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SIX publishes framework for Swiss SPACs

After a lengthy process and as one of the last stock exchanges in Europe, SIX Exchange Regulation (together with SIX Swiss Exchange, "SIX") has enacted its new rules on special acquisition companies (SPACs). The new rules will enter into force on 6 December 2021 and finally open up the possibility for the listing of SPACs in Switzerland. The new rules are designed to provide a high degree of investor protection. Some of the new provisions, such as the requirement to use a Swiss incorporated company as the SPAC vehicle and to commission an independent fairness opinion for the De-SPAC go beyond mere disclosure rules and impose substantive requirements which may be viewed onerous and costly by sponsors. It remains to be seen whether the elevated level of investor protection compared to other international listing venues will attract or rather deter listings of SPACs at SIX.

1 GENESIS OF THE NEW RULES

Earlier this year, SIX had been approached by sponsors preparing a listing of their SPAC on SIX. The intention of these sponsors was to list the SPAC under the regular listing regime based on case specific exemptions to be granted by SIX due to the nature of the SPAC (in particular no historical financial statements). FINMA subsequently became aware of the impending SPAC listings and requested the enactment of new specific SPAC rules from SIX. Thus, SIX set up a working group to draft the necessary changes to the listing framework. A lengthy exchange between SIX, its issuer's committee and FINMA must have taken place which led to the final design of the rules as presented here.

2 REGULATORY FRAMEWORK AND APPLICABLE STANDARDS

SIX, the main Swiss stock exchange, is a private body but has rulemaking power in the area of listing on the exchange operated by it. However, SIX is supervised by FINMA and its listing and trading rules need to be approved by FINMA. This also applies to amendments of the SIX listing rules ("Listing Rules"), which govern the conditions to list and maintain the listing of securities on the exchange. In the context of SPAC listings, the Listing Rules were amended to allow for a new "Standard" of listing for SPACs alongside existing listing frameworks, such as the International Reporting Standard, the Swiss Standard, which are the regular listing framework for operating companies, and the specific

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standards for certain types of issuers or instruments such as the standards for real estate companies or investment companies. The Listing Rules now include a definition of a SPAC and the basic rules for listing of a SPAC and for the De-SPAC process.

The main substance of the new SPAC rules is to be found in the new Directive on the Listing of SPACs ("Directive"). It includes the requirements on disclosure of information to investors in the context of the SPAC listing as well as in the De-SPAC process. It also sets out certain substantive requirements, for example as to the required escrow account as well as use of proceeds from the SPAC IPO deposited on it. The Directive also imposes a requirement for a fairness opinion by an independent body, usually an audit firm, in the De-SPAC process.

The Directive on Financial Statements has also been amended to address the applicable accounting rules for the new SPAC Standard. It clarifies that only IFRS and US GAAP are permissible accounting standards for SPACs. Swiss GAAP FER are not permitted, but may be used upon De-SPAC in the context of the then required change to a standard for operating companies.

3 LISTING OF A SPAC

Definition

The Listing Rules define a SPAC as a Swiss corporation (*Aktiengesellschaft*) whose sole purpose is an acquisition of or a merger with one or more target companies (De-SPAC) and which will be dissolved after a maximum of three years from the first trading date absent a De-SPAC.

The requirement that only Swiss corporations (*Aktiengesellschaften* or "AG") may be listed appears to be strict compared to the relatively liberal practice of cross-border SPAC listings within Europe. It prevents the use of foreign listing vehicles that are more attractive from a corporate perspective because they offer easier corporate law solutions for the redemption rights of investors of a SPAC. Also, Swiss AGs will have to pay a 1% stamp duty on the IPO proceeds, except if equity-linked securities will be used (in which case the stamp duty will only kick-in upon conversion). The requirement of a Swiss AG originated from the Swiss Collective Investment Scheme Act, which exempts Swiss listed corporations from regulation altogether, but does not do so for foreign corporate entities. This requirement seems, therefore, to address a concern of FINMA that by allowing SPACs incorporated in foreign jurisdictions, the Swiss regime on collective investments could be evaded.

Mandatory SPAC Features

While the maximum duration of three years for a SPAC seems relatively generous for sponsors, the Listing Rules also turn certain typical features of SPACs into mandatory requirements. This applies to:

- Trust account: Proceeds raised in the IPO of the SPAC must be held on a trust account of a licensed bank in Switzerland or foreign financial institution with similar prudential supervision. The latter will hardly be relevant in practice as only Swiss corporations may be listed as SPACs. Although the new rules do not state the requirement that the proceeds must be deposited in CHF, we expect that in most cases, SPACs will choose CHF as their main currency for practical reasons.

- Redemption right: Holders of shares having been issued in the SPAC IPO must have the right to redeem their shares in a De-SPAC transaction. Such right may be limited to those holders of shares, who voted against the De-SPAC transaction.

- Liquidation preference: Holders of shares having been issued in the SPAC IPO (i.e. who are unrelated to sponsors, members of the board of directors and the management) must be privileged in case of a liquidation of the SPAC.

- Lock-ups: Founder shareholders, sponsors as well as members of the board of directors and management must enter into lock-up undertakings in respect of their shares in the SPAC lasting for at least six months following completion of the De-SPAC.

- Convertible bonds: Special rules apply to SPACs issuing convertible bonds in lieu of shares. Any such issuance might be considered unusual against the backdrop of international practice but may have two benefits in the Swiss context: Stamp duty would kick in only upon conversion into shares (*Aktien*) of the SPAC vehicle and the redemption right is easier to implement for a debt instrument such as convertible bonds.

- Change of listing standard upon De-SPAC: Within three months from completion of a De-SPAC the listed entity must leave the Standard for SPACs and apply for a change in standard, usually to the International Reporting Standard or the Swiss Reporting Standard, where operating companies are usually listed.

Disclosure, Accounting Rules and Calculation of Capitalization

SIX requires additional disclosure items in the prospectus prepared in connection with the listing of the SPAC vehicle. The Listing Rules require that the SPAC discloses adequate information about the SPAC. The Directive specifies this rule by requiring the following specific disclosure items:

a) Quantitative examples for the investment of a public shareholder: The prospectus must provide scenarios for a De-SPAC transaction considering the capital structure and the securities offered. The examples must disclose the percentages of the stakes of the sponsors, the management, the public shareholders and potentially other classes of shareholders (e.g., private placement investors). The examples need to consider any potential conditions for the issuance of additional capital and show the highest potential dilution for the different investor classes as well as for potential convertible instruments, including warrants. Further, SIX requires the disclosure of compensation in favor of the sponsor or of the management, which the sponsors and the management, respectively, will receive in addition to the SPAC shares or the shares in the company after the De-SPAC transaction. In addition, the prospectus has to present the amount originally invested by an investor and the potential decrease due to taxes, costs and other expenses at the time of the De-SPAC. As at the time of the IPO, the De-SPAC transaction is not yet known, the examples will include underlying assumptions which may differ from the actual De-SPAC transaction.

b) Additional disclosure items due to the specific structure of the SPAC:

   (1) Disclosure of conflicts of interest and roles of lead banks: These disclosure items include the publication of potential conflicts of interest of the founding shareholders, the sponsors, the members of the board of directors, the management as well as adequate measures to prevent or mitigate these conflicts. Also, the lead banks must describe their role in the IPO of the SPAC, which corresponds largely to the same role as in a traditional IPO. However, the banks will typically have a role in the De-SPAC transaction, which needs to be explained to investors. To alert investors to potential conflicts of interests, which may arise due to the different roles of the bank, the IPO prospectus must highlight such potential conflicts.

(2) Use of proceeds: Main conditions for the use of proceeds and the trust agreement are required to be included in the IPO prospectus.

(3) Further disclosure items include information about the targeted market and the process of a De-SPAC, the founders, the members of the board of directors and the management, including their track record, lock-up undertakings of the founders, the sponsors, the members of the board of directors and the management of the SPAC as well as of potentially other parties, and the liquidation preference of the IPO shares before all other share categories in the case of a liquidation of the SPAC.

c) Financial statements: As a SPAC is typically a newly incorporated company, SIX abandoned the track requirement and the corresponding required historical financial statements. Typically, it will be only the opening balance sheet of the SPAC which will be disclosed in the prospectus.

As already mentioned, only IFRS and US GAAP are permitted accounting standards for a SPAC listed on SIX. In particular, Swiss GAAP FER is not recognized by SIX for the SPAC standard. The rules on disclosure of financial statements follow the rules applicable to the other reporting standards of SIX. Prior to the De-SPAC transaction, the financial statements of a SPAC will be simple as the SPAC is a cashbox only.

The IPO shares with a right to redeem and the convertible bonds, respectively, will be count towards the calculation of the capitalization of the SPAC, irrespectively of the equity or debt capital according to the applicable accounting standard.

4 MAINTAINING THE LISTING

After the IPO, the SPAC is subject to continued periodic and ad-hoc disclosure obligations like any other listed company. This also applies to the duty to disclose management transactions in equity securities of the SPAC. In the Standard for SPACs, this duty not only applies to the members of the board of directors and the executive management, but also to founding shareholders and sponsors.

5 THE DE-SPAC

In General

The new rules also contain detailed minimum provisions governing the De-SPACing process. These include the requirement to publish an information document which is intended to form the basis for the shareholder vote to approve or disapprove the contemplated De-SPAC. A simple majority of holders of "IPO-shares" (shares having been issued in the IPO to investors) represented at a special shareholder meeting is sufficient to approve a De-SPAC.

As mentioned above, this information document must include a fairness opinion of an independent body regarding the fairness of the transaction and, in particular, the valuation of the target. We expect that such fairness opinions will mainly be provided by audit firms or financial advisers already engaged in such practice for takeover offers and hence the required "report" of the fairness opinion provider may look similar to what the market is used to seeing in the context of takeover offers for Swiss listed target companies.

Content of Information Document

In addition, the information document has to contain detailed disclosure about the acquisition target and its financial statements, its corporate governance and the contemplated transaction which have obviously been inspired by the requirements for equity prospectuses pursuant to the Swiss

Financial Services Ordinance. Hence, the audited financial statements of the target group for the past three financial years have to be disclosed or incorporated by reference in the information document. These statements do not have to be reconciled to the accounting standard used by the SPAC, but a description of the main differences between the respective standards has to be included unless the target group already uses IFRS or US GAAP.

The disclosure has to include a discussion of the rationale for and the risks associated with the transaction, a description of (personal) interests of the directors and officers of the SPAC when evaluating the target, a disclosure of potential conflicts of interests (also with regards to members of the banking syndicate) and the expected dilution of the IPO shareholders resulting from the De-SPAC. The new rules also require the preparation and publication of a "supplement" to the information document in case new facts arise or are established between the time of the publication of the information document and the shareholder vote which could have a significant influence on the decision of the investors.

Overall, the detailed requirements are evidencing the importance attached to investor protection and transparency by SIX and FINMA.

Quarterly Financial Statements

As already stated, the new rules do not require that the financial statements of the target company are drawn up in accordance with a recognized accounting standard. However, SIX requires the publication of quarterly financial statements if the acquisition company did not disclose financial statements for the previous three financial years in accordance with a recognized accounting standard in the information document. This duty applies for the first time after the completion of the first full quarter for a maximum duration of two financial years. It is not required that these quarterly financial statements have to be audited or reviewed.

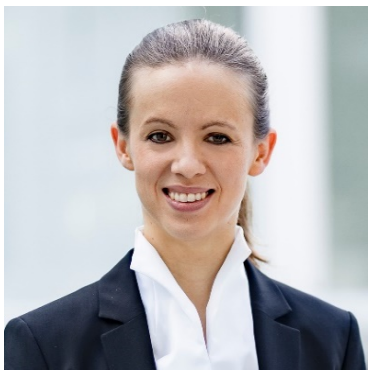
Liability Provisions

The Listing Rules expressly state that the liability provisions of the FinSA apply to the information document to be prepared in connection with the De-SPAC transaction. Although SIX does not have the authority to determine the application of the liability provisions of the FinSA, it highlights the focus of investor protection by SIX and FINMA. Irrespectively of this provision in the Listing Rules, the information document may qualify as a communication similar to a prospectus (*prospektähnliche Mitteilung*), that is also subject to the prospectus liability.

6 CONCLUSION

The new SPAC Rules enacted by SIX and approved by FINMA are the result of a rather cautious approach vis-à-vis the SPAC phenomenon. The focus is clearly on investor protection. The new rules mandate certain strict substantive requirements such as the Swiss incorporation for a SPAC or the fairness opinion in a De-SPAC. These requirements are testimony to a departure from the premise that investors may fend for themselves if in possession of sufficient information. Clearly, the high level of protection will be positively perceived by many investors. By the same token, some sponsors may be deterred by the costs of a Swiss SPAC, such as issuance stamp duty, negative interest and fairness opinions. It remains to be seen whether the right balance between investor protection and attractiveness as a listing venue has been struck with the new rules. The good news is at least that it currently looks like the new listing Standard for SPACs may have its first issuer soon.

Contacts



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