ADVESTRA INSIGHTS

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Swiss Bond Guide

This guide is designed to assist Swiss and international companies planning to issue bonds on the Swiss market (or on the EUR-market by Swiss issuers) with the legal and regulatory considerations involved. It is particularly valuable for first-time or infrequent issuers of straight bonds, while also serving as a practical reference for frequent issuers. The guide provides an overview of the rights and obligations of issuers of bonds from a Swiss law perspective and examines the relationship between issuers and bondholders. It does not purport to be complete, but is intended to serve as an overview.

1 WHAT IS A BOND?

Swiss law does not provide a definition of a bond (except in the context of taxation, see below). The Swiss federal supreme court and the literature define bonds (*Anleihen* or *Obligationenanleihen; emprunts*) as loans that are divided into equal tranches with fungible terms (such as interest rate and term) and based on the same legal basis. Legally, the issuer concludes an identical agreement with a large number of investors, each based on the so-called "terms and conditions of a bond" (*Anleihebedingungen*). Bonds structured in such a way are easily transferable and qualify as "securities" under Swiss financial market laws. A characteristic feature of bonds (*Anleihe*) is the split into several individual instruments (*Anleihensobligationen*), which have the same denomination and may be transferred individually and independently of each other.

The qualification of a bond is particularly relevant because Swiss law provides a different set of legal consequences for bonds compared to loans despite the absence of a definition of bonds under Swiss law. Bonds are regulated mainly in three different areas of Swiss law:

(i) The Swiss Code of Obligations (the "**CO**") imposes specific duties on issuers having their registered seat or place of business (*Geschäftsniederlassung*) in Switzerland, which have issued bonds by way of public offering. In particular, it governs bondholder meetings and sets limits on what an issuer may agree with bondholders from a contractual point of view.

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(ii) The Swiss Financial Services Act (the "**FinSA**") regulates the public issuance and the admission to trading of bonds as well as the content of Swiss bond prospectuses.
(iii) Swiss tax law imposes different tax consequences for bonds than for loans. Under Swiss tax law, loans are subject to the so-called "10/20 non-bank rule". In order that interest payments by a Swiss borrower of loans are not subject to Swiss withholding tax, the borrower must not have more than 10 non-bank lenders under one loan and 20 non-bank lenders under all outstanding loans of at least CHF 500,000 of that borrower. It is worth noting that the tax definition of bonds is different from what practitioners would usually qualify as bonds under Swiss securities laws (cf. section 7 for more details).

Separately, Swiss issuers of bonds qualify as public companies from an accounting perspective, irrespective of whether the instruments are listed or not. Hence, such companies are subject to enhanced auditing requirements (cf. section 5.1).

2 BOND ISSUANCE AND PLACEMENT

2.1 Swiss vs. Foreign Issuers

Swiss securities laws generally do not distinguish between Swiss issuers and foreign issuers. Hence, if a foreign issuer conducts an offering in Switzerland, it is – as a matter of principle – subject to the same set of rules.

However, when it comes to the ongoing issuer obligations of the CO, these are only applicable to Swiss issuers. The same applies to Swiss issuers regarding the rules on bondholder meetings (applicable, for example in case of a restructuring); however, this regime has recently been eased by allowing bonds of Swiss issuers being at least partially publicly issued outside of Switzerland to opt for a different, i.e., foreign, law governing such matters (cf. section 4.2).

Often, the main reason for choosing a non-Swiss issuer for Swiss corporations is tax driven: Provided that certain criteria are met, interest payments on bonds by foreign issuers are not subject to Swiss withholding tax, which is key for non-Swiss investors. Hence, many Swiss corporations choose to issue bonds through a foreign subsidiary with a guarantee from the Swiss parent company for placements of bonds with international investors (cf. section 7 regarding taxation).

2.2 Public Offering vs. Private Placement in Switzerland

As a general rule, a public offering triggers the duty to publish a prospectus approved by a regulatory authority (prospectus office) absent any exemptions. Swiss law defines a "public offering" as an offering to the public. An offering to the public is deemed an offering to an unlimited number of people. While this definition leaves questions open when applied in practice, it is generally acknowledged among practitioners that the decisive criterion for the differentiation between a public offering and a private placement is rather of qualitative than of quantitative nature (i.e., how investors are approached). In practice, the question is often what exemption is available in order to have a water-proof solution if no prospectus is published at launch. Quite often, however, a prospectus is available at launch. In such cases, the question becomes obsolete. For further details on prospectus requirements, please refer to section 3.1 below.

2.3 Listing and Admission to Trading

Bond issuers often seek to list their bonds to facilitate trading for bondholders. Typically, CHF-denominated bonds are listed on SIX Swiss Exchange, while EUR-denominated bonds have historically been listed on EU venues. However, recently, Swiss issuers have increasingly chosen SIX Swiss Exchange for their EUR bonds due to the streamlined offering and listing regime provided by Swiss law and SIX, respectively, compared to the EU.

The admission to trading on a Swiss trading venue of bonds also requires the publication of a prospectus under Swiss law. In contrast to a public offering, there are no exemptions readily available for the admission to trading of a new instrument as a general rule.

SIX offers a lean and quick way to list bonds: Assuming that an issuer is not a new issuer, issuers may apply through a recognized representative for the provisional admission to trading three trading days prior to the intended first day of trading through an online tool. The formal listing application has to be submitted within two months after the first day of trading. New issuers must file an additional request in advance (cf. section 6.1.1).

3 PROSPECTUS

3.1 Prospectus Requirements

The Swiss prospectus requirements are governed by the FinSA and its implementing ordinance, the Financial Services Ordinance (the "**FinSO**"). Swiss law requires in principle the publication of a prospectus in cases of (i) a public offering in Switzerland or (ii) an admission to trading on a Swiss listing venue, such as SIX Swiss Exchange. The FinSA provides for some exemptions to publish a prospectus, among others, if the public offering is made to less than 500 investors (retail or others), if the public offering is directed to professional investors (professional clients in the sense of art. 4(3) FinSA) only or if the denomination is at least CHF 100,000. There are further exemptions available for certain securities or for the admission to trading, which are less relevant in the present context.

FinSA requires a prospectus to be approved by a Swiss review body (prospectus office; *Prüfstelle*). Both Swiss exchanges, SIX Swiss Exchange and BX Swiss established a review body. While for equity securities, the prospectus must be approved by a Swiss prospectus office prior to its publication, FinSA allows issuers of certain debt instruments, such as straight bonds, to seek approval only *after* the publication of the prospectus (so-called *ex post* approval) provided that a Swiss bank or a Swiss securities dealer confirms that all important information on the issuer and the securities were available at the time of publication. As a result, a Swiss bank is typically involved in a Swiss public offering of bonds in order that the issuer may benefit from a more flexible timing because neither the prospectus approval nor the approval for listing has to be in place at launch.

If a bond is offered by way of a private placement, but afterwards listed on SIX Swiss Exchange, a prospectus is required for the admission to trading. Typically, the prospectus is also prepared for the offering in such cases to mitigate prospectus liability by ensuring that investors purchasing the bonds have all relevant information beforehand and may not claim after the publication of the prospectus that they did not have all relevant information. The listing, however, does not need to be made immediately after the placement; it may also occur at a later stage (depending on the undertaking in the terms and conditions of the bonds), in which case the prospectus will be published in connection with the listing.

3.2 Form of a Prospectus

While most issuers choose to publish a standalone prospectus for an issuance of bonds, issuers have different options available: In case of a programme for bonds, issuers may publish the terms of the new issued bonds by the publication of terms only provided that the base prospectus is up to date. In order to keep the base prospectus up to date, the issuer may (and must) publish supplements to the base prospectus.

As incorporation of reference is permitted, issuers regularly refer to the financial statements to be included in the prospectus by making reference to the path on their website where these financial statements may be found. If not only the financial statements, but the entire annual report is incorporated by reference, attention should be given to the entire content of the annual report as all information in there will be deemed part of the prospectus and is subject to prospectus liability, which is typically not desirable. In the international context, it is standard to incorporate by reference only the financial statements.

3.3 Prospectus Liability

The FinSA provides for a civil liability for all persons, who are materially involved in the drafting of the prospectus and thereby provide false, misleading information or information in violation of statutory requirements, while failing to exercise due care. Such persons are liable to the acquirer of the relevant securities for the loss, which such person incurred. It is important to note that the liability does not only apply to prospectuses, but extends to similar communications, such as investor presentations or other documents relating to the offering.

The civil liability eases the liability for (i) summaries, in which case the liability is limited to information, which is misleading, inaccurate or inconsistent when reading together with the remaining parts of the prospectus, and (ii) prospects, where a person may only be held liable if the relevant misleading or non-compliant information is provided or omitted knowingly (*wider besseres Wissen*) or without reference to the uncertainty to the future developments.

FinSA also establishes a criminal liability: A fine up to CHF 500,000 may be imposed on any person, who intentionally provides false information or omits important information in a prospectus or fails to publish a prospectus at the beginning of the public offering.

3.4 Alignment of Investor Presentation with Prospectus

Often, issuers and the involved syndicate banks do not use the prospectus as their primary marketing tool. Instead, the issuer presents at an investor meeting or provides an investor deck together with the prospectus to investors. The investor presentation summarizes the business of the issuer in a more digestible format. It is worth highlighting that an investor deck is subject to prospectus liability as well. Further, as the prospectus is the only document, which is supposed to serve as a basis for the investment decision, issuers must ensure that the content of the presentation is aligned with the content in the prospectus and that all material information of the investor presentation is reflected in the prospectus.

4 RELATIONSHIP WITH BONDHOLDERS (TERMS AND CONDITIONS)

4.1 Freedom in Design of Terms?

Subject to certain exceptions, Swiss and non-Swiss issuers may freely choose the applicable law and the terms and conditions in principle. Having stated this, there are the following main exemptions worth highlighting:

(i) Swiss issuers offering the bonds in Switzerland by way of a public offering are bound by mandatory provisions as to matters related to bondholder meetings, including the amendment of the terms and conditions. Swiss issuers may deviate from these provisions if the bonds are at least partially publicly issued abroad (cf. also section 4.2).
(ii) SIX Swiss Exchange requires that the terms and conditions of bonds to be listed on its stock exchange are governed by Swiss law or a jurisdiction of a member state of the OECD. Exemptions are possible, however. For example, SIX Swiss Exchange allows New York law as governing law.

In practice, it is not (only) the governing law, which is important, but rather the terms and conditions (Ts&Cs), which are expected to follow market practice. Swiss law dominates the CHF-bonds market. In the EUR-bonds market, English law is the prevalent applicable law, although certain Swiss issuers choose Swiss law in order to align their EUR-bonds with their domestic bonds.

4.2 Terms Governed by Swiss Law

Swiss law does not directly impose specific rules on issuers, which need to be implemented in the terms and conditions. However, it mandates Swiss issuers to adhere to a set of rules in connection with bondholder meetings and certain changes in the terms of the bonds. There are a few particularities on Swiss bondholder provisions worth mentioning here:

Swiss bondholder provisions are governed in the CO and in the Ordinance on the Community of Holders of Bonds (*Verordnung über die Gläubigergemeinschaft bei Anleihensobligationen*). In principle, they apply to all issuers having their registered seat or principal place of business (*Geschäftsniederlassung*) in Switzerland which have offered their bonds by way of a public offering. Exempted are the Swiss Confederation, cantons, municipalities and other corporations or entities of the public sector. Hence, while the governing law of the terms of the bonds may be freely chosen, the Swiss provisions on bondholder meetings still apply in such cases. An exemption is only permitted if the bonds are (at least partially) offered publicly abroad, in which case the law allows the application of that other law, which relates to the public offering.

Swiss bondholder provisions have remained substantially unchanged in the last 70 years. As a result, the procedural rules are cumbersome and can make it challenging for issuers to amend the terms and conditions after issuance, e.g., in case of a restructuring. Certain changes, such as the extension of the redemption or the reduction of annual interest payment require approval from two-thirds of the outstanding bonds (i.e., not only of the bonds represented at a bondholder meeting). As there is no bondholder register, issuers of publicly traded bonds encounter difficulties in assembling or representing bondholders at meetings, in particular as bondholders who would like to be represented require a written proxy – a requirement, which is hard to meet in case of an international investor base. Swiss law offers although the possibility of a consent solicitation, i.e., the possibility to ask bondholders for written and certified consents within two months after the meeting. Since bondholders are frequently not known, implementing bond restructurings may prove to be complex under these conditions in practice.

Rather than holding a bondholder meeting to restructure bonds, issuers often opt to offer new bonds with modified terms in exchange for existing bonds to their bondholders. This method is generally effective as issuers usually include incentives for investors who participate in the exchange of their bonds.

Foreign issuers may choose Swiss law as governing law and include rules on bondholder meetings, which deviate from the rules provided by the CO.

5 STATUS AS ISSUER OF BONDS

5.1 Corporate Law Requirements

Swiss corporate law imposes additional duties on Swiss issuers of bonds:

(i) *Financial statements*: The CO requires issuers of bonds to have their financial statements and their consolidated financial statements (if applicable) audited by way of an ordinary audit (*ordentliche Revision*; art. 727 CO).
(ii) *Auditors*: The audit process must be conducted by a state supervised audit firm (*staatlich beaufsichtigtes Revsionsunternehmen*; art. 727*b* CO).
(iii) *Non-Financial Reporting*: Provided that an issuer and its consolidated subsidiaries have at least 500 full-time equivalent positions on an annual average in two subsequent financial years and exceed either a balance sheet total of CHF 20 million and/or sales revenues of CHF 40 million in two subsequent financial years, the issuer is subject to non-financial reporting (art. 964*a* et seqq. CO).

For a Swiss issuer having shares listed on a Swiss stock exchange, it already complies with the above duties (if applicable). For an issuer, which issues bonds for the first time and whose shares are not already listed, these duties may impose additional work and organization, which should be set up prior to the issuance of the bonds.

5.2 Swiss Law on Bonds Listed on a Swiss Stock Exchange

In case of a listing on a Swiss stock exchange, the Swiss provisions on insider trading and market abuse kick in. While these provisions are less relevant for trading of bonds than for equity securities given that , absent restructuring cases, bond prices tend not to fluctuate in response to corporate news, they are still applicable and should be reflected in the respective issuer policies.

Other rules, such as takeover law and disclosure of major shareholdings do not apply to straight bonds.

For bond issuer duties enacted by SIX Swiss Exchange, please refer to the next section.

6 SIX LISTING RULES

6.1 Main Requirements for Listing: Overview

Bonds regularly get listed on SIX Swiss Exchange. SIX Swiss Exchange has its own admission rules, of which the main conditions are as follows:

Item	***Content***
Track record	3 years.
Financial record	Annual reports for the last two years in accordance with a recognized accounting standard.
Capital requirements	At least CHF 25 million in accordance with the applicable financial reporting standard.
Recognized reporting standard	US GAAP, IFRS or Swiss GAAP FER. For foreign Issuers, EU-IFRS, UK-IFRS, ASBE (from PRC) are recognized. For Swiss banks, SIX recognizes the standard under the Swiss Banking Act and for Swiss public entities, the harmonized accounting model. Foreign issuers may use other accounting standards provided that the issuer's debt securities would be admitted to a regulated market of a member state of the EU or EEA based on the applied accounting standard or the applied accounting standard is permitted on a market recognized by SIX Swiss Exchange and the differences between the applied accounting standard and IFRS or US GAAP are explained in detail in text form.
Auditors	Auditors must be subject to public supervision according to art. 8 of the auditor oversight act; they must confirm the compliance of the accounts with the financial reporting standard applied.
Applicable law	Swiss law or another jurisdiction recognized by SIX Swiss Exchange (e.g., one of a OECD member state) may be applied. Upon request, further foreign legal systems may be

Item	***Content***
	recognized provided that they meet international standards in terms of investor protection and transparency regulation. Investors must be able to sue the issuer in a state court which must be (at least alternatively) in the same jurisdiction as the applicable law of the relevant bonds.
Minimum aggregate value of bonds	Aggregate nominal value of at least CHF 20 mio.
Guarantee (if applicable)	Guarantee according to art. 111 (*Garantie*), surety according to art. 496 CO (*Solidarbürgschaft*) or a keep-well agreement. The guarantee commitment must be governed by Swiss law; foreign law permitted if it is a law recognized by SIX (e.g., one of a OECD member state). Place of jurisdiction must be a state court, while at least one court of the applied law must be competent.
Paying agent services	The issuer must appoint at least one Swiss paying agent, which qualifies as a bank or securities dealer and is subject to the supervision of FINMA.

6.1.1 New Issuers

New issuers must submit an application for pre-verification through their recognized representative. The application must include essentially: (i) a brief description of the issuer specifying the duration of the issuer's existence, its capital resources and its financial reporting (accounting standard and information regarding independent auditors; date of the annual financial statements and planned publishing date of the same), (ii) the articles of association (or an equivalent document under foreign law), and (iii) an excerpt from the competent commercial register regarding the issuer (or an equivalent document from a foreign register). A new issuer qualifies as an issuer that has not had securities issued by it listed on SIX Swiss Exchange for the past three or more years.

6.1.2 Specificities for Guarantors

In order that issuers may benefit from a waiver of certain listing requirements, SIX requires that the guarantee qualifies as a guarantee in the sense of art. 111 CO (*Garantie*) or a joint and several surety pursuant to art. 496 CO (*Solidarbürgschaft*). Certain guarantees under foreign laws are also recognized by SIX. Additionally, keep-well agreements are permitted as well.

SIX rules allow that the guarantor to fulfill certain listing requirements instead of the issuer provided that the issuer is fully consolidated with the guarantor.

In addition, the review body of SIX (Prospectus Office) allows the publication of the financial statements of the guarantor and exempts issuers from the publication of their financial statements if the issuer is fully consolidated with the guarantor based on the requirements of the FinSO.

Shifting the fulfillment of listing requirements from the issuer to the guarantor allows corporations to issue their bonds through a subsidiary (typically a financing vehicle) with the parent company acting as guarantor.

Specific conditions apply to the issuers and guarantors in the case of cross- and upstream guarantees.

6.2 Main Ongoing Listing Obligations

Below is a brief overview of the main ongoing listing obligations for bond issuers:

Obligation	***Content***
Ad hoc reporting obligations*	Duty to inform the market of all price-sensitive facts, which have arisen in the sphere of activity of the issuer.
Publication of annual report*	Publication of the annual report within 4 months after the issuer's closure of financial year. No interim financial statements (half-year financial statements or quarterly updates) are required.
Financial reporting standard recognized by the SIX Swiss Exchange*	US GAAP, IFRS or Swiss GAAP FER. For foreign Issuers, EU-IFRS, UK-IFRS, ASBE (from PRC) are recognized. For Swiss banks, SIX recognizes the standard under the Swiss Banking Act and for Swiss public entities, the harmonized accounting model. Foreign issuers may use other accounting standards provided that the issuer's debt securities would be admitted to a regulated market of a member state of the EU or EEA based on the applied accounting standard or the applied accounting standard is permitted on a market recognized by SIX Swiss Exchange and the differences between the applied accounting standard and IFRS or US GAAP are explained in detail in text form.
Regular reporting obligations (regarding information on the issuer and the bonds)	Examples are the substitution of the issuer, early repayment or increases or invitation to a bondholder meeting.

* Note: These obligations may be fulfilled by the guarantor instead of the issuer if the issuer is fully consolidated with the guarantor.

SIX rules allow guarantors to fulfill a large part of the ongoing listing obligations and exempt issuers from many obligations if the issuer is fully consolidated with the guarantor: The guarantor may undertake to fulfill the obligations of the issuer in respect of ad hoc reporting and the publication of the annual report. This is an important relief particularly for those issuers that are financing vehicles and do not have another business. For guarantors that already have equity securities listed on SIX Swiss Exchange, it means that they do not have any substantive additional duties as the standards for equity securities are higher than for debt securities. Regular reporting obligations on the issuer/guarantor and the bonds need, however, to be fulfilled by the issuer and the guarantor, i.e., they may not be delegated to the guarantor. This is, however, regularly not a problem since the reporting obligations are rather formal in nature.

7 TAX CONSIDERATIONS

In the case of Swiss issuers, 35% Swiss withholding tax on interest payments is due. If the issuer is a non-Swiss subsidiary and the bonds are guaranteed by a Swiss company (typically, the parent company), no Swiss withholding taxes are due if the non-Swiss subsidiary has its legal seat outside of Switzerland and is not managed *de facto* in Switzerland. Further, the proceeds are either not used in Switzerland; if the proceeds are for use in Switzerland, (i) the maximum amount must correspond to the consolidated equity of all non-Swiss subsidiaries of the group or (ii) the maximum amounts may not be greater than the sum of all loans granted by the Swiss entities to the non-Swiss entities within the group. (i) and (ii) may also be combined. As a result, Swiss issuers often use an issuer-guarantor structure if they would like to tap the EUR or other foreign markets or – more generally speaking – expect to have a significant portion of the investors to be outside of Switzerland and therefore are not able to (fully) claim back the Swiss withholding tax.

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