in one parcel may not exceed more than 25% of its net assets. *See generally* Ordinance I, *supra* note 23, at arts. 46(5), 47-48 Ordinance I. For a discussion of the issue of valuation, see also 25 FBC Bulletin 34 (1994) (FBC decision).

months notice by the investor.²²⁰ This provision has already been heavily criticized because such investments may prove to be illiquid where the units are not listed and/or where no real market exists for them.²²¹

The category of "other funds" includes all other types of funds, in particular those which present increased business risks for investors. The objective of such funds may be the investment in less liquid securities and/or assets, the value of which may be difficult to appraise. The units of such funds are usually subject to greater volatility than those of UCITS. Hence, the category includes funds whose principle objective is investment in precious metals, commodities, futures and options, other derivatives, unquoted securities, and hedge funds.²²² The management of such funds must be particularly qualified.²²³ The prospectus, which as such is not subject to FBC approval, must contain specific risk warnings which must be approved by the FBC and figure in any marketing material.²²⁴ According to Ordinance I, these funds may invest in (i) any securities, money market instruments, bank deposits, or units of other funds without being subject to the restrictions applicable to UCITS;²²⁵ (ii) futures and options traded on an exchange or other regular market open to the public and any other type of standardized derivatives;²²⁶ (iii) foreign exchange deals and forex swaps;²²⁷ (iv) any standardized futures and options contracts on commodities, if they are traded on an exchange or other regular market open to the public;²²⁸ and (v) precious metals or any derivatives on such assets traded on an

²²⁰ See IFA, *supra* note 5, at art. 41 IFA; IFA Explanatory Report, *supra* note 5, at 223-24.

²²¹ Investors will now have to wait for one year to get their money back without knowing at what price. Prices of existing real estate funds, therefore, have plummeted by 15% since the IFA became effective. Even where the units are listed, there is rarely a sufficient market in them since custodian banks and brokers are not eager to hold these investments on stock given their illiquidity. Furthermore, the spread between issue and redemption prices has considerably widened. As a consequence, two real estate funds have already been wound-up since the adoption of the IFA. A number of bankers, therefore, have called for an amendment of the new Act. See CASH, No.11, Mar. 17, 1995, at 89.

²²² See IFA, *supra* note 5, at art. 35(1)-(2). According to the Explanatory Report, certain types of investments would not be permitted where valuation would be too complex, or rather, in the author's view, where too much depends on individual appreciation, such as investments in antiques, art, stamps or other objects of collection. See IFA Explanatory Report, *supra* note 5, at 245.

²²³ At least two directors must have a minimum professional experience of five years in the management of investment as contemplated under the Fund. Delegation of Fund management is permitted if the persons to whom such power is delegated have at least the same minimum experience. The FBC may then waive these requirements with respect to the Fund directors. See Ordinance I, *supra* note 23, at art. 44.

²²⁴ See *id.* at art. 45.

²²⁵ See *id.* at art. 43(1)(a).

²²⁶ The underlying investments may be securities, commodities or precious metals; they may also be based on indices or reference indices (interest indices, currencies). See *id.* at art. 43(1)(c).

²²⁷ See *id.* at art. 43(1)(d).

²²⁸ See *id.* at art. 43(1)(c).

exchange or another regular market open to the public.²²⁹ With respect to investment restrictions, the following principle applies: These funds may hold as much liquidity as their objectives require.²³⁰ The borrowing limit is ordinarily twenty-five percent of the net asset value. The FBC may waive that threshold where the fund seeks to leverage its assets.²³¹ If a fund wishes to effect short sales, detailed provisions must be contained in the investment regulations. The FBO may impose limitations where it deems necessary.²³² As is true for any other fund category, the fund may never issue units as consideration for the purchase of assets.²³³ Detailed regulations also exist with respect to securities lending which have been issued for UCITS, but which apply by analogy to other funds.²³⁴ All securities lending must be undertaken through the Custodian bank who may act as principal or agent. Counterparties must be first-class addresses.²³⁵ Depending on the lending period and the type of assets, it is limited to fifty percent, but may go up to 100% of any specific asset type depending on the duration of the lending period (usually short term) and the applicable notice period for termination of the lending contract.²³⁶

Given the very broad rule-making and supervisory powers of the FBC in this area, the IFA's success in strengthening the Swiss fund industry will depend to a large extent on the manner in which it will be applied and implemented by the FBC, which has pursued rather conservative policies in the past.

B. Marketing of Foreign Investment Fund Units

The IFA also applies to all foreign investment schemes whose units are publicly marketed in Switzerland, irrespective of their legal form.²³⁷ No public solicitation is permitted without FBC authorization,²³⁸ which will be granted if the foreign scheme (i) is a foreign investment fund (Foreign fund) in terms of the IFA, (ii) is subject to adequate supervision in its home country,²³⁹ and (iii) has an organiza-

²²⁹ See *id.* at art. 43(1)(b).

²³⁰ See *id.* at art. 25(1).

²³¹ See *id.* at art. 25(2).

²³² See *id.* at art. 42(4).

²³³ See IFA, *supra* note 5, at art. 31.

²³⁴ See FBO, *supra* note 16, at art. 25.

²³⁵ See *id.* at arts. 13-14.

²³⁶ See *id.* at arts. 16-18.

²³⁷ See IFA, *supra* note 5, at arts. 2(1), 3(3), 45. According to FBC statistics, there were 566 foreign Funds publicly promoted in Switzerland of which 54 were domiciled in a jurisdiction with no comparable supervision. See 1993 FBC Ann. Rep. 90.

²³⁸ See IFA, *supra* note 5, at art. 45(1); IFA Explanatory Report, *supra* note 5, at 225-26.

²³⁹ Funds incorporated, *inter alia*, on the British Virgin Islands, the Cayman Islands (despite the new Cayman Island Mutual Fund Law, effective July 26, 1993) cannot be publicly marketed anymore, but, in the author's view, if correctly structured and adequate safeguards against public marketing are truly undertaken, they may still be sold to a predefined and limited number of investors in Switzerland. Foreign fund managers may wish to seek a decision on this issue from the Federal Banking Commission.

tion and investment policy equivalent to the IFA's provisions relating to investor protection.²⁴⁰ "Foreign funds" are defined as (i) collective investment undertakings constituted in contractual form²⁴¹ or (ii) investment companies the units of which are redeemed either by the scheme or an affiliate upon the investor's request.²⁴² Consequently, closed-ended schemes do not qualify as foreign funds. Hence, such schemes are not regulated under the IFA, but the Act also includes a provision prohibiting marketing of such (domestic or foreign) schemes as "investment funds," "fonds de placement," "Anlagefonds," "Investment Trust" or any similar labels which might give rise to confusion with funds or foreign funds in terms of and licensed under the IFA.²⁴³ However, if such an undertaking is (i) deemed to be an investment fund according to the laws of the state of its incorporation or origin, (ii) is subject to adequate supervision in that jurisdiction, and (iii) the scheme and its units or shares are not marketed as fund or any other name or label which again might give rise to confusion with funds or foreign funds in terms of and licensed under the IFA, its units or shares may also be publicly marketed and the scheme as such is subject to the Act's provisions relating to public marketing.²⁴⁴ In contrast, units of any undertaking may not be publicly marketed in Switzerland if the undertaking is not subject to adequate home country supervision.²⁴⁵ To facilitate cross-country marketing of Swiss and foreign funds similar to the UCITS Directive, the Government may enter into reciprocal agreements with other countries.²⁴⁶ Foreign funds domiciled in such jurisdictions need no marketing authorization and must merely inform the FBC of their intention to market and distribute units in Switzerland.²⁴⁷ Finally, foreign schemes which are not subject to home country supervision, but which have been licensed prior to December 31, 1991, are automatically grandfathered.²⁴⁸

²⁴⁰ See IFA, *supra* note 5, at arts. 44(1), 45(2). For a discussion of the documents which must be submitted with the application, see Ordinance I, *supra* note 23, at art. 55 (borrowing from UCITS Directive, *supra* note 190, at art. 46). See also Ordinance I, *supra* note 23, at art. 61; UCITS Directive, *supra* note 190, at art. 47 (relating to reporting requirements and continuing obligations).

²⁴¹ These are collective undertakings in terms of Art. 6 of the IFA. See IFA, *supra* note 5, at art. 6.

²⁴² See IFA, *supra* note 5, at art. 44(1)(b).

²⁴³ See IFA, *supra* note 5, at art. 5.

²⁴⁴ This follows from the general regime applicable to Swiss Funds. See also IFA Explanatory Report, *supra* note 5, at 225, 248. The FBC may require that explanatory particulars be added to the name of the foreign scheme where it might give rise to confusion or deception. See Ordinance I, *supra* note 23, at art. 59 Ordinance; UCITS Directive, *supra* note 190, at art. 48.

²⁴⁵ See IFA Explanatory Report, *supra* note 5, at 225, 249.

²⁴⁶ See IFA, *supra* note 5, at art. 45(5).

²⁴⁷ See IFA Explanatory Report, *supra* note 5, at 249.

²⁴⁸ See IFA, *supra* note 5, at art. 45(6). Any marketing document must indicate that the Fund is not subject to adequate home country supervision. See Ordinance I, *supra* note 23, at art. 60.

VI. Conclusion

Important regulatory and market developments have occurred or will occur in 1995 on the Swiss capital markets. The new Securities Exchange Act will for the first time provide for federal regulation of stock exchanges and broker-dealers in Switzerland. On the market side, the introduction of the Swiss electronic exchange will substantially change the manner in which the trades are effected. With the introduction of the SEA, for the first time a distinction is made in Switzerland between capital market law applicable to companies as a body of law distinguished and separate from ordinary company law. It also includes regulations on the disclosure of major holdings similar to EC legislation. While the Swiss legislature has developed a tendency to adopt legislation similar to EC law, it has gone further than the EC and has introduced specific provisions on takeovers of listed companies, including an obligation to make a bid to take over all shares outstanding on the market upon exceeding certain thresholds. These new provisions will likely improve the interests of the investors and, by the same token, fairness on and the quality and attractiveness of the Swiss capital markets which have for a long time been less transparent than their English or U.S. peers. The Swiss legislature has also recognized that the investor is best protected if he is enabled to take an informed investment decision. For that purpose, he must be given the possibility to access market information freely. The free flow of information shall now be facilitated through improved disclosure, reporting and publication requirements applicable to broker-dealers and specifically listed companies and offerors in takeover battles.

The same rationales apply with respect to the new Investment Fund Act. The legislature recognized that the investor is best protected by enabling him to make a fully informed investment decision rather than through rigid investment regulations, which also hampered the development of the Swiss investment fund industry. Overall, Switzerland has introduced modern regulatory instruments which should permit investors to follow market developments more easily and provide more fairness for investors on the capital markets. The new laws should also facilitate the Swiss market participants to compete with other important capital markets in Europe and elsewhere.

