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“The Public Company: The Burden of Being Public and the Pain to Go Private”

Banking & Finance Commission and International Business Law Commission

WS 04 National Report of Switzerland

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1. BACKGROUND

1.1. Applicable Laws and Regulations and Public Companies.

- a. In your jurisdiction, are there laws and regulations regarding disclosure, continuous reporting and corporate governance matters that apply only to public companies? What are the names of those laws and regulations?

Introductory Remarks: The Swiss Laws and Rules governing Public Companies in general

Switzerland has no intrinsic separate law of the public company. In addition to the corporate law¹ applicable to the issuers, the public company in Switzerland and its shareholder are governed by the stock exchange and securities law as well as the rules and regulations of the stock exchange on which the securities of the issuer are listed.

The Laws and Regulations governing Disclosure, Reporting and Corporate Governance Matters of Public Companies in Switzerland

The three sets of laws and regulations governing disclosure and continuous reporting duties as well as corporate governance matters of public companies in Switzerland are:

- The **Swiss Code of Obligations** of March 30, 1911 as amended²;
- The **Federal Act on Stock Exchanges and Securities Trading** of March 24, 1995 as amended (SESTA)^{3,4}, and its implementing ordinance, the **Ordinance of the Swiss Federal Banking Commission on Stock Exchanges and Securities Trading** of June 25, 1997 as amended (SESTO-SFBC)⁵;

¹ Article 620 et sqq. of the Swiss Code of Obligations of March 30, 1911.

² http://www.admin.ch/ch/fr/rs/2/220_fr.pdf (in French).

³ http://www.swx.com/download/admission/regulation/federal_acts/sesta_en.pdf (unofficial English translation).

⁴ Pursuant to its article 1, the SESTA provides rules for the establishment and operation of stock exchanges and the professional trading in securities, to ensure transparency and equality of treatment of investors. It provides the framework to ensure the proper functioning of the securities market. Accordingly, the SESTA contains rules regarding (a) stock exchanges, (b) securities dealers and (c) public companies. The section on public companies contains duties for (x) shareholders of public companies to disclose their shareholding to the public company, (y) public companies to publish shareholdings disclosed to them by its shareholders and (z) offerors, shareholders as well as the board of public companies in case of public takeover offers.

⁵ http://www.swx.com/download/admission/regulation/federal_acts/fbc_en.pdf (unofficial English translation).

- The rules, regulations and implementing provisions of the SWX Swiss Exchange⁶: Within the framework of the federal laws, the SWX has issued rules and regulations regarding the admission of securities to trading on SWX Swiss Exchange. The **Listing Rules**⁷ govern the admission to the main segment and serve as the basis for all additional rules for listing⁸ on the other segments⁹. **Directives**¹⁰ supplement the Listing Rules and provide detailed explanations of the rules and regulations. The **Circulars**¹¹ contain the interpretation of the Admission Board of the SWX Swiss Exchange on the rules and regulations and explain administrative details of their practical application.

Different Relevant Points of Contact

The three sets of rules provide for different relevant point of contacts for public companies. Basically, the following applies:

- Swiss Code of Obligation: The duties conveyed on public companies by the Swiss Code of Obligations apply to any company which is governed by Swiss law¹² and has equity or debt securities listed on a stock exchange in Switzerland or abroad.
- Federal Act on Stock Exchanges and Securities Trading: The rules applicable to public companies and its shareholders under the SESTA apply to companies with registered seat in Switzerland^{13,14} whose equity securities are wholly or partly listed in Switzerland.

⁶ SWX Swiss Exchange is an authorized self-regulated stock exchange under the SESTA. Pursuant to the SESTA, the Swiss Federal Banking Commission authorizes self-regulated stock exchanges to operate, provided that the stock exchange provides for adequate organization of its operations, administration and supervision.

⁷ http://www.swx.com/download/about/publications/rules_listing_en.pdf

⁸ http://www.swx.com/admission/regulation/rules_en.html (this link provides links to all additional listing rules for segments other than the main segment).

⁹ see Section 1.1, c, below.

¹⁰ http://www.swx.com/admission/regulation/guidelines_en.html (this link provides links to all applicable directives).

¹¹ http://www.swx.com/admission/regulation/circulars_en.html (this link provides links to all applicable circulars).

¹² According to article 154 para. 1 of the Swiss International Private Law of December 18, 1987, Swiss law applies to companies which are organized and governed under Swiss law provided they fulfill the publicity and registration requirements of Swiss law.

¹³ According to article 21 of the Swiss International Private Law the registered office of a company shall be the place designated by the articles of incorporation or the partnership agreement. In the absence of such a designation, the place at which the company is actually managed shall be deemed to be its registered office.

¹⁴ In the order of the Swiss Federal Banking Commission re LVMH Moët Hennessy Louis Vuitton, Paris and TAG Heuer International SA, Luxembourg dated September 30, 1999 the Swiss Federal

- Rules and regulations of the SWX Swiss Exchange: Basically, the body of rules of the SWX Swiss Exchange applies to companies which are listed on SWX Swiss Exchange with equity or debt securities, irrespective of the law applicable to the company or its place of registration. Companies with a secondary listing on SWX Swiss Exchange (i.e. companies that are listed on another official stock exchange with equivalent rules on listing), remain governed by the rules of the stock exchange of their primary listing.¹⁵

The applicable Provisions under Swiss law

Disclosure Duties under the Swiss Code of Obligations (CO):

Pursuant to article 697h paragraph 1 cipher 2 CO, public companies shall publish their annual statutory financial statements (consisting of the profit and loss accounts, the balance sheet and the notes), their consolidated financial statements and the auditors' reports after having been approved by the shareholders' meeting in the Swiss Official Commercial Gazette or forward it to any person who requests those financials.

The notes to the financial statements of public companies must contain to following information:

- The total amount of the following items: sureties, guarantees and pledges in favour of third parties that are not reported as provisions in the balance sheet, assets pledged, leasing liabilities not reported in the balance sheet, fire insurance value of fixed assets, liabilities towards the company's pension fund, any outstanding bonds, authorised and contingent share capital, all write-ups of land and investments and the net amount of any material realisation proceeds resulting from hidden reserves, material participations in other companies and information on own shares (article 663b CO).
- All compensations directly or indirectly paid to the company's current members of the board of directors and senior management, former members of the board of directors or senior management, provided the compensations were made in connection with their activity as a corporate body of the company or the compensation was not at arms' length, and non arms' length transactions with persons being close to those persons mentioned before (article 663b bis CO).

Banking Commission decided that the SESTA also applies to a company with registered seat abroad, provided that it is factually managed in Switzerland. However, the Banking Commission had to rule on the applicability of the takeover rules of the SESTA and not of its disclosure rules.

¹⁵ See: SWX Swiss Exchange Directive on Listing of Foreign Companies. (http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20011101-1_en.pdf).

- Important shareholders and their participations insofar as these are known to the company, whereby important shareholders are deemed to be shareholders and groups of shareholders who aligned their voting rights with each other whose participation exceeds 5 per cent of all voting rights, subject to a lower statutory threshold (article 663c paragraph 1 and 2 CO).
- The shareholding, the option rights and the name of each of the current member of the board of directors, current member of the senior management as well as of any person being close to those mentioned before (article 663c paragraph 3 CO).

Disclosure Duties under the Federal Act on Stock Exchanges and Securities Trading and the Ordinance of the Swiss Federal Banking Commission on Stock Exchanges and Securities Trading:

Article 21 SESTA: The public company has to publish information which it received from shareholders pursuant to the shareholders duty to disclose their shareholdings according to article 20 SESTA. The information must be published in one of the important electronic media (Bloomberg, Reuters or Telekurs) within two trading days¹⁶ as well as in the Swiss Official Commercial Gazette¹⁷.

Article 20 SESTA requires shareholders to disclose their shareholdings if they directly, indirectly or in concert with third parties purchased or sold shares and thereby attained, fell below or exceeded certain thresholds. The thresholds are 5%, 10%, 20%, 33⅓%, 50% or 66⅔% of the voting rights. The duties under article 20 SESTA apply irrespective whether or not the voting rights are exercisable¹⁸.

Article 9 to 16 SESTO-SFBC contains implementing rules as to the creation of the disclosure duty¹⁹ and article 17 to 23 SESTO-SFBC deals with the time and the form of the notification, exceptions from the duty to disclose, procedure rules and supervision.

Disclosure and Continuous Reporting Duties and Corporate Governance Matters under SWX Swiss Exchange Listing Rules (LR) and Directives:

- Articles 64 and 65 LR and the Directive on Requirements for Financial Reporting²⁰: companies listed on SWX Swiss Exchange must publish their annual business report,

¹⁶ Trading days are days on which the SWX Swiss Exchange is open for trading.

¹⁷ Articles 18 and 19 SESTO-SFBC.

¹⁸ Own shares held by the public company are also subject to the disclosure duty.

¹⁹ I.e. the time of creation of the disclosure obligation, detailed rules as to the question of usufruct, securities lending, conversion rights, call and put options, acting in concert and organized groups, and investment funds.

²⁰ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20070101-2_en.pdf.

including the auditors' report. Issuers of listed equity securities must also publish an interim financial report.

- In order to guarantee transparency and a healthy balance of management and control article 64 LR and the Directive on Information relating to Corporate Governance²¹ require the public company to disclose important information on their board of directors and senior management (or to give substantial reasons why this information is not disclosed).
- Article 72 LR and the Directive on Ad hoc Publicity²²: public companies must inform the market of any potentially price-sensitive fact which has arisen in their sphere of activity and is not of public knowledge.
- In case of an IPO or capital market events (*e.g.* capital increase, merger etc.), the issuer has the duty to disclose relevant information in a listing prospectus. Prospectus Schemes²³, which are annexed to the Listing Rules provide for the minimum information to be contained in the listing prospectus²⁴.
- Article 74a LR and the Directive on the Disclosure of Management Transactions²⁵: All transactions by members of the board of directors and senior management in equity securities, conversion rights and all other types of financial instruments of the public company must be disclosed if the value of all transactions concluded by a person who is subject to the disclosure obligation exceeds the sum of CHF 100'000 within one calendar month.

b. How do those laws and regulations define public companies?

The Swiss laws, rules and regulations do not provide for a consistent definition of public companies. Basically, companies whose shares are listed on a stock exchange are considered

²¹ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20070101-1_en.pdf
²² http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20050701-1_en.pdf
²³ http://www.swx.com/admission/regulation/templates_en.html (this link provides links to all applicable prospectus schemes).
²⁴ In case of equity securities are publicly offered for subscription (irrespective whether they are listed on a stock exchange), the prospectus has to comply with the requirements of article 652a CO, which provides for the minimum information to be contained in the prospectus. If an issuer meets the requirements set out in the SWX Prospectus Schemes the requirements pursuant to article 652a CO are met as well.
²⁵ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20050701-2_en.pdf

public companies. However, as set forth in Section **Different Relevant Points of Contact**²⁶, above, each set of rules applicable to public companies defines its scope differently.

- c. Are there different types or categories of public companies to which different levels of regulation or different timing requirements apply? If so, how are the different types or categories of public companies defined?

The Swiss **Code of Obligations** and the **Federal Act on Stock Exchanges and Securities Trading** do not provide for different rules applicable to different types or categories of public companies. It goes without saying that public companies that engage in regulated business activities (banks, insurances etc.) are subject to additional rules and regulations.

The SWX Swiss Exchange differentiates between several categories of public companies in so far as the different trading segments are governed by different rules:

- The **Main Segment** of SWX Swiss Exchange, on which most of the equity and debt securities and derivatives are listed, is governed by the Listing Rules.
- The **SWX Local Caps Segment** is governed by the Listing Rules and the Additional Rules for the Listing in the Segment Local Caps²⁷. Companies listed on SWX Local Caps do - due to their investor base, corporate history, capitalisation or equity securities distribution - not, or do not yet, qualify for listing in another SWX trading segment.
- **Investment Companies, Real Estate Companies** and **Investment Funds**²⁸ are governed by the Listing Rules and by additional rules²⁹, as applicable.
- The **Sponsored Segment** is governed by the Rules for the Admission of Equity Securities to trading in the SWX Swiss Exchange - Sponsored Segment³⁰ only, hence the Listing Rules do not apply. The applicable rules do not convey any duties on the issuer itself. The sponsoring securities dealer applies for admission to trading and has

²⁶ see Section 1.1.a, above.

²⁷ http://www.swx.com/download/admission/regulation/rules/addrules_localcaps_en.pdf

²⁸ Swiss and foreign collective investment schemes may also be subject to the approval of the Swiss Federal Banking Commission under the Federal Law on Collective Investment Schemes of June 23, 2006 (<http://www.admin.ch/ch/f/rs/9/951.31.fr.pdf> (in French)).

²⁹ Additional Rules for the Listing of Investment Companies:

http://www.swx.com/download/admission/regulation/rules/addrules_invcomp_en.pdf

Additional Rules for the Listing of Real Estate Companies:

http://www.swx.com/download/admission/regulation/rules/addrules_realestate_en.pdf

Additional Rules for the Listing of Collective Investment Schemes:

http://www.swx.com/download/admission/regulation/rules/addrules_invschemes_en.pdf

³⁰ http://www.swx.com/download/admission/regulation/rules/rules_sponsored_segment_en.pdf

limited disclosing obligations. Companies whose equity securities are traded³¹ on the Sponsored Segment are sponsored by one or several security dealers, are Swiss or foreign issuers that have a primary listing on a stock exchange officially recognised by the SWX Swiss Exchange and are neither primarily nor secondarily listed on the SWX Swiss Exchange.

- As a general matter, issuers included in the SMI[®]³² are listed on the **EU-Compatible Segment** of SWX Swiss Exchange but traded on the EU-Regulated Market Segment of virt-x³³. They are governed by the EU's capital market regulations³⁴ and benefit from the harmonised EU securities market. Additional listing rules³⁵ and directives³⁶ of SWX Swiss Exchange modify the Listing Rules so that the securities listed on the SWX EU-Compatible Segment comply with the EU's capital market regulations and the implementing regulations of the relevant member state (in particular, with respect to virt-x, the UK)³⁷.
- Companies traded on the U.K.-Regulated Market Segment of virt-x are listed on the **Main Segment** of SWX Swiss Exchange. Those issuers are not governed by the EU's capital market regulations but by those of virt-x, which in turn is supervised by the FSA.

³¹ Companies traded on the Sponsored Segment do not undergo the listing procedures, hence are not listed on SWX Swiss Exchange.

³² Swiss Market Index.

³³ virt-x is a UK-regulated Recognised Investment Exchange ("RIE") in London, supervised by the Financial Service Authority (FSA), and, hence, a regulated market under the relevant EU capital market rules.

³⁴ Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Prospectus Directive); Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (Market Abuse Directive); Directive 2004/109/EC on the harmonization of transparency requirements with regard to information about issuers whose securities are admitted to trading on an EU Regulated Market and amending Directive 2001/34/EC (Transparency Directive) and Directive 2004/39/EC on markets in financial instruments (MiFID).

³⁵ Additional Rules for listing on the SWX "EU-Compatible" Segment (AR EU):

³⁶ http://www.swx.com/download/admission/regulation/rules/addrules_eu_compatible_en.pdf.

³⁶ Directive on the Procedure for the Listing on the SWX "EU-Compatible" Segment and Directive on Maintaining Listing on the SWX EU-Compatible Segment:

³⁶ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20070120-2_en.pdf

³⁶ and http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20070120-1en.pdf

³⁷ The companies which were automatically allocated to the EU-Compatible Segment upon its creation in July 2005 and did not "opt down" to the U.K.-Regulated Segment benefit from a "Grandfathering" regime: Certain duties under the Market Abuse Directive will only apply once the issuer confirmed its admittance to trading on an EU stock exchange by an explicit action.

- d. Do those laws or regulations contain provisions requiring private companies with certain characteristics to become public companies or to disclose certain information? Do they contain provisions allowing private companies whose securities are not traded on a securities exchange to voluntarily become public anyway?

No Duty to become a Public Company

There are no Swiss laws and regulations that impose a duty on companies to list their securities on a stock exchange.

Duty to disclose Information to the Public

If a company publicly³⁸ offers securities for subscription, the article 652a CO requires the company to provide information about the company in an offering prospectus.

Pursuant to article 697h paragraph 1 cipher 1 CO, a company which has debt securities outstanding, irrespective of whether the bonds are listed on a stock exchange, has to publish its statutory and consolidated financials statements after having been approved by the shareholders' meeting in the Swiss Official Commercial Gazette or forward it to whomever requests them.

Going Public

Neither the Code of Obligations nor the Federal Act on Stock Exchanges and Securities Trading contain requirements for the listing of a company's securities on a stock exchange. Subject to the requirements of the SWX Swiss Exchange Listing Rules and, if applicable, the various additional listing rules for the applicable SWX segment, any company can apply for the listing of its securities on SWX Swiss Exchange.

1.2. Regulatory Authorities.

- a. What regulatory body or bodies administer the laws and regulations regarding public companies in your jurisdiction?

No Regulator for Public Companies

Swiss law does not provide for a regulator of public companies *per se*. The Swiss Federal Banking Commission is the supervising authority under the Federal Act on Stock Exchanges and Securities Trading. Of course, the competent Swiss civil courts deal with shareholders' actions under the Swiss Code of Obligations.

³⁸ The offer to subscribe shares is deemed public if it is not made to a definite number of addressees.

The Stock Exchange Regulator

The operation of a stock exchange in Switzerland is subject to the authorisation by the Swiss Federal Banking Commission³⁹. Authorisation will be granted if – among other things – the self-regulated stock exchange provides for adequate organization of its operations, administration and supervision⁴⁰. Any rules and regulation of the stock exchange and any amendment thereto must be approved by the Swiss Federal Banking Commission⁴¹.

The SWX Swiss Exchange Organisation

Pursuant to the rules⁴² of SWX Swiss Exchange, the **Admission Board** draws up rules and regulations governing the listing and issuance of securities and decides about admission of securities for trading/listing and supervises compliance with the issuers' ongoing obligations. The **Sanction Commission** can impose sanctions against issuers under the SWX rules and the **Appeal Board**^{43,44} can be referred to in connection with appeals against decisions on listing, suspension of trading and delisting. Decisions of the Appeal Board can be appealed to the **Board of Arbitration** whose decision is exclusive and final⁴⁵.

- b. Are public companies regulated on a national or regional level, or both?

The Code of Obligations and the Federal Act on Stock Exchanges and Securities Trading apply nationally. The SWX Swiss Exchange rules and regulations apply only to issuers listed and/or traded on SWX Swiss Exchange.

- c. Do non-governmental or quasi-governmental organizations also regulate public companies (for example, a securities exchange)?

Under the self-regulatory regime provided for by the Federal Act on Stock Exchanges and Securities Trading, the SWX Swiss Exchange has adopted its own rules and regulations⁴⁶ which are approved by the Swiss Federal Banking Commission. SWX Swiss Exchange is organized as a private association under the Swiss Civil Code.

³⁹ Article 3 para. 1 SESTA.

⁴⁰ Article 3 para. 2 letter a SESTA.

⁴¹ Article 4 para. 2 SESTA.

⁴² Internal Regulations of the Admission Board:

http://www.swx.com/download/admission/board/internal_regulations_010107_en.pdf.

⁴³ Article 9 SESTA requires the stock exchange to set up an independent appeal board.

⁴⁴ Regulations for the Appeals Board:

http://www.swx.com/download/about/publications/rules_appealboard_en.pdf.

⁴⁵ Pursuant to article 9 para. 3 SESTA the right to civil actions, which may be taken only after the appeal procedure has been exhausted, remains reserved.

⁴⁶ see: Section 1.1.a, 1.1.c and 1.2.a above.

- d. What are the primary securities exchanges on which the securities of public companies domiciled in your jurisdiction are traded?

SWX Swiss Exchange.

1.3. Financial Accounting Regimes

- a. Is there a standardized set of accounting rules and principles required to be applied by public companies in your jurisdiction? What is the common name of those rules and principles?

Article 66 Listing Rules holds that the financial statements of the issuer must present a true and fair view of its assets and liabilities, financial position and profit and losses. The Directive on Requirements for Financial Reporting⁴⁷ further determines these requirements as follows: Issuers of equity securities that are listed on the Main Segment or the SWX EU-Compatible Segment must apply either **IFRS** or **US GAAP** as their accounting standards. IFRS, US GAAP and **Swiss GAAP FER** are permissible in the other SWX segments^{48,49}.

- b. What body sets and interprets those rules and principals?

Swiss GAAP FER⁵⁰ is issued by the Swiss Foundation for Accounting and Reporting Recommendations (*Schweizerische Stiftung für Fachempfehlungen zur Rechnungslegung*). Its commission sets and interprets the rules on the basis of the principle of true and fair view.

- c. What are the basic principles and to what extent do they differ from international standards? Please limit yourself to the most important differences.

Swiss GAAP FER focuses on small to medium Swiss companies of national importance. As a general matter, its rules are less specific and restrictive than those of IFRS but in terms of content and method the rules are similar.

⁴⁷ see footnote 24.

⁴⁸ SWX Local Caps, Real Estate Companies and Investment Companies.

⁴⁹ Note 10 and 11 of the Directive on Requirements for Financial Reporting.

⁵⁰ <http://www.fer.ch/de/inhalt/home/home/news.html>.

2. DISCLOSURE AND CONTINUOUS REPORTING REQUIREMENTS

2.1. Required Reports and Reporting Calendar

- a. Are there continuous or ongoing reporting or disclosure requirements for public companies in your jurisdiction?

These ongoing reporting and disclosure rules and the three different points of contact are described above in section 1.1.

The Swiss Code of Obligation provides for the disclosure and publication of their annual financial statements, the consolidated financial statements and the report of the auditors' (article 697h CO). It also provides in for the minimal content, structuring and guiding principles for the statements (articles 662 to 670 CO).

Further to the basic rules of the Swiss Code of Obligations, listed public companies need to comply with the disclosure rules of SESTA. Most important are the obligation to publish the information they receive from shareholders disclosing the purchase or sale of shares exceeding or below the relevant thresholds (article 21 SESTA and articles 9 to 40 SESTO-SFBC)⁵¹. The publications are all published on the website of SWX Swiss Exchange⁵² and thus freely accessible for the public.

The listing rules of SWX Swiss Exchange contain further important mandatory disclosure rules, such as:

- articles 64 and 65: periodic provision of financial reports (annual business reports and interim financial reports), which are detailed in the Directive on Requirements for Financial Reporting⁵³ and the Admission Board Circular No. 1⁵⁴
- article 72: disclosure of potentially price-sensitive facts (ad hoc publicity), which is detailed by the SWX Directive on Ad hoc Publicity⁵⁵
- article 73: disclosure of changes in the rights attached to securities

⁵¹ All pertinent rules and the practical aspects related to shareholders' disclosures are detailed in the SWX brochure "Disclosure of Shareholdings".

(http://www.swx.com/download/admission/being_public/disclosure/brochure_ols_en.pdf).

⁵² http://www.swx.com/admission/being_public/disclosure/shareholders_en.html.

⁵³ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20070101-2_en.pdf.

⁵⁴ http://www.swx.com/download/admission/regulation/circulars/abcircular_001_en.pdf.

⁵⁵ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20050701-1_en.pdf.

- article 74: disclosure of management transactions, which is detailed by the Directive on the Disclosure of Management Transactions⁵⁶
- Directive on Information Relating to Corporate Governance⁵⁷.

b. Are public companies in your jurisdiction required to file or provide security holders with one or more annual reports?

Generally reports must be provided yearly. Issuers of listed equity securities are obliged to publish interim financial reports that may cover a time frame of six months at maximum.

c. When must such reports be filed or provided to security holders?

Annual reports must be published within four months of the closing of a given financial year and submitted to the Admission Board of SWX Swiss Exchange at the time of their publication at latest.

Interim financial reports must be published within three months of the end of the given reporting period and submitted to the Admission Board of SWX Swiss Exchange at the time of their publication at latest.

d. What disclosures and materials are required to be included in such reports? Please include a brief discussion of the disclosure requirements in such annual reports with respect to the following matters:

1. The Company's Business, Operations and Assets

Annual reports must contain a verbal description of the course of business and the economic and financial situation of the company, which includes basic information on the business, operations and main assets or participations of the company. Financial information to be provided in the statutory financial statements consist of the profit and loss accounts, the balance sheet and the notes.

The Admission Board Circular No. 1 provides for the issuers of equity securities, bonds and conversion rights and derivatives to report the details of important factual company information and changes of such as they occur (contact information, responsible persons).

⁵⁶ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20050701-2_en.pdf.
⁵⁷ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20070101-1_en.pdf.

2. Legal Proceedings

There is no general requirement to disclose legal proceedings. Only financial information on potential claims is due according to the financial accounting regime applicable (valuation of contingent liabilities). Further, important claims made against the company could be deemed potentially price-sensitive facts to be disclosed under the rules of ad hoc publicity.

3. Executive Officer Compensation and Benefits

Swiss company law provides only for the disclosure of the total of the compensation, benefits and loans all executive officers have received and the highest amount an individual officer has received.

Listed companies have to comply with the listing rules and the Directive on Information Relating to Corporate Governance in specific. The directive provides for the disclosure of:

- the content and method of determining the compensation and the shareholder programs for the board of directors and senior management
- the total of all compensations such as fees, salaries, credits, bonuses and benefits in kind
- additional severance payments for persons mentioned above who gave up their functions
- compensations for former members of governing bodies
- additional fees and remunerations
- loans granted to the persons mentioned above.

4. Director Compensation and Benefits

See above.

5. Market Data Regarding the Company's Securities

No such information needs to be provided.

6. Equity Compensation Plans

In general, only the amount of the capital needed for such plans needs to be disclosed (authorized capital increase and capital increase subject to a condition (article 663b paragraph 11 CO)).

Additional information needs to be disclosed by listed companies according to the Directive on Information Relating to Corporate Governance:

- content and method of determining the compensation and the shareholding programs of members of the board and senior management
- share allotment in the year under review
- options on shares held by the executive members of the board of directors, the members of the senior management and the total of such option held by the non-executive members of the board of directors; in each case with the allotment year, the duration, the subscription ratio and the exercise price.

7. Significant Stockholders

The notes to the financial statement must list the important shareholders and their participations known to the company⁵⁸. Article 663c paragraph 2 CO defines important shareholders as such whose participation exceeds five percent of all voting rights.

8. Security Ownership by Executive Officers and Directors

There is no general obligation to list security ownership in the company's reports. Only listed companies have to disclose management transactions in securities.

9. Related Party Transactions and Matters Involving Conflicts of Interest Among the Company, and its Executive Officers, Directors and Large Stockholders

The only duty of such kind is to show in the balance sheet all claims and liabilities against other companies of the group or against shareholders that shareholders that are holding a participation in the company (article 663a paragraph 4 CO).

10. Audited or Unaudited Financial Statements and Information for Recent and Prior, Full and Partial Periods

Audited Financial statements have to be published as described under questions 1.1 and 2.1. There is no obligation to disclose or publish unaudited financial statements.

All Financial Statements and Information have to be provided only for the recent, not for prior periods. There are no obligations to publish budgets or other anticipated financial statements and information.

11. Discussion and Analysis of the Financial Statements and Information by Management

⁵⁸ Not all shareholders may be known to the company due to the possibility of bearer shares being issued and name share not being registered or being registered in the name of trustees.

The annual report needs to contain a short discussion of the course of business and the economic and financial situation of the company, which includes basic information on the business, operations and main assets or participations of the company.

12. Liquidity and Capital Resources

The balance sheet has to show the current assets, meaning the liquid assets, claims resulting from deliveries and performances, other claims and inventories.

Equity has to be shown divided into share capital, legal and other reserves and profits shown in the balance sheet. Outside funds are to be shown divided into debts resulting from deliveries and performances, other short-term liabilities, long-term liabilities and provisions.

13. Off-Balance Sheet Obligations

The notes to the annual report have to include:

- the total of the amount of guarantees, indemnity liabilities and pledges in favor of third parties
- the total of the amount of assets pledged or assigned for the securing of own liabilities, as well as of assets with retention of title
- the total amount of liabilities from leasing contracts not included in the balance sheet.

The applicable financial accounting regime (IFRS, US GAAP, Swiss GAAP FER) may provide for more disclosure obligations for listed companies.

14. Controls and Procedures Regarding Accounting and Disclosure

No disclosure rules in this regard.

15. Significant Accounting Policies

The company needs to state the consolidation and valuation principles used in preparing the consolidated statements of account. Listed company need to state the financial accounting regime used (IFRS, US GAAP, GAAP FER).

16. Relationship with External Accountants

The company does not have such a duty to disclose. Auditors have to confirm in their report that they fulfil the independence and conflict of interest requirements.

17. Risk Factors

Only those requirements of the applicable financial accounting regime for listed companies.

18. Other Matters that are Material to Security Holders

Article 663b CO provides for the disclosure of the following material information:

- liabilities to personnel welfare institutions

- the amounts, interest rates and maturities of bonds issued by the company
- each participation which is essential for assessing the Company’s financial and income situation
- the total amount of dissolved replacement reserves and of other hidden reserves if thereby the business result is shown considerably more favorably
- information on the object and the amount of revaluations of assets
- information on the acquisition, alienation, and number of own shares held by the company, including its shares held by another company in which it holds a majority participation.

19. Contracts or Other Documents that Also Must be Filed as Exhibits

No such filing obligations.

- e. Are public companies in your jurisdiction required to file or provide security holders semi-annual or quarterly reports?

Listed companies are obliged by the listing rules of SWX Swiss Exchange to file and provide semi-annual reports.

1. When must such reports be filed or provided to security holders?

Interim financial reports must be published and filed within three months of the end of the given reporting period.

2. What disclosures and materials are required to be included in such reports? Please include a brief discussion of the disclosure requirements in such semi-annual or quarterly reports with respect to the matters listed in Question 2.1.d above.

Interim financial reports provide the same information and materials as the annual reports. The most important difference is that interim financial reports need not be audited.

- f. Are public companies in your jurisdiction required to file or provide security holders with “current reports” or “ad hoc” disclosure to disclose the occurrence of certain events with respect to the company?

The listing rules of SWX Swiss Exchange provide for the disclosure of potentially price-sensitive facts (ad hoc publicity) (article 72 LR).

1. What are the events/conditions that may trigger the requirement to file or provide such current reports/ad hoc disclosure, and what is the filing or provision deadline after the occurrence of such event?

Article 72 LR contain a general definition of such events or conditions as facts that are sensitive for the stock price which have arisen in the company's sphere of activity and are not of public knowledge. Price-sensitive facts are facts which are capable of triggering a significant price change.

Examples are changes in the company's structure (mergers, takeovers, spin-offs, restructurings), changes in capital (increases or reductions in capital, share buyback programs, changes in the type of equity securities), major personnel changes (changes in the membership of the board, the management board or other key positions, change of auditors), changes in the course of business (new sales partners or strategic alliances, new important products, withdrawal or recall of an important product, important new contracts, termination of important contracts), change of financial results (major changes in earnings, profit collapse, discontinuation of the dividend, profit warning, financial restructuring), key figures (annual and interim results).

Only relevant and significantly price-sensitive facts need to be disclosed. This is the case if the fact can be expected to trigger a price change that is considerably greater than the usual price fluctuations. Whether or not a fact has the potential to trigger a significant price change is decided on a case-by-case basis.

Such events and conditions must be filed as soon as the company has knowledge of its main points, meaning that the obligation to disclose arises at the time that specific information becomes available. E.g. if the annual or interim financial results have a significant potential for impacting the price of a given security, they must be published regardless of previously determined publication dates. Multi-stage communication is recommended in connection with events producing complex consequences.

2. Please summarize the disclosures that may be required in such current reports/ad hoc disclosure?

The disclosures contain a description of the event or specific conditions. There need not be a particular assessment of the impact nor documents are to be filed.

- g. Are public companies in your jurisdiction required to file or provide security holders with an additional disclosure document in connection with their annual meeting of security holders? If so, please summarize those requirements and the matters that must be disclosed, including discussion of the matters summarized in Question 2.1.d above.

For groups of companies, consolidated statements of accounts need to be provided (article 663e CO).

- h. Are public companies in your jurisdiction subject to any other continuous, ongoing, periodic or other significant reporting or disclosure obligations? If so, please summarize those requirements and the matters that must be disclosed, including discussion of the matters summarized in Question 2.1.d above.

Article 74a paragraph 8 LR and the Directive on the Disclosure of Management Transactions provide for the continuous disclosure of the transactions in the company's

securities made by the members of its board or senior management. Companies must report to SWX Swiss Exchange the direct or indirect purchase or sale of equity securities, conversion rights and share acquisition rights or other rights to purchase or to sell the company's securities or all types of financial instruments whose price is materially influenced by the price of the company's equity securities.

- i. Are the chief executive officer and/or chief financial officer and/or any other corporate bodies (in particular, directors) of the company required to personally certify the accuracy of any of these filings or disclosures?

No. Financial reports are accepted by the board and by the shareholder's meeting. There are no specific provisions relating to who is allowed or obliged to file and sign the disclosures.

2.2. Disclosure Principles and Related Matters.

- a. Does your jurisdiction have laws or regulations governing or prohibiting the selective disclosure of information by public companies to stockholders, securities analysts, capital markets professionals or others (such as ad hoc communications rules)? If so, please describe them.

The company has the obligation of equal treatment of all shareholders (article 717 section 2 CO), which applies also to the dissemination of information. However, several authors claim that exceptions should be permissible for cases where the selective disclosure of information to majority stockholders, securities analysts and capital markets and the like is in the clear interest of the company. Such selective disclosure is widespread in practice but has not been contested in the courts yet.

The SWX Swiss Exchange Listing Rules contain detailed provisions to ascertain that all disclosure made in its application are made to the public at the same time and no selective disclosure is made.

Selective disclosure of information always present issues with regard to insider dealing, which is prohibited by article 161 of the (Swiss) criminal code.

- b. Does your jurisdiction have laws or regulations governing or prohibiting the presentation of financial information in filings or disclosures that is not in accordance with required accounting rules and principles? If so, please describe them.

There are no such rules. Only the annual and the interim reports need to be in accordance with the accounting rules and principles.

- c. Do the laws or regulations or regulatory authorities in your jurisdiction seek to promote the use of projections, forward-looking statements or other disclosure regarding anticipated events or performance? Include a summary of any law or regulation barring liability for such statements when made under certain circumstances, and the necessary requirements.

There are no such rules encouraging the use of such information on future developments, nor are there any rules prohibiting or hindering its use.

- d. Are any of the filings and reports described in Part 2.1 above reviewed by regulatory authorities in your jurisdiction? If so, please discuss the review process and the standard of review.

There is no formal process of review of filings and reports. SWX will act in its function as supervisory body if a listed company files manifestly wrong or incomplete reports. But the process of reviewing the filings and reports is left to its discretion.

3. ADDITIONAL BURDENS ON PUBLIC COMPANIES

3.1. Corporate Governance.

- a. Are there different, more stringent obligations imposed on public companies in your jurisdiction regarding corporate governance matters?

For listed companies, the Directive on Information Relating to Corporate Governance of SWX Swiss Exchange applies. The directive does not impose specific corporate governance rules on the companies but merely obliges them to provide to the public information relating to corporate governance. The information to be disclosed relates to group structure and shareholders; capital structure; board of directors (including personal details on other activities and vested interests); senior management (including elements of the management's contracts); compensation, shareholdings and loans to the board of directors and senior management; shareholders participations; changes of control and defence measures; auditors and the company's information policy.

- b. If so, please describe them. Please include a brief discussion of the different, more stringent corporate governance requirements regarding the following matters:

3.2. Additional Obligations.

Please briefly identify any other significant obligations imposed on public companies in your jurisdiction that are not imposed on private companies.

With the entry into force of the new Federal Audit Act (probably on Januar 1st, 2008), listed companies can be audited only by auditors qualified and supervised by the Federal Audit Supervisory Body⁵⁹

4. REACTIONS TO THE PAIN OF BEING PUBLIC

4.1. “Going Private”.

- a. Please briefly describe the primary methods by which a public company in your jurisdiction can become a private company, and briefly summarize the requirements of those methods.

General Remarks

In the past, most of the hot delistings⁶⁰ from SWX Swiss Exchange have been made in connection with and subsequent to a successful public offer for all shares of an issuer. The public offer allows the offeror to increase its stake in the issuer and to substantially reduce the free float of shares of an issuer. Though a small number of public shareholders is not a formal requirement for the delisting, it certainly helps the delisting process with the SWX Swiss Exchange and, in case there are less than 5% public shareholders remaining, prevents the issuer of guaranteeing the maintenance of off-exchange trading after the delisting⁶¹ for a certain period of time.

Formal Delisting Procedure

As a principle, the issuer itself decides about the delisting of its securities, but must provide the Admission Board a well-founded petition for delisting⁶².

The Admission Board must take into account the interests of the smooth operation of the market, of the investor and, if applicable, of the issuer. The Directive for the Delisting of Securities⁶³ implements the detailed requirements for the delisting:

- The Admission Board decides on the point in time of the public announcement of the delisting as well as of the last trading day. The earliest date for the public announcement is one month subsequent to the submission of the application for delisting to the Admission Board;

⁵⁹ see Section 4.2, b, below.

⁶⁰ *Hot Delisting* means if the delisting is the consequence of a formal request of the issuer whereas a *Cold Delisting* means a delisting as a consequence of corporate restructuring of the issuer.

⁶¹ see Section 4.1, a “*Formal Delisting Procedure*”, 2nd paragraph, 3rd bullet point.

⁶² Article 80 cipher 1 LR.

⁶³ http://www.swx.com/download/admission/regulation/guidelines/swx_guideline_20010101-1_en.pdf.

- The announcement of the delisting is to be made at least three month prior to the last trading day by publication of a delisting advertisement in two or more Swiss newspaper in German and French language, identifying the securities to be delisted as well as the last trading day.
- If, at the time of the delisting, more than 5% of the delisted securities are still held by the public, the issuer has to ensure off-exchange trading for a period of six month at most.

The Admission Board may grant exceptions from the three month period between the announcement of the delisting and the last trading day in case of the delisting being the consequence of (i) the issuer's merger or liquidation or (ii) a public takeover offer, in case (y) the takeover documents did mention the intention to delist the target's shares or (z) 98% or more target shares had been tendered to the offeror and the latter successfully conducted the mandatory squeeze-out procedures according to article 33 SESTA⁶⁴. In these cases the Admission Board may reduce the duration between announcement and last trading day to five trading days.

- b. Please discuss the challenges, costs and other obstacles to such methods (including but not limited to the applicable laws and regulations).

Corporate Law

If the articles of incorporation of the issuer do not explicitly assign the decision to list/delist the shares of the company to the shareholders' meeting, such decision is in the sole competence of the board of directors. The decision of the board of directors cannot be challenged by the shareholders.

Securities and Stock Exchange Law and SWX Swiss Exchange Rules and Regulations

Neither the Federal Act on Stock Exchanges and Securities Trading nor the Listing Rules require shareholders approval for the delisting. The decision of the Admission Board of the SWX Swiss Exchange regarding the delisting can be challenged to the SWX Swiss Exchange Appeal Board and eventually to the Board of Arbitration. The right to challenge

⁶⁴ An offeror, who upon completion of the offer, holds more than 98% of the voting rights of the target company may petition the court to cancel the outstanding securities. For this purpose the offeror shall commence an action against the target company. The remaining shareholders have the right to participate in the proceedings. Upon cancellation of the remaining shares by the court, the target company shall reissue the cancelled shares and allot them to the offeror against payment of the offer price in favour of the squeezed-out shareholders.

the decision is limited to the issuer and other SWX Swiss Exchange participants. Shareholders have no right to challenge any of the decisions.

Fees

The SWX Swiss Exchange does not charge any fees for the processing of a delisting application⁶⁵.

Applicable Law and Regulations

See Section 4.1, a "*Formal Delisting Procedure*" of this report.

4.2. Trends

- a. Have there been many "going private" transactions, de-listings or changed listings in your jurisdiction or by public companies domiciled in your jurisdiction?

In 2004, 2005 and 2006, respectively, 9, 17 and 19 issuers delisted their shares from SWX Swiss Exchange⁶⁶. Most of them were hot delistings.

Since July 2005, 4 issuers chose to opt down from the EU-Regulated Market Segment to the U.K.-Regulated Segment of the virt-x⁶⁷ to avoid the consequences of a listing on the EU-Compatible Segment on SWX Swiss Exchange.

See also Section 4.1, a "*General Remarks*" of this report.

- b. Please describe any other the reactions of regulatory authorities, stock exchanges and public companies in your jurisdiction to increased regulation of domestic and foreign public companies in the United States and other countries. In particular, please describe the impact, if any, of the Sarbanes-Oxley-Act in your jurisdiction.

On 16 December 2005, the Swiss Parliament adopted the new Federal Law on the Admission and Supervision of Statutory Auditors⁶⁸ and amended, among others, the provisions on the corporation law pertaining to the auditors⁶⁹. The Federal Law on the Admission and Supervision of Statutory Auditors sets forth requirements for qualifying as

⁶⁵ see Section 7.1 of the List of Charges of the SWX.

(http://www.swx.com/download/admission/fees_en.pdf).

⁶⁶ Caroline Möhrle, *Delisting*, Dissertation, Zurich 2006, Schweizer Schriften zum Handels- und Wirtschaftsrecht, Vol.: 256, p. 1, footnote 3.

⁶⁷ see footnote 37.

⁶⁸ <http://www.admin.ch/ch/f/ff/2005/6867.pdf> (in French).

⁶⁹ <http://www.admin.ch/ch/f/ff/2005/6809.pdf>, and in particular article 727 et seqq.

auditor and governs the supervision of persons performing audit services. Pursuant to the amended corporation law, the applicable audit standard (limited review or ordinary audit) is dependant on the size of the company. The required qualification of the auditor depends on the applicable audit standard and additional factors.

Public companies must undergo an ordinary audit by a government approved and supervised audit company. To qualify as such and in addition to the requirements for auditors performing ordinary audits, the public company's audit company (i) must comply with stricter independence and quality assurance requirements, (ii) warrant compliance with the law, (iii) take out adequate insurance against liability risks and (iv) is, at least every third year, subject to an in-depth inspection by the Federal Audit Supervisory Body. Currently, it is expected that these new provisions will enter into force on January 1, 2008.

5. ADDITIONAL INFORMATION

Please provide any additional information regarding public companies in your jurisdiction that you believe is relevant or would be interesting to this joint working session.

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Gelöscht: —Seitenumbruch—