Vanderbilt Journal of Transnational Law

Volume 6
Issue 2 *Spring 1973*

Article 7

1973

Securities Regulation in Switzerland

Roger Dagon

SECURITIES REGULATION IN SWITZERLAND

*Roger Dagon**

I. INTRODUCTION

The Swiss system of securities regulation, to the extent that it exists at all, is primarily a system of self-regulation. The basic company law, the Code des obligations of 1911,[1] as amended, which enumerates the minimum disclosure requirements for public offerings of foreign or domestic debt securities and for public offerings of new shares of domestic corporations, represents the only formal regulation of corporate issues. The Code exempts secondary offerings of outstanding shares as well as initial issues of foreign shares.[2] Secondary offerings of outstanding shares and issues of new foreign shares, however, must comply with the prospectus requirements established by the exchange[3] if they are listed on a Swiss exchange.[4]

Switzerland does not have a counterpart to the Securities and Exchange Commission of the United States. Enforcement of the

---

* Attorney-at-Law, Geneva. Member, Geneva and Zurich Bars. Dr. jur., 1959, Zurich University School of Law. Research Fellow, University of Michigan, 1968-69.

The author wishes to thank Dean Robert L. Knauss, Vanderbilt Law School, for his support in the writing of this paper; J. Vontobel & Co. (Zurich); Dr. A. Rossi, Secretary of the Swiss Stock Exchanges Association (Zurich); Dr. Maurice Aubert of Hentsch & Cie., Geneva; and Dr. Joseph Dach of Lavoro Bank A.G. (Zurich). This article is part of a project sponsored by the American Society of International Law.

1. 34 CODE DES OBLIGATIONS § 1156 (Payot 1966) (Switz.) [hereinafter cited as C.O.].

2. 26 C.O. § 651 (Payot 1966). *See* F. VON STEIGER, DAS RECHT DER AKTIENGESELLSCHAFT IN DER SCHWEIZ 102 (Zurich 1966).

3. With the exception of foreign securities, listings on Swiss exchanges are subject only to the regulations of the local exchanges; the decision to list foreign shares is made by the Swiss Board of Admissions under a convention signed by the local exchange associations, the "National Bank" and the Federal Government. *See* note 65 *infra* and accompanying text. This convention is also the exclusive source of rules governing the disclosure requirements for foreign shares. Disclosure requirements for foreign shares are in Prospekt-Schema, which is the implementing provision of § 8 of the Regulation on the Listing of Foreign Securities for the Official Trade on Swiss Exchanges.

4. *See* F. VON STEIGER, *supra* note 2, at 101; note 65 *infra* and accompanying text.

disclosure provisions depends on the individual investor, who can pursue legal remedies for fraudulent or misleading statements in the prospectus.[5]

Swiss regulation most closely resembles the vigorous policing of the SEC in the mutual fund area, which constitutes an exception to the rule of self-regulation. Domestic mutual funds are under the strict supervision of the Banking Commission, which delegates quasi-official functions to approved private auditors who insure adherence to Swiss law and to individual fund bylaws. The foreign and "offshore"[6] funds are required to obtain licenses from the Commission to engage in the public solicitation of purchase orders.

Swiss banks control more than 140 billion Swiss francs in marketable securities,[7] the larger part of which probably is owned by nonresident investors. Moreover, in recent years Switzerland has ranked first in capital exports to foreign borrowers. American sources indicate that Swiss banks are by far the largest foreign traders on Wall Street. In 1968, purchases and sales were estimated at 11.3 billion dollars.[8] These statistics reveal a unique facet of the Swiss securities market—the role of Swiss banks as market intermediaries.

This article examines the system that polices the potent and dynamic economic force of Switzerland by presenting the basic structure of securities regulation, including the major considerations of initial issues and trading in the secondary market. A description of mutual fund regulation follows the outlining of the securities regulation structure in Switzerland. The concluding segment of this article contains a discussion of the capital market regulatory scheme.

---

5. For fraudulent or misleading bond issues see 34 C.O. § 1156 (Payot 1966); 26 C.O. § 752 (Payot 1966).

6. *See* note 160 *infra* and accompanying text. Offshore funds are those funds established in an exotic tax-haven country (*e.g.*, Panama, Bahamas, Bermuda and Curaçao), subject to virtually no governmental supervision and, therefore, free to apply any investment techniques (*e.g.*, short-swing transactions, leverage, hedging and particularly short sales) prohibited or restricted in the United States of America. The funds are often under indirect control of American or British investment advisers. D. HAWES, INVESTMENT PARTNERSHIPS AND "OFFSHORE" INVESTMENT FUNDS (P.L.I. 1969); Note, *United States Taxation and Regulation of Offshore Mutual Funds,* 83 HARV. L. REV. 404 (1969).

7. H. BAR, THE BANKING SYSTEM OF SWITZERLAND 25 (3d rev. ed. Zurich 1964).

8. Sheehan, *Swiss Secrecy a U.S. Irritant,* International Herald Tribune (Paris), Dec. 2, 1969).

II. Regulation of the Initial Issuance of Securities

A. *Methods of Issuing New Securities*

Public offerings are used infrequently to form new companies. The negotiated, underwritten public offering, however, is the typical method for the distribution of new securities of large established companies. Distribution is effected by the outright purchase (at a discount) of the entire new issue by a banking syndicate, which then offers the new shares for public subscription to the existing shareholders (a rights offering), to the public or, in certain cases, to both. There is no registration process for new shares, but a prospectus is mandatory for public subscription of debt[9] and equity[10] securities. The basic company law requires a prospectus whenever the offering is for a subscription of new shares (not a secondary offering) and is directed either to an unlimited number of shareholders (a rights offering to a widely held company) or to the public at large. The shareholder's right to subscribe to the offering is certified by a "talon" attached to each share certificate. An offering to existing shareholders is considered unlimited if the talons are negotiable or are traded actively on the exchanges where the underlying securities are listed.

The public offering is limited usually to a subscription period of approximately six days. After the closing, there is a secondary over-the-counter market, but the shares are not listed on a stock exchange until the share certificates have been printed.

If the new shares are offered to the existing shareholders, the board of directors adopts a ratio of exchange, which the shareholders must ratify. The purpose of the ratio of exchange is to avoid the dilution of existing holdings. The shareholder must present the talon during the subscription period in order to exercise his right to subscribe. During the same period, the talons are traded either on the exchange where the shares themselves are listed or in over-the-counter transactions.[11]

---

9. 34 C.O. §§ 1156 *et seq.* (Payot 1966). "Public subscription" is also the usual method for domestic and foreign bond issues. *See* § II(B) of this article *infra*. A prospectus has to be drafted according to § 1156 of the Code des obligations. The content of the prospectus is the same as in share offerings except for some additional requirements such as interest, sinking fund and collateral provisions. There is a limited subscription period of 6 to 8 days as well.

10. *See* 26 C.O. §§ 631, 651 (Payot 1966). No prospectus is required, however, if the subscription form (*bulletin de souscription*) mentions the necessary date. 26 C.O. §§ 631(3), 651(3) (Payot 1966).

11. Sarasin, *Effekten-und Börsengeschäfte, Kundenberatung,* in 1 Banken und Bankgeschafte in der Schweiz 322 (Zurich 1969) [hereinafter cited as Banken]. Assume that the old share is traded at 300 and the new shares

Swiss law guards strictly the preemptive rights of existing shareholders. Although preemptive rights may be excluded by a provision in the charter, a "sacrificed" minority may challenge the exclusion in the courts. Case law tends to protect jealously minority rights[12] unless the survival (and to some extent the normal expansion) of a company requires sacrificing these rights in favor of prior rights held by creditors. Other examples of permissible elimination of preemptive rights are an increase of the stated capital, fusions (exchanges of shares of the surviving company for those of the submerged company),[13] and the issuance of bonds convertible into new shares. The number of fusions and convertible bond issues in Switzerland has increased in recent years.

The Swiss stock exchanges are primarily trading places, and generally are not geared to the distribution of securities. Nevertheless, the over-the-counter distribution system is successful, particularly for mutual fund shares. This success stems, in part, from the high level of domestic saving and the great number of foreign accounts in Switzerland. Because many clients vest the depository bank with a comprehensive power of attorney, the bank, at its discretion, may invest the balance of their accounts in securities. Therefore, the Swiss banks, through their wide network of subsidiaries and branches throughout the country, are able to provide services comparable to those rendered by the American securities industry by selling to individual and institutional investors.

Soliciting orders by telephone or asking for an appointment at the prospective buyer's office or home is considered unethical conduct. Advertising a security issue or mutual fund is the usual sales promotion technique. If a prospective purchaser requests an appointment, an agreement may be reached at his office or home.[14] The

---

offered at 250. If a buyer can purchase one new share and if he holds seven old shares, the talon is worth 6.25:

7 old shares (300)	2,100
1 new share (250)	250
	2,350
8 shares (average)	293.75
value of talon (300 - 293.75)	6.25

12. *See, e.g.*, Wyss Fux A.G. v. Fux, 91(2) R.O. 298, [1966] J. Trib. I. 265 (1re Cour Civile 1965).

13. 51(2) R.O. 432; 49(2) R.O. 49; SCHUCANY, KOMMENTAR ZUM SCHWEIZERISCHEN AKTIENRECHT 652 (Zurich 1960).

14. For example, Investors Overseas Services, Inc., entered an agreement with the Swiss Bankers' Association by which IOS would not sell shares by hawking

salesman, however, may not carry the securities in his briefcase, and the actual transfer must be completed at a subsequent meeting. Federal law prohibits the door-to-door sale of securities (hawking or canvassing).[15] In Geneva, a gentlemen's agreement has evolved that foreign brokers will not compete with the Swiss banks by soliciting purchase orders from resident clients.[16] Resident foreign brokers, however, solicit orders indirectly for their headquarters located outside Switzerland. Because a Swiss resident may unconditionally and freely invest and trade in any securities issued abroad, this market is quite substantial.[17]

B. *Prospectus Requirements*

A prospectus is required only for those securities sold through a public subscription. Public subscription generally means a public offering made through a press release. The press release consists of the entire prospectus, or at least an extract, an announcement of the opening and closing dates and a subscription form for the acceptance of subscriptions.[18] The concept of public offering has been interpreted broadly to include an offering to as few as ten investors.[19] At the organizational meeting, subscribers usually purchase shares in the presence of a notary public;[20] public offerings seldom are conducted at the time of incorporation.[21]

A public offering of foreign shares does not necessitate a prospectus.[22] Nor is a prospectus required when the promoters' shares are offered to the public by the banks in a secondary offering, since

---

and canvassing at the prospective client's home, but rather would resort to normal banking services. *See* Petitpierre, *Accord entre l'Association Suisse des Banquiers et IOS*, 33 J. de Genéve, Feb. 9, 1967.

15. Regulation of June 5, 1931, Concerning Commercial Travelers § 14, 10 R.S. 222 (1931).

16. 137 Neue Zürcher Zeitung, Mar. 4, 1969, at 9.

17. As to foreign securities investments in Switzerland, the Government took vigorous action in June and July 1972, described in detail in §§ V(B) and V(C) of this article *infra*.

18. Budich, *Das Effektenemissionsgeschäft in der Schweiz*, in BANKEN, *supra* note 11, at 347-49. This is different from the techniques used in Germany, Great Britain and the United States, where there is usually no closing date.

19. Budich, *Das Effektenemissionsgeschäft in der Schweiz*, in BANKEN, *supra* note 11, at 343.

20. *See* 26 C.O. § 638 (Payot 1966).

21. The head of the Geneva Commercial Register reported only one case for 1967.

22. F. VON STEIGER, *supra* note 2, at 102.

the law applies only to "new shares" offered in a public subscription.[23]

Although the company law demands that a prospectus be filed with the Commercial Register, the company law prospectus is a mere formality and is not comparable to registration with the SEC in the United States. The quantity and quality of information disclosed varies greatly from company to company.[24] Moreover, the private suit

23. F. VON STEIGER, *supra* note 2, at 101.

24. An example of a "good" Swiss prospectus may be seen by comparing the recent Eurobond and Swiss prospectuses of the same company, the Swiss Aluminum, Ltd., a large international corporation. This corporation increased its stated capital from Sw. fr. 175 million to Sw. fr. 200 million (April 1968) and then from Sw. fr. 200 million to Sw. fr. 250 million (November 1968). The latter issue was designed partially to create the shares for the conversion of a 60 million dollar Eurobond issue by its Curaçao subsidiary. The ten-page Swiss prospectus of November 28, 1968, began with a resume of the shareholders' resolution, by the terms of which the existing shares were split to avoid the dilution of existing holdings, and further, 100,000 new shares issued of which 40,000 were offered to existing shareholders and 60,000 kept by the banking syndicate as trustee for the bondholders who purchased convertibles in the Eurobond issue. A short description of the business purpose, the management of the corporation, board of directors, managers and auditors followed. The remainder of the Swiss prospectus consisted of financial data, balance sheet, profit and loss statement, allocation of profits and the consolidated balance sheet and profit and loss statement of the group. There was no data on production, geographical area of sales, or subsidiaries and affiliates.

Consolidated statements are not required by Swiss law, nor is a list of subsidiaries or affiliates.

The Eurobond prospectus, which was 32 pages long, carried a wealth of data not included in the Swiss prospectus including: (1) underwriting commissions; (2) detailed group capitalization with ratio of shareholders' equity to total capitalization; (3) a statement of consolidated and nonconsolidated net income for the last four years and unaudited data of the current year; (4) a breakdown of the business into business lines, production, and expansion program; a breakdown into the percentage that each business line represents of total group turnover, and an indication of production by subsidiary and affiliate; (5) a chart of the geographical location of fixed assets and a percentage breakdown according to countries where such assets are located; (6) a consolidated statement of source and application of funds for 1967; and (7) a short description of the issuer's competitive position and the total number of employees.

Neither prospectus carried additional data required by United States securities laws, such as share holdings of directors and managers in the stock of the company, their compensation or credit lines, and stock option plans of directors, managers and key employees. In contrast to the lack of information on holdings by directors and managers in the Eurobond prospectus of Alusuisse, a Gulf &

for damages by the individual investor represents the sole deterrent against willful or negligent misstatements or omissions.[25] Swiss law requires the following disclosures in the prospectus:[26]

(1) the date of recording at the Commercial Register;
(2) the name of the firm, its purpose and the location of its headquarters;
(3) stated capital, par value of shares and the nature of any preferences;
(4) participating certificates or *Genusschein* (nonvoting shares);
(5) the names of the managers and auditors;
(6) the last profit and loss statement and balance sheet, as well as the audit;
(7) the record of dividend payments for the last five years or since the corporation's inception;
(8) a listing of outstanding bond issues;
(9) the directors' resolution concerning the issue, amount, number, face value, kind and price of the new securities;
(10) property exchanged for securities (contribution in kind), preferred securities and other preferences;
(11) maturity of interest and dividends, any preferences or limitations on payments; and
(12) the name of the paying agent (agent accepting subscriptions).

The prospectus for bond issues must include information concerning interest payments, maturity, sinking fund and redemption provisions, listing of paying agents and collateral.[27] Foreign bond issues incur the added requirement that the full convertibility of any payments be warranted by the foreign issuer.[28]

C. *The Financial Statement*

The value of the prospectus as a device to encourage intelligent and informed investment depends on the reliability of the data presented in the prospectus. The financial statements reflecting the operations

---

Western prospectus concerning the proposed merger with Sinclair Oil Corp., and the registration statement dated November 26, 1968, disclosed even the credit lines of directors' wives.

25. 26 C.O. § 752 (Payot 1966); 34 C.O. § 1156 (Payot 1966). No case law is reported by Scyboz/Gilliéron, Code Civil and C.O. Annotés (Payot 1972).

26. 26 C.O. § 651 (Payot 1966); 34 C.O. § 1156 (Payot 1966).

27. 34 C.O. § 1156 (Payot 1966).

28. Budich, *Das Effektenemissionsgeschäft in der Schweiz,* in BANKEN, *supra* note 11.

and net worth of the company are especially vital to the investor seeking to make an informed decision. Swiss law demands that every company maintain an income statement and a balance sheet,[29] but prescribes neither the system of accounting to be used nor the composition or nature of the annual financial statements. The basic company law refers only to "generally accepted accounting principles."[30] The accounting profession, however, has established general systems and uniform charts for the annual financial statements. Moreover, the Ordinance to the Federal Law on Banks and Savings Banks of August 30, 1961, as amended,[31] outlines detailed charts needed for the annual balance sheet and profit and loss statement. The Regulation of February 20, 1967, to the Law on Mutual Funds of July 1, 1966, provides the detailed accounting system required for the mutual funds that hold securities and for real estate mutual funds.[32]

1. *Financial Reporting Requirements and Practices.*—The company law deals specifically with the determination of corporate net worth. Under the statute, assets are valued not at their market price but at the value that the board of directors deems appropriate.[33] "Silent reserves" for contingent liabilities[34] may be created by entering assets on the balance sheet at less than cost or market value. Fixed assets, however, must not be valued at more than cost, and current assets must not be valued above the lower of cost or market value.[35] Securities may not be valued at more than the average market price over the one-month period immediately preceding the date of the balance sheet;[36] over-the-counter stock is valued at cost.[37] Widespread practice endorses the entry of fixed assets at the value of one franc, but the actual insurance value must be disclosed.[38]

---

29. 26 C.O. §§ 662, 957-58 (Payot 1966).

30. 26 C.O. § 959 (Payot 1966).

31. Switzerland, Ordinance to the Federal Law on Banks & Savings Banks, Aug. 30, 1961, *as amended,* Mar. 11, 1971.

32. Regulation of Feb. 20, 1967, Concerning the Law on Mutual Funds of July 1, 1966, [1967] ROLF §§ 14, 25, 26.

33. 26 C.O. § 960(2) (Payot 1966); NOK v. Glaris, 75(1) R.O. 22, [1949] J. Trib. I. 22 (Bundesgericht, Tribunal fédéral 1949).

34. 26 C.O. § 663 (Payot 1967) approves of silent reserves that may be created by entering assets at less than cost or market value. Under debate was the question whether "fictitious liabilities" could be entered in the balance sheet. Section 663 corresponds to § 133 of the old German Share Company Act.

35. 26 C.O. §§ 665-66 (Payot 1966).

36. 26 C.O. § 667 (Payot 1966).

37. 26 C.O. § 667 (Payot 1966).

38. 26 C.O. § 665(4) (Payot 1966).

The requirement that corporate income statements and balance sheets adhere only to general accounting practices and policies allows the reporting company great flexibility. For example, a plea of business secrecy operates as an absolute bar to disclosure under Swiss law; the company need prove only that business secrecy is affected. Business secrecy has been interpreted liberally to include technical expertise, data that could jeopardize the credit rating of the company and even information that could reveal the competitive position of the company. In a leading case,[39] the Federal High Court upheld the decision by a company's board of directors to refuse a request by minority shareholders for disclosure of corporate investments in a foreign subsidiary and the operating results of that subsidiary. The company's market position in the foreign country had been criticized heavily by the foreign press and by the host government; the High Court reasoned that disclosure of the financial information might exacerbate the situation. Therefore, in the view of the High Court, the effect of disclosure on business secrecy precluded dissemination of the financial information to the minority shareholders. Leading writers in Switzerland have criticized the decision on the ground that it effectively invalidated the shareholders' right to be informed.[40]

The financial statement often omits reference to subsidiaries, or at most lists them at cost. Moreover, companies need not divulge their gross sales and cost of sales, data considered essential by the American investor. Finally, Swiss law does not require the disclosure of the minimum amount of data needed to permit the assessment of cash flow.

2. *Voluntary Disclosure.*—Some companies have begun to release more financial data than the law requires. Studies indicate that in 1966 only three of the important international companies provided enough data to enable investors to assess reasonably the financial condition of the company.[41] Two-thirds of the important international corporations disclosed their annual gross sales, but only sixteen per cent provided meaningful data on consolidated group sales. The statements of only two companies provided enough data to determine cash flow. Indications of working capital (assets actually employed for current business) were generally nonexistent or

39. 82(2) R.O. 217 (1956 Bundesgericht, Tribunal federal 1956).

40. *E.g.*, Bürgi, *Die Aktiengesellschaft*, in 39 KOMMENTAR ZUM OBLIGATIONENRECHT art. 697 (1957).

41. Studies have been conducted by the "Association Suisse des Analystes Financiers," Commission "Information des Actionnaires," Geneva, on disclosure by the most important international companies.

deficient. Moreover, one company provided data on depreciation according to the useful life of assets. Reports of business prospects and semi-annual or quarterly reports were rare. The companies seldom provided projected investments or comments and notes to the financial statements. Liabilities typically were combined with reserves. With the conspicuous exception of Swiss Aluminum, Ltd., omissions of investments in subsidiaries, minority interests and statements of sources and applications of funds for the company's fiscal period abounded. Corporate disclosure was obviously insufficient in Switzerland.

In 1968, the amount of financial data disclosed had increased. Yet, only 7 of 23 companies provided more than 50 per cent of the data deemed necessary for a valid assessment of corporate worth and performance.[42] During 1970, the 21 most important Swiss corporations reported only 44 per cent of the requisite financial information.

3. *Company Law Reform.*—The weakness of the presentation and the content of Swiss company financial statements is acknowledged generally. In 1968, the Federal Council appointed a Work Group to study potential reform of the Swiss company law. The Work Group published an "Interim Report" in April 1972.[43] The Work Group proposed minimum requirements for the share companies' annual reports, including charts with captions. The profit and loss statement, under the Work Group proposal, would indicate gross sales (consolidated gross sales) or total production, cost of sales, depreciation and depletion allowances, and allowances for bad debts. The Work Group also recommended that the share companies disclose enough data to permit assessment of the cash flow.

The Work Group distinguished three kinds of "silent reserves": (1) reserves created by the increase in value of assets that are carried on the books at cost (inflationary reserves); (2) reserves created by prudent valuation of assets in accordance with generally recognized management principles; and (3) arbitrary reserves created by partial or complete omission of assets or by entry of fictitious liabilities.[44] The Work Group has not challenged the validity of the first two types. Therefore, the board of directors would retain considerable flexibility in the valuation of both assets and the extent of contingent liabilities. The third type of silent reserves, "arbitrary hidden reserves," however,

42. *Id.* 1968 report.

43. WORK GROUP, RAPPORT INTERIMAIRE DU PRESIDENT ET DU SECRETAIRE DU GROUPE DE TRAVAIL POUR L'EXAMEN DU DROIT DES SOCIETES ANONYMES (University of Geneva Law Faculty 1972).

44. At present these arbitrary reserves are not outlawed, but their validity is under debate.

would be prohibited under the Work Group recommendations. Nevertheless, the board would be able to create reserves in addition to those required by generally recognized management principles, but the creation of these additional reserves would have to be in the form of disclosed special reserves and depreciation allowances. The proposed formula indicates that the board may create reserves that are required for "the continued prosperity of the enterprise." If the board's decision to establish special reserves is not challenged by the majority of the shareholders, the board, at its discretion, may retain profits earned by the business.

Under the Work Group proposals the business report must provide the principles utilized to value assets and liabilities and the methods of depreciation (straight line, accelerated, weighted average). The report also must disclose any special reserves that were created and expended to cover losses through the business year, but that were not entered in the balance sheet. The auditors must insure that no "hidden reserves" exist.

These proposals are now under consideration and the final outcome is not certain. The private sector of the Swiss economy, however, defends vehemently the concept of business secrecy and the efficacy of the discretionary power of the board of directors.

4. *Regulatory Role of the Accounting Profession.*—Because Swiss law demands only limited financial disclosure in company reports, the role of the Swiss accounting profession in securities regulation is less dominant than that of its counterpart in the United States. Nevertheless, a significant segment of the profession participates actively in the preparation of company financial reports, albeit for a severely restricted audience. The Code des obligations directs that every company appoint a "shareholders' auditor." In addition, a company that possesses stated capital equaling or exceeding five million Swiss francs, that plans a public offering, or that has debt securities outstanding must select, through its board of directors, an independent "expert-comptable"[45] or an auditing firm to review its balance sheet and to prepare an independent audit.[46] The audit is prepared exclusively for the board of directors and is not made available to the shareholders. Instead, the shareholders receive the report of the "shareholders' auditor," which is ordinarily brief and cursory. The following is typical of the financial report received by the shareholders:

45. Expert-comptables are equivalents of English Chartered Accountants or American Certified Public Accountants. *See* note 51 *infra* and accompanying text.

46. 26 C.O. § 727 (Payot 1966).

> We have examined the balance sheet and the profit and loss statement as required under the Code des obligations. In our opinion the statements concur with the properly kept books and present "fairly" the company's financial condition as of . . . and the operating results for the year ended . . . . They are consistent with generally accepted accounting principles and with the principles of valuation prescribed by law.[47]

The board may refuse to discuss the independent auditors' report at the shareholders' meeting on the ground that disclosure would divulge business secrets.[48] A judge may direct the board to disclose further data, but only to the extent that "the interests of the company" would not be jeopardized.[49] In practice, however, the judge will decide in favor of the board whenever the board raises the "business secrecy" defense, an absolute bar to any disclosure. A minority shareholder, therefore, has no recourse against arbitrary retention of profits by the company since he lacks the power to compel disclosure of the corporate financial records that may reveal the arbitrariness of the retention.

5. *Company Law Reform and the Regulatory Role of the Accounting Profession.*—The Work Group, in its Interim Report, proposed that only a person who possesses accounting and management acumen be permitted to become a company auditor. The Work Group considered the independence of the auditor to be essential; an auditor may not be a director, a manager or an employee of the company to be audited, nor a director, a manager or an employee of any related company (*société liée*). The auditor may not perform accounting, managing or other services inconsistent with his independence for the company to be audited or any related company. Counseling (tax and legal advice) may be permissible, but the Work Group suggested that permanent supervision of the company's accounting department by the company auditor should be prohibited.[50]

---

47. Auditors' report received by the author in the course of his duties as a company director.

48. 26 C.O. § 697 (Payot 1966).

49. 82(2) R.O. 217 (Bundesgericht, Tribunal fédéral 1956). *See* text accompanying note 39 *supra.*

50. A conspicuous example of a concern affected by the Work Group's Report is Fides, Inc., an incorporated auditing firm, the majority of shares of which are owned by the Swiss Credit Bank. If the Work Group's proposals are to be taken at face value, the Swiss Credit Bank could not be audited by its affiliated auditing company.

The Work Group recommended that companies important to the Swiss economy be required to appoint "expert-comptables" as auditors. Companies that the Work Group deemed important to the Swiss economy are:

(1) companies with outstanding bonds and debentures;
(2) companies listed on exchanges;
(3) companies with conditional capital;
(4) companies with sizable sales (ten million francs) and a sizable total of the balance sheet (five million francs); and
(5) companies with over 200 employees.

Only one who has earned a federal master's degree in accountancy[51] may become an "expert-comptable" and thereby serve as company auditor for "important companies." The Work Group proposed that the auditor verify whether the annual statements are consistent with book entries and whether the distribution of profits as proposed by the board of directors is consistent with the law. The Work Group also recommended that the auditor evaluate the adequacy of the company's organization and the efficiency of the company's accounting department. The auditor's paramount task, however, would be to insure the disclosure of any "special reserves."[52] The auditor's financial report, according to the Work Group's proposals, would disclose the special reserves established by the board and would estimate the extent of silent reserves created to cover losses during the business year.

III. Regulation of the Secondary Market

A. *The Swiss Exchanges*

Of the seven exchanges in Switzerland,[53] only the Zurich, Geneva and Basel exchanges are of international importance. The Zurich exchange is the largest in Switzerland.[54] In December 1969, the

51. *See* Law of Sept. 20, 1963, § 36(2), Concerning the Federal Law on Professional Education; Law of Mar. 30, 1965, §§ 26, 29, Concerning the Implementing Ordinance of March 30, 1965; Regulations of June 16, 1967, Concerning Professional Exams of Master-Accountants.

52. *See* § II(C)(3) of this article *infra.*

53. Zurich, Basel, Geneva, Lausanne, Bern, St. Gallen and Neuchatel.

54. J. Vontobel & Co., Kleines Brevier der Zurcher Borse (Handbook of the Zurich Stock Exchange) (6th ed. 1969) [hereinafter cited as Vontobel]. Although trading data is not available in comparable figures, it is estimated that it also ranks first in Continental Europe.

Zurich exchange listed 1,357 securities, including 89 foreign shares and 243 foreign bonds.[55] The sales volume of the Zurich exchange was 41.5 billion Swiss francs (9.7 billion dollars) in 1968; from 1964 through 1967 the Zurich exchange volume averaged 4.5 billion dollars per year compared to an average of 1.3 billion dollars per year for the Basel exchange.[56]

Trading of listed securities outside the exchanges is substantial. Over-the-counter transactions are priced at current market quotations,[57] which are carried in the financial press. Listed stock also is traded to a considerable extent among the banks. Swiss banks usually maintain only a small volume in domestic stocks, but trade extensively for their clients on foreign exchanges, particularly in American securities.[58] When trading on foreign exchanges for their clients, the banks act as dealers rather than as commission agents (*Nettoabrechnung*), unless otherwise directed by a client. Although there are no legal margin restrictions, customary rules (*Usanzen*) usually provide that credit will not be extended beyond 50 per cent of the purchase price. The client must supply the balance in cash or securities.[59] For particularly speculative shares, the cash requirements are higher (at least 70 per cent). Credit regulations enacted by the Federal Parliament on December 20, 1972, limit the banks to extremely narrow margins. The total credit volume (total credits per bank) is restricted to a six per cent increase in the period from August 1, 1972, to July 31, 1973.[60]

---

55. *See* VONTOBEL, *supra* note 54, at 5.

56. VONTOBEL, *supra* note 54, at 5. For a discussion of the Basel Exchange see COMMITTEE OF THE CHAMBER OF BASEL SECURITIES EXCHANGE, BASLER EFFEKTENBORSE JAHRESBERICHT 24 (1967).

57. 15 C.O. § 436 (Payot 1966). *See* Börsenordnung (Exchange Regulations) § 8, in ZURICH SECURITIES EXCHANGE ASSOCIATION, HANDBUCH DER ZURCHER EFFEKTENBORSE (1965) [hereinafter cited as HANDBUCH]; Zurich Law on Professional Trade with Securities § 15 (1912), in HANDBUCH. The applicant trader has to name the securities offered or sought in a cash or forward deal on the exchange, and he must make a price. If the offer has been repeated three times without an acceptance, he may apply the price he has made (called an "application" transaction at the market quotation).

58. *See* note 8 *supra* and accompanying text.

59. H. BAR, THE BANKING SYSTEM OF SWITZERLAND 61 (3d rev. ed. 1964). The Geneva trading market is characterized by a high incidence of cash deals. In Zurich approximately 70% of the cash deals are in the spot market, the balance being in forward dealings.

60. Federal Decree Instituting Measures in the Field of Credits, [1972] ROLF 322; Implementing Ordinance of January 10, 1973, [1973] ROLF 86.

B. *Listing Securities on the Exchanges*

Among the securities listed on the Swiss exchanges are corporate shares (including those of closed-end investment companies), government bonds and debt issues of intergovernmental agencies and international governmental organizations.[61] The primary determinant for listing is the existence of a trading market for the shares.

Before a security may be listed on a Swiss exchange, an introductory prospectus describing the security must be published by the issuing company in a local newspaper.[62] The issuing company certifies the accuracy of the information supplied in this prospectus.[63] The information is often identical to that contained in the issue prospectus, unless issuance antedates admission to the exchange by more than six months.[64] The local exchanges seldom verify the information disclosed. The local exchanges, however, may not approve foreign securities until the Swiss Board for the Admission of Foreign Securities to Swiss Stock Exchanges (*Instance Suisse d'Admission, Zulassungstelle*) has sanctioned the application for listing. If the Board vetoes the application, the local exchanges may not proceed further.[65] The Board also published an outline of the information to be disclosed in the introductory prospectus for the foreign securities.[66]

---

61. H. BAR, *supra* note 59, at 64.

62. Regulation of June 21, 1938, Concerning the Introduction of Foreign Securities for Trade and the Listing on Swiss Exchanges, in HANDBUCH, *supra* note 57; Implementing Convention of June 7, 1938, Concerning the Listing of Foreign Securities on the Official Market of the Swiss Exchange, in HANDBUCH, *supra* note 57; Zurich, Kotierungsreglement § 4 in HANDBUCH, *supra* note 57.

63. Zurich, Kotierungsreglement § 4(4), in HANDBUCH, *supra* note 57.

64. Zurich, Kotierungsreglement § 4(2), in HANDBUCH, *supra* note 57.

65. Convention of June 7, 1938, Concerning the Listing of Foreign Securities for the Official Trade on the Swiss Exchanges § 9.

66. Prospekt-Schema. *See also* Zurich, Kotierungsreglement §§ 4 *et seq.*, in HANDBUCH, *supra* note 57. The Prospectus must provide: (1) data on the issue, number, kind of securities, interest, payment conditions, publications of drawings, sinking fund provisions, collaterals such as mortgages and guarantees (by parent company), etc. [Prospekt-Schema § 1(2)-(5) Zurich, Kotierungsreglement § 4(VI)(1)-(6)]; (2) data on the issuer, incorporation, firm purpose, capital and reserves, voting rights, preferred equity securities, bonus shares (nonvoting shares) [Prospekt-Schema § 2(1)-(3), (5); Zurich, Kotierungsreglement § 5(1)-(5)]; (3) composition of the management and auditors [Prospekt-Schema § 2(5); Zurich, Kotierungsreglement § 5(6)]; (4) the dividends paid through the last five years or from the corporation's inception (a company must have been in existence for at least one year and must have published an annual report) [Prospekt-Schema § 2(6); Zurich, Kotierungsreglement § 5(7)]; (5) indication of the other bond

C. *The Regulation of Brokerage Activities*

Self-regulation is the rule in the brokerage business as in most other sectors of the securities industry. Each exchange promulgates its local laws and regulations;[67] each exchange also prescribes the qualifications for membership. Membership is open only to banks.[68] Each bank delegates a senior securities expert as its representative to execute the actual trading on the floor. The banks trading on the stock exchanges insure themselves against the risks of insolvency in order to protect the other members from the consequences of an insolvent bank's failure to fulfill commitments incurred in exchange transactions. The employer bank must bond the representative's activities by posting a security deposit with both the Government and the Stock Exchange Association.[69] The security is forfeited for

---

issues, sinking fund and redemption provisions and maturity [Prospekt-Schema § 2(7); Zurich, Kotierungsreglement § 5(8)]; (6) fiscal period and the charter provisions concerning the establishment of the balance sheet, depreciation and allocation of net profits [Prospekt-Schema § 2(8); Zurich, Kotierungsreglement § 5(9)]; (7) the last balance sheet and profit and loss statement including a summary report of the contingent liabilities guarantees and the report of the auditors (extract) [Prospekt-Schema § 2(9); Zurich, Kotierungsreglement § 5(10)]; (8) the principal subsidiaries and affiliated companies including indication of outstanding share capital and bond issues [Prospekt-Schema § 2(10); Zurich, Kotierungsreglement § 5(11)]; (9) a brief resume of the current business year, provided that more than six months have passed since the last stockholders' meeting [Prospekt-Schema § 2(11); Zurich, Kotierungsreglement § 5(12)]; (10) indication of the local paying agent for interest, dividends or redemption of bonds [Prospekt-Schema § 1(7); Zurich, Kotierungsreglement § 4(VI)(5)]; and (11) undertaking by the issuer of timely publication of official notices to the investors in the local newspaper [Prospekt-Schema § 1(8); Zurich, Kotierungsreglement § 4 (VI)(7)]. The National Bank, which is charged with preventing adverse effects on domestic capital and money markets by domestic listings of foreign securities, may block the application. *See* § V of this article *infra*. *See also* Convention of June 7, 1938, Concerning the Listing of Foreign Securities on the Official Market of the Swiss Exchanges § 5, in HANDBUCH, *supra* note 57.

67. The exchanges of Zurich and Basel are under state supervision, but that of Geneva is not.

68. On January 1, 1946, the status of the individual stockbroker (*agent de change*) was abolished in Geneva and, with one exception (Collet, Odey & Cie), only banks are admitted as brokerage firms. The banks designate a specialized employee as their delegate who is registered as a broker (*agent de change*) at the state's offices in accordance with Geneva exchange regulations. Law of December 20, 1856, *as amended,* Concerning the Geneva Exchange § 8.

69. In Zurich, the requirement is a deposit of Sw. fr. 300,000 with the Stock Exchange Association and Sw. fr. 30,000 with the State Bank. *See* Zurich Law on

nonfulfillment at the date of liquidation (failure to pay or deliver) or for fines assessed against a member. The representative exercises purchase and sell orders for his employer bank; the bank in turn repurchases from or resells to the client. Therefore, the banks, unless specifically directed by the client to act as brokers, perform dealer functions.

The Swiss exchanges function as "continuous auction markets": listed securities may be traded on the exchange, in the premarket (before the opening of the exchange), or in the over-the-counter market. Since a bank may have a position in securities (*i.e.* act as a dealer) it may sell outside the exchange, but only at the latest exchange price, unless the client expressly requests an urgent delivery outside exchange hours.

In Zurich, Basel and Geneva, only banks subject to the Federal Law of 1934 Concerning Banks and Savings Banks[70] are admitted to the exchange as trading members.[71] The large corporate banks and the private banks[72] are trading members. The exchange membership in Zurich is open-ended, but only two foreign bank subsidiaries (Allgemeine Elsässische Bankgesellschaft and American Express Company) are members. In Geneva, admission of any trading member requires the common consent of the other members (the foreign-owned Banque de Paris et des Pays Bas is a trading member).

The financial requirements for membership in the Zurich exchange are substantial.[73] An applicant also needs a government license.[74] A

Professional Trade with Securities § 17 (1912), in HANDBUCH, *supra* note 57. In Geneva, the requirement is a deposit of Sw. fr. 200,000 with the Central Bank in cash or 210,000 in listed securities. *See* VONTOBEL, *supra* note 54, at 8.

70. Federal Law of 1934 Concerning Banks and Savings Banks §8, 10 R.S. 329 (1934), *as amended,* Law of March 11, 1971, [1971] ROLF 808.

71. *See* VONTOBEL, *supra* note 54, at 7. In Geneva there are the "membres représentés à la Corbeille" and "membres associés" (banks and investment managers without banking character). Although they enjoy privileged commission rates, they are not permitted at the "Corbeille" (trading rings). *See* note 68 *supra* and note 78 *infra.*

72. Private banks are partnerships with or without limited partners. *See* R. REIMANN, KOMMENTAR ZUM SCHWEIZERISCHEN BANKENGSETZ § 1 (Zurich 1963).

73. *See* Zurich Law on Professional Trade with Securities § 17 (1912), in HANDBUCH, *supra* note 57; note 69 *supra.*

74. Zurich Law on Professional Trade with Securities §§ 2, 18 (1912), in HANDBUCH, *supra* note 57. Sarasin, *Effektenund Börsengeschafte, Kundenberatung,* in BANKEN, *supra* note 11, at 312. The Government also required a license for any over-the-counter trading in Zurich and in Basel. A license is not required in Geneva. *See also* VONTOBEL, *supra* note 54, at 7.

prospective member of the exchange must produce excellent references, and its management and majority stockholders must possess spotless reputations. The "trader" or representative, who must be a Swiss national, needs the sponsorship of at least two other member banks. Ordinarily, he has many years of experience on the exchange as an aide or associate of a representative.[75]

The brokerage business in Geneva is not subject to government licensing; all "traders," however, are Swiss nationals appointed by firms "recorded in the Commercial Register" and by members of the "Chambre de la Bourse."[76] Although only those banks subject to the Federal Law on Banks are "trading members" ("membre de la corbeille"),[77] the Geneva exchange admits nonbank associate members ("membres associés").[78]

Foreign brokerage establishments abound in Switzerland, particularly in Zurich, Geneva and Basel. The Geneva banks recently revealed a thirty-year-old gentlemen's agreement providing that foreign brokers would refrain from soliciting orders from the resident constituency. The agreement indicates that foreign brokers operate only to bring "Wall Street" and other exchanges closer to the Swiss banks by accepting both wholesale orders and orders from foreign clients temporarily residing in Switzerland, and by giving investment advice.[79]

D. *Trading in Foreign Securities*

Foreign securities are traded most frequently on the Zurich, Geneva and Basel exchanges. Although individual purchasers may request to be registered as shareholders of the foreign corporations whose shares they purchase, individual registration ordinarily is discouraged. The Swiss banks have developed an ingenious alternative to the registration of individual purchasers as shareholders of a foreign corporation—the bearer certificate (*Inhaber Zertifikat*). The bearer warrants that are issued to the bank's clients are "global bearer certificates" representing lots of 5, 25, 100, 500 or more original, registered shares (*e.g.*, shares of GM, IBM or GE) purchased by the bank and held in its

75. *See* VONTOBEL, *supra* note 54, at 7.

76. *See* note 68 *supra.*

77. Newcomers are admitted only by common consent.

78. While members of the "Corbeille" do not pay commissions, the "membres associés" have privileged rates compared to nonmembers (other Swiss banks) and third parties. Thus the distinction between "Corbeille," associates of the "Chambre de la Bourse," and other nonmember banks is of little financial significance.

79. *See* 137 Neue Zürcher Zeitung, Mar. 4, 1969, at 9.

name. Only the bearer certificate warrant is traded on the exchange. The terms on the "global bearer certificate" provide that the original shares acquired by the bank must be held in a special deposit. A "société fiduciaire,"[80] who acts as a trustee, supervises the original shares for the benefit of the client. Since the holder of the "global bearer certificate" can request the bank to surrender to him the original securities, the depository bank may not dispose of them without first obtaining the client's express selling order. Dividends are paid to the client in proportion to his interest in the stock.

The bearer warrants may represent Swiss shares of high market value (bonus shares).[81] Bonus shares (*e.g.*, the Hoffman LaRoche bonus shares) may be beyond the financial reach of the average investor. With the permission of the issuing corporation, however, the exchange may list bearer warrants representing fractional parts of the bonus shares, thereby increasing their marketability.[82]

IV. MUTUAL FUND REGULATION

A. *Background*

The economic characteristics of the Swiss mutual fund[83] system resemble those of its American counterpart. The legal foundations of the two systems, however, are dissimilar. The investment trust, similar

80. The "sociétés fiduciaires," who generally are incorporated auditors (*Treuhandgesellschaft*) also performing services as legal, tax and economic advisors, are not regulated. The "street-name" system was developed first for Italian registered shares such as Montecatini, Pirelli, Olivetti and Fiat, by the Decree of October 27, 1941, which introduced a mandatory system of registration of all shares in circulation. Any change of ownership had to be registered with the foreign diplomatic service of Italy. After Law No. 43 of February 7, 1956, had amended some of the restrictions to favor foreign investments in Italy, the Swiss bankers acted to have certain Italian shares registered in the street name. There is a limited number of bearer warrants circulating in Switzerland. Recently, negotiations have taken place with the competent Italian authorities to have a wider array of registered Italian securities traded in Switzerland and listed on the exchanges in the form of bearer warrants or in substantia.

81. 26 C.O. § 651 (Payot 1966). A *bon de jouissance* (*Genusschein*) is a nonvoting share in the net profits, or it may confer a warrant to subscribe to new shares.

82. Patry & Aubert, *Le Régime Juridique des Valeurs Mobilieres en Droit Suisse*, in THE LEGAL STATUS OF SECURITIES IN EUROPE AND THE UNITED STATES (Presse Universitaires 1970).

83. Law of July 1, 1966, Concerning Investment Trusts, [1967] ROLF 125 [hereinafter cited as Investment Trust Act of 1966]; Regulations of Jan. 20,

to the unit trusts prevalent in the United Kingdom, is the medium utilized to establish Swiss mutual funds. Banks initiate and sponsor most mutual funds. These depository banks, acting as custodians, issue and distribute the investors' shares, but separate corporations organize and manage the funds. A bank must serve as custodian unless the management company is a bank. The management companies must meet a minimum stated capital requirement of one million francs, at least 500,000 francs of which must constitute paid-up capital. If management is entrusted to a corporate bank, however, its paid-up capital must be at least two million francs. A corporate bank may serve both as manager and as custodian if it has satisfied the minimum capital requirement of two million francs. When a private bank formed as a partnership manages a fund, or serves as both manager and as custodian, one of its partners is exposed to unlimited liability.[84]

The investor's rights are specified in the investment agreement and enumerated both on the fund certificates and in the fund bylaws (*reglement du fonds; Fondsreglement*).[85] Changes in the Fondsreglement are subject to the approval of the courts and must be published in the "Feuille Officielle Suisse du Commerce" (*Schweizerisches Handelsamtsblatt*). The investor possesses only contractual rights (iura ad personam); in the case of bankruptcy, a receiver[86] is appointed to safeguard the investor's rights in the fund. Unlike the mutual fund investor in the United States, the Swiss investor has no voting rights, and, hence, no control over the management of the fund. The investor's remedies against mismanagement of the fund are either an injunction ordering the management to adhere to the investment agreement, or a claim for damages.[87]

1967, [1967] ROLF 145 [hereinafter cited as 1967 Regulations]; Ordinance of Jan. 13, 1971, Concerning Foreign Investment Trusts, [1971] ROLF 145. *See* J. SCHUSTER, ANLAGEFONDGESETZ (Zurich 1967); Hirsch, *Fonds de placement,* SEPTIEME JOURNEE JURIDIQUE 46 (University of Geneva Law Faculty 1967).

84. Investment Trust Act of 1966 §§ 3, 5. There are a number of important banks formed as partnerships with or without limited partners, subject to the Law on Banks and Savings Banks. *See* note 70 *supra* and accompanying text. While all Swiss banks control more than 140 billion Swiss francs in marketable securities, the private banks (Julius Bär, J. Vontobel & Co., Zurich; A. Sarasin, Basel; Ferrier Lullin & Co., Hentsch & Co., Lombard, Odier & Co. and Pictet & Cie, Geneva, to name some of the most important) control about 20 billion. *See* H. BAR, *supra* note 59, at 23.

85. Investment Trust Act of 1966 § 9(II).

86. Investment Trust Act of 1966 §§ 17, 44(II), 45.

87. Investment Trust Act of 1966 § 23. *See* Bächstädt v. Müllach A.G., 96(2) R.O. 388(b) (Bundesgericht, Tribunal fédéral 1970).

B. *Regulation*

1. *General Description.*—Aside from state supervision of the banks, the mutual funds system is the only segment of the securities industry that receives close governmental regulation.[88] The Investment Trust Act of 1966[89] vests responsibility for the comprehensive supervision of the domestic mutual fund system and for the licensing of foreign mutual funds[90] in the Banking Commission and its Chamber of Mutual Funds.[91]

The Commission wields wide-ranging powers to review and approve fund bylaws[92] and to appoint special auditors to check financial reporting.[93] The Commission may require the fund or the depository bank to provide collateral to protect the interests of the investors. The Commission also issues and revokes business licenses.[94] In addition, the Commission appoints receivers or trustees to supervise fund reorganization or bankruptcy proceedings.[95] If the Commission fears disruptions in the Swiss money and capital markets, it may ask the Swiss National Bank to prohibit temporarily the acquisition by mutual funds of foreign securities or real estate abroad.[96] The Commission is competent to determine whether its jurisdiction extends to a particular investment trust, to establish rules of behavior and trading for the funds, to set the time limit for redemption of shares of funds

88. Although mutual fund shares are traded, listing on exchanges was not possible in Switzerland until December 1, 1971, when the Basel Exchange issued regulations sanctioning exchange listing of mutual fund shares. 60 REPORT OF SWISS BANKERS' ASS'N 62 (1971-1972).

89. Investment Trust Act of 1966 § 40.

90. Only the *domestic* open-end type, however, is regulated by the Investment Trust Act of 1966. Foreign funds in whatever organized legal form (unit trust or corporation) need a license for public offerings in Switzerland. *See* § IV(D) of this article *infra.*

91. The Chamber is composed of the Chairman and three other members who are experts in the mutual fund industry. Members of the Chamber may not serve as director or manager of any mutual fund. Association by members with an auditing firm registered with the Commission also is prohibited.

92. Investment Trust Act of 1966 §§ 9, 11, 41(1).

93. Investment Trust Act of 1966 § 42.

94. Investment Trust Act of 1966 §§ 3, 5.

95. Investment Trust Act of 1966 §§ 43, 45.

96. Investment Trust Act of 1966 § 48. Throughout the period of a monetary crisis, the foreign funds may not issue shares in Switzerland. The Government recently prohibited sales of mutual funds to nonresident aliens. (Sales by investment trusts holding more than 80 per cent of their assets abroad were exempted from the prohibition.) Nonresident aliens may not hold more than 25 per cent of the assets of a real estate fund. *See* § V of this article *infra.*

holding immovable property and to determine the conditions for licensing a foreign investment company. Decisions of the Commission, however, may be appealed to the Federal High Court.[97]

2. *Jurisdiction.*—The Commission's jurisdiction extends to funds engaged in the public solicitation of orders.[98] The burden of proving that a fund engages only in private solicitation rests with the management of the fund seeking the exemption. The Commission jealously guards its jurisdiction by narrowly construing the private solicitation exemption.[99] While no formal principles concerning solicitation have been promulgated, the Banking Commission has established certain "rules of behavior" (*lignes de conduite*). For example, if the solicitation is directed to more than a limited and determined number of persons, the Commission deems it a public solicitation. The success of the solicitation is immaterial. A bank that sells shares only to its clients by soliciting orders only within its premises probably will come within the Commission's jurisdiction because the number of the bank's clients is generally not limited. The number of persons to whom the solicitation is directed may be determined and limited if the bank solicits orders only for institutional investors or only for wealthy clients whose accounts exceed 100,000 dollars. The likelihood of qualifying for a private solicitation exemption increases in proportion to the selectivity of the methods of solicitation and the limitations on the number of prospective clients. The prerequisite to regulation under the 1966 Investment Act is that the fund be professionally managed for diversified mutual investment.[100] Although professional management is essential to the Commission's exercise of jurisdiction, diversification is not. If the fund engages in the public solicitation of orders and utilizes professional management, its lack of asset diversification cannot create an evasion of the Commission's jurisdiction.[101]

---

97. Investment Trust Act of 1966 § 47. The appeal petition must be filed within 30 days of the Commission's decision. Important decisions of the Commission are published in the *Decisions Administratives des Autorités Fédérales.* 1967 Regulations, *supra* note 83. The collection of administrative rulings of the Confederation is much behind schedule.

98. Hirsch, *Fonds de placement,* SEPTIEME JOURNEE JURIDIQUE 71 (University of Geneva Law Faculty 1967).

99. Verwaetungsgesellschaft für Mittellständische Anlagefonds v. Commission Federale des Banques, 93(1) R.O. 476, [1969] J. Trib. 2 (Chambre de Droit Administratif 1967).

100. Switzerland Federal Supreme Court Decision of September 16, 1970, 96(2) R.O. 388 (1970).

101. 1967 Regulations, *supra* note 83, § 5. J. SCHUSTER, ANLAGEFONDGESETZ § 2(3) (Zurich 1967).

3. *Audits and Disclosure Requirements.*—The Investment Trust Act of 1966 requires that the basic agreement between the management and the investor reveal the following information:[102]

(1) the objective(s) of the fund and its organization (management company and custodial bank);[103]
(2) the investment policy of the fund,[104] including a description of the investments held (real estate, securities or mixed investments) and the geographical area in which investments are to be made;[105]
(3) the issue price and the repurchase price of shares;[106]
(4) the allocation of net profits and of realized capital gains;[107]
(5) a detailed indication of management fees, commissions of the depository bank, sales load, redemption commissions and other incidental expenses;
(6) the fiscal year;
(7) the address or location where the bylaws and the annual and quarterly reports can be obtained;
(8) publications in which legal notices of the fund are printed; and
(9) the duration of the fund. [108]

A significant element of the mutual fund regulatory scheme is the annual audit performed by an independent registered auditor.[109] The annual audit investigates the liquidity of the fund and insures that the fund's activities conform to the standards prescribed by law.[110] The business judgment of the fund managers, however, is not question-

102. Investment Trust Act of 1966 §§ 9, 11.
103. Investment Trust Act of 1966 § 11(II)(a).
104. Investment Trust Act of 1966 §§ 6, 11.
105. Investment Trust Act of 1966 § 10(I)(a). If the investment scheme includes securities, they should be identified further as listed or unlisted shares, and as equity shares, bonds or convertibles.
106. Investment Trust Act of 1966 § 11(c).
107. 1967 Regulations, *supra* note 83, § 12. Growth funds that carry their profits and realized capital gains forward for reinvestment are allowed, but their policies must be disclosed.
108. Investment Trust Act of 1966 § 11(d)-(i).
109. Investment Trust Act of 1966 § 37(1); 1967 Regulations, *supra* note 83, § 31. Only specialized firms with adequate and competent members (*i.e.* those who hold the diploma of accounting, the highest grade in accounting, and who are experienced in the banking sector as auditors) may be considered for the annual auditing that is required.
110. Investment Trust Act of 1966 § 15(II).

ed.[111] The review extends to both management and custodial accounts.[112] Adherence by the fund managers and custodians to fund bylaws and to the prescribed ratio of the equity held by management to fund net assets also are examined.[113] The results of the annual audit are submitted to the Banking Commission as well as to the management of the fund and to the custodian bank;[114] the annual report to the shareholders includes an extract of the audit report.[115]

4. *Regulation of the Management Companies.*—A management company may not engage in a trade or business other than portfolio management; likewise, it may not acquire the controlling interest in a domestic or foreign enterprise engaged in a trade or business other than portfolio management.[116] The Investment Trust Act of 1966 prohibits the purchase by a management company of merchandise warrants, merchandise (including gold or silver) or shares of another mutual fund that is directly or indirectly under the same management (a "captive fund"). Furthermore, a management company may not hold "treasury shares" (its own certificates). A management company, however, is permitted to hold shares redeemed from the investor. Investments in over-the-counter stocks are allowed if provided for in the fund bylaws.[117]

The management company must purchase common stock or securities from the fund at the listed price.[118] A fund may not utilize leverage techniques or dual fund devices, buy on margin or maintain short positions in securities.[119] A real estate mutual fund, however, is permitted to contract mortgage loans if no more than 50 per cent of the market value of the fund's immovable assets are involved in the loan.[120] The purchase and redemption prices of the shares are

111. 1967 Regulations, *supra* note 83, § 35 (surprise audit without requesting appointment provided for by law).

112. 1967 Regulations, *supra* note 83, § 36. The auditors of the custodian bank must submit a report to the auditors of the management company.

113. The prescribed ratio is one per cent. Investment Trust Act of 1966 § 4. The maximum equity required, independent from the fund's total assets, is ten million Swiss francs.

114. 1967 Regulations, *supra* note 83, § 37.

115. Investment Trust Act of 1966 § 15. Only a summary is required.

116. Investment Trust Act of 1966 § 3(2).

117. 1967 Regulations, *supra* note 83, § 10(2)(a).

118. Investment Trust Act of 1966 § 14(3).

119. Switzerland Federal Supreme Court Decision of October 29, 1971, 97(1) R.O. 866 (1971). Under a dual fund device, the shareholders are entitled only to the fund's income if they are in category A, and only to the fund's capital gains if they are in category B.

120. Investment Trust Act of 1966 § 35(III).

computed on a daily net assets basis plus the sales load or redemption commission.[121]

5. *Restrictions on Holdings.*—The Investment Trust Act of 1966 places the following restrictions on specific holdings of the mutual fund: (1) no more than seven and one-half per cent of the assets of the fund, calculated at net asset value on the day of investment, may be held in the securities of any single enterprise;[122] (2) a fund may not own securities representing more than five per cent of the votes of any one company;[123] and (3) securities that have arrearages outstanding may not constitute more than ten per cent of the assets of the fund.[124] The Act expressly provides that the management company fee, which is based on a percentage of gross revenue, may not be a function of realized or unrealized capital gains or net profits.[125]

C. *Contractual Investment Plans*

Contractual investment plans (*plans d'investissement*)[126] are permitted in Switzerland, but the Banking Commission currently scrutinizes the use of the plans. The few plans now sold in Switzerland are promoted by Swiss banks and by foreign and offshore mutual funds. As long as the plans are promoted by Swiss banks, the Commission has opined that no particular need for regulation exists since the banks are presently subject to comprehensive inspection by auditors registered with the Banking Commission. The bank, when acting merely as an account executive or representative, is not subject to the mutual fund law. Only the purchase of mutual fund shares by the bank falls within the confines of the Investment Trust Act of 1966. Under the contractual investment plans promoted by Swiss banks, the individual investor, an account holder, directs the bank to make installment payments to one or more mutual funds sponsored by the bank. Each month for ten, fifteen or twenty years the investor pays an amount designated in the contract to the "plan com-

121. Investment Trust Act of 1966 §§ 11(c), 12(III).

122. Investment Trust Act of 1966 § 7(I).

123. Investment Trust Act of 1966 § 7(II). If a management company holds several funds, the limit is 10%.

124. Investment Trust Act of 1966 § 7(III).

125. Investment Trust Act of 1966 § 11(e).

126. *E.g.*, Union Bank of Switzerland and Swiss Bank Corporation (*plan d'investissement* 1969).

pany."[127] The payments[128] are invested in one or more funds selected by the investor. The sales load, approximately 2.5 per cent, is based on the total investment but is payable in small portions deductible from each monthly installment. The plan, which is essentially an agency agreement, is revocable under Swiss law.[129] An early withdrawal by the investor, however, generally evokes a heavy penalty in the form of a percentage of the total unpaid monthly payments for the entire investment period.[130]

D. *Regulation of Foreign Mutual Funds*

Switzerland recently tightened its regulation of foreign mutual funds.[131] Previously, the foreign funds had enjoyed greater latitude in their operations than had Swiss mutual funds. Under prior regulations, a foreign fund was authorized to conduct public solicitations after a corporate or private bank had been appointed as its representative. In its prospectus and in other reports the foreign fund was required to state clearly its nationality and to disclose whether the supervision to which it had been subjected in that country was equal to the supervision accorded Swiss funds. (In the past, many unregulated funds solicited publicly in Switzerland.) In addition, the Swiss representative of the foreign fund was required to submit to the Banking Commission an annual report of the total shares issued and repurchased in Switzerland. The Swiss National Bank demanded certain disclosures of the fund's management.[132] At the same time,

127. The "plan company" is not necessarily a separate legal entity since the plan is carried out by an internal "service" or department. *See* Swiss Bank Corporation (*plan d'investissement* 1969).

128. Sw. fr. 50 or Sw. fr. 100 ($11.60 or $23.20) per month, or a multiple thereof. *See* Swiss Bank Corporation (*plan d'investissement* 1969).

129. 13 C.O. § 404 (Payot 1966).

130. *See* notes 126 & 127 *supra.* Assume 120 monthly payments at $100 each and withdrawal after 10 months. The balance of 110 monthly payments at $100 is subject to a commission of 1%, which would amount to a penalty of $110. The penalty becomes exorbitant if one assumes, for example, 300 monthly payments (25 years) at $50 each and a cancellation by the investor after 3 months. The penalty then is 1% of $14,850—*i.e.* $148.50 out of $150 invested in shares.

131. Ordonnance sur les fonds de placement étrangers of January 13, 1971, [1971] ROLF 145 [hereinafter cited as 1971 Ordonnance].

132. 1967 Regulations, *supra* note 83, § 6, *as amended,* 1971 Ordonnance § 12. Under § 12 the representative of the fund should submit quarterly reports to the Swiss National Bank in Zurich, showing: (1) the number of shares issued in Switzerland in the three-month period and the amount paid for such shares; (2)

however, the foreign mutual funds could engage in practices that were expressly prohibited for domestic funds, *e.g.*, employing leverage techniques, dual fund devices and "super funds" that invest in other investment trusts under the same management. The investment policy of foreign funds was not subject to the restrictions of the Investment Trust Act of 1966 or to review by the Banking Commission. Only gross violations of long-standing policies occasioned Commission regulation. For example, the Commission halted public sales of a well-known foreign mutual fund when the fund suspended redemption. The suspension of redemption violated the rule that a fund holding securities must redeem its own shares at any time.[133] Generally, however, the Swiss Government relied on its powers of persuasion and on private investor suits[134] to maintain domestic standards in foreign fund operations.

A foreign fund is by definition one that is organized under foreign law or whose management is located or incorporated abroad. If the foreign fund is professionally managed, as opposed to self-management as in a partnership, and if the fund repurchases the shares issued, it is defined as a mutual fund regardless of its legal structure (corporate form or unit trust). A fund not within the definition is not allowed to solicit orders from the public under the title of "*Fonds de placement*," "Investment-Trust" or "Fund."[135] Authorization[136] for the public solicitation of purchase orders for mutual fund shares is given only to Swiss banks or branches of foreign banks in Switzerland that are subject to the Federal Law of 1934 for Banks and Savings Banks,[137] *i.e.* a corporate bank with equity or assets of at least two

---

the number of shares repurchased in Switzerland during the three-month period and the amount reimbursed for such shares; (3) the market value of the fund and the net asset value of each share, with a breakdown of securities in the portfolio, and immovable property, Swiss or foreign, as well as any liquid assets, computed as of the last day of the three-month period; and (4) the face value of the total of contractual plans.

133. *See* Neue Zürcher Zeitung, Nov. 11, 1970 (Investors Overseas Services and its "Fund of Funds"); Neue Zürcher Zeitung, June 6, 1970.

134. Actions against directors and managers were brought by private investors against Investors Overseas Services (I.O.S.) in 1970, 1971 and 1972 before the Geneva courts.

135. 1971 Ordonnance § 1.

136. With the application made by the Swiss representative bank, the Commission requests that the foreign fund submit certain documents such as its charter and bylaws, annual accounts and a prospectus. 1971 Ordonnance § 13(2).

137. *See* note 70 *supra* and accompanying text. The authorization may be denied to banks if they have engaged in unlawful conduct. In Diversified Growth

million francs or a private bank with a partner exposed to unlimited liability. The foreign management must be represented by a bank and may not engage directly in the public solicitation of orders. Any public solicitation of orders from a Swiss resident, even from investors residing abroad, requires authorization.[138] The representative bank has full power to deal with both the Swiss authorities and investors. Furthermore, the representative is held responsible if the foreign mutual fund does not comply with Swiss regulations. When the representative bank in Switzerland achieves authorization, the foreign fund becomes subject to Swiss jurisdiction. An investor, therefore, may bring an action against the foreign fund or attach its assets at the Swiss representative bank.[139]

The new regulation provides that publicity and sales promotion within Switzerland, or by a distributor operating in Switzerland to attract investors residing abroad, must be conducted through the representative bank or persons acting on its behalf.[140] While the sale of contractual investment plans (*plans d'investissement*) by domestic funds is not restricted, the recent regulation on foreign mutual funds provides that contractual plans must be sold by the representative bank in Switzerland. The representative bank also serves as custodian for the shares purchased pursuant to a contractual plan that are not delivered to the purchaser.[141] Clearly, however, Swiss law does not inhibit the front-end load.[142] Further provisions of the new law applicable to foreign funds include the following:

(1) the fund must issue share certificates;[143]
(2) a custodian bank must be appointed to carry out the

Stock Fund Inc. v. Federal Banking Commission, 94(1) R.O. 392, [1969] J. Trib. I. 159 (Chambre de Droit Administratif 1968), the Federal High Court upheld the constitutionality of the regulation.

138. 1971 Ordonnance § 2.

139. 1971 Ordonnance §§ 8(1)-(3). Swiss jurisdiction is maintained by operation of law even after the authorization is canceled. 1971 Ordonnance § 4.

140. 1971 Ordonnance § 9. A representative bank must act at least as co-signatory with the distributor on sales and promotional advertisements. Note, however, that while virtually free in Geneva, the foreign mutual fund distributor needs a government license in Zurich and Basel. Publications in Switzerland should be in an official language and always carry the issue and repurchase price per share. 1971 Ordonnance §§ 9(III), (IV).

141. 1971 Ordonnance § 11.

142. The sales commission under German law may not exceed one-third of each periodical payment agreed on for the first year.

143. 1971 Ordonnance § 4(I)(h).

safekeeping functions for the entire "trust fund" unless the management company is a bank;

(3) if the foreign fund is not under foreign supervision that is equivalent to domestic supervision, the custodian bank must insure that investments and expenses are in conformity with the charter or bylaws;[144]

(4) the foreign fund may invest assets only in securities or immovable property according to the rules of diversified investment;[145]

(5) leverage funds, funds that engage in short sales (hedge funds), funds that purchase merchandise warrants, (*e.g.*, whiskey-funds and super funds ("fund of funds")) may not publicly solicit purchase orders in Switzerland;[146]

(6) short-term credits (*à titre provisoire*) are allowed for any fund up to ten per cent of the fund's assets;[147]

(7) if the investor requests that the fund repurchase his shares by presenting his certificate, the request must be executed immediately and cash paid (an extension of up to two years from the fund's receipt of the repurchase order is permitted for real estate funds only).[148]

The charter, bylaws or the issue prospectus of the foreign mutual fund must provide the following data: (1) name, legal form and seat of the fund or investment company liable to the investor;[149] (2) investment policy, particularly the kind of investment, business lines and geographical location of the assets;[150] (3) a calculation of the issue and repurchase prices;[151] (4) allocation of profits and capital gains;[152] (5) types, amounts and methods of calculation of commissions, management fees and sales load for the fund or the investor;[153] and (6) opening and closing dates of the business year.[154]

---

144. 1971 Ordonnance § 4(I)(a).
145. 1971 Ordonnance § 4(I)(b).
146. 1971 Ordonnance §§ 4(I)(c)-(f). Buying on margin is prohibited and credits for funds holding immovable property are allowed only to the extent of 50% of cost.
147. 1971 Ordonnance § 4(I)(d).
148. 1971 Ordonnance § 4(I)(g).
149. 1971 Ordonnance § 4(II)(a).
150. 1971 Ordonnance § 4(II)(b).
151. 1971 Ordonnance § 4(II)(c).
152. 1971 Ordonnance § 4(II)(d).
153. 1971 Ordonnance § 4(II)(e).
154. 1971 Ordonnance § 4(II)(f).

The new regulations also require the publication of an annual business report within six months after the closing of the business year.[155] This report must reveal the market value of net assets held by the foreign fund, the financial results of operations and the allocation of net profits and capital gains. An enumeration of the shares outstanding at the end of the business period and the shares issued and redeemed during the period must be included in the report.[156] A listing of the fund's assets, investments (with breakdown into security investments and purchases of immovable property) and net asset value per share as of the closing date of the period is mandatory.[157] Real estate funds must include consolidated accounts of the fund; the real estate companies owned by the fund also must be listed.[158]

An audit, declaring that the fund follows accounting procedures consistent with the bylaws, charter or issue prospectus of the fund, accompanies the report.[159] The audit also must confirm the assets listed in the business report and the accuracy of the report's enumeration of outstanding, newly issued and redeemed shares during the fiscal period.

The new regulation also seeks to control offshore funds, which are not subject to equivalent supervision abroad. Under the new regulation the Banking Commission may request that unregulated offshore funds deposit collateral in Switzerland to protect Swiss investors.[160] The Commission may ask the representative bank to surrender documents and information that the Commission desires to examine, including a detailed audit from the fund's auditor.[161] Should the Swiss representative be unable to satisfy the request, the Commission will cancel the authorization of the representative bank to solicit orders from the public for the offshore fund. The authorization for public sales also will be withdrawn in cases of unlawful conduct by the fund management or by the representative bank.[162] Finally, foreign funds registered with the Banking Commission before the enactment of the new regulation must comply with the new regulation. The foreign funds had no vested rights in the previous regulation since their licenses generally expired six months after the new law became effective.

155. 1971 Ordonnance § 4(I)(i).
156. 1971 Ordonnance § 6(I)(b).
157. 1971 Ordonnance §§ 6(I)(c), (d).
158. 1971 Ordonnance § 6(I)(a).
159. 1971 Ordonnance § 6(II)(a).
160. 1971 Ordonnance § 14(I)(a). *See* note 6 *supra.*
161. 1971 Ordonnance §§ 13, 14(I)(c).
162. 1971 Ordonnance § 15.

V. Capital Market Regulation

A. *In General*

Because the excessive demand for capital and credits was considered a major cause of inflation, the Swiss Government recently applied a "strait-jacket" to the Swiss economy. The Government established a program characterized by extremely narrow credit limits, supervision of prices, government-restricted salary and profit increases, limits on depreciation allowances for tax purposes and restrictions on "small blank credits" and on the hire-purchase business (purchase on deferred terms).[163] Under the Ordinance of January 10, 1973, the public issuance of debt securities, shares and similar securities must be authorized unless the face value of the issue is less than five million francs.[164] Under this Ordinance, each application for a public issue is reviewed by a commission of nine to eleven members chaired by a general manager of the National Bank. Delegates from both the public authorities and the private sector (banking, industry and commerce) also serve on the commission. Subsequent to the commission's review, the National Bank sets a quarterly timetable for the public issuance. The new commission retains final decision-making authority and may veto the covering of budgetary deficits through new bond issues in the capital market by the Swiss "states" (cantons) and municipalities, if this course of action is contrary to the anti-inflationary policy of the federal government.[165]

---

163. *E.g.*, Federal Decree of Dec. 20, 1972, Concerning Instituting Measures in the Field of Credits, [1972] ROLF 322; Federal Decree of Dec. 20, 1972, Concerning the Supervision of Prices, Salaries and Profits, [1972] ROLF 3112. "Small blank credits" are defined as "small credits given to private persons without requesting the usual bank guarantees." Federal Decree of Dec. 20, 1972, Concerning Instituting Measures in the Field of Credits § 3(7), [1972] ROLF 3123.

164. Ordonnances instituant des mesures dans le domaine du credit, January 10, 1973, § 3, [1973] ROLF 87.

165. Message of the Federal Council to the Federal Assembly, Dec. 22, 1972, in II Feuille Federale 1533 (No. 52 1972). Prior to the enactment of the Ordinance of January 10, 1973, *supra* note 164, under Convention XIV of March 17, 1967 (a cartel initiated by the Swiss Bankers' Association), the banking community had agreed to report all bond or fixed interest debt securities issued by domestic borrowers for amounts exceeding eight million Swiss francs to the Cartel of Swiss Banks or to the Association of Cantonal Banks. 3 Publications of the Swiss Commission of Cartels 271, 309 (Zurich 1968) [hereinafter cited as Cartels] (concerning the state of competition in the Swiss banking sector and Convention XIV of March 17, 1967). The Cartel of Swiss

B. *Securities Investments*

In June 1972, the Swiss Government enacted emergency legislation seeking to restrain the flow of foreign funds into Switzerland and to provoke their exodus.[166] The Government particularly sought to exclude speculative foreign funds ("hot money").[167] On August 20, 1971, the banks, pursuant to a gentlemen's agreement on the influx of foreign funds made between the Swiss National Bank and the principal

---

Banks includes the Cantonal Bank of Berne (Chairman), Union Bank of Switzerland, Swiss Bank Corporation and Swiss Credit Bank, Bank Leu & Co., Inc., The People's Bank of Switzerland, the Groupement des Banquiers Privés Genevois, the members of the Association of Swiss Cantonal Banks and those of the Association of Local and Savings Banks. A commission of eleven members appointed by the Board of the Swiss Banker's Association, with the National Bank as Chairman, prepared a quarterly "issue calendar," which operated as a queue-system determining the timing and amount of particular issues. The member banks refrained from participation in a bond issue that had not been reported properly to the commission or that had evaded the queue-system. *Id.* at 319 (§ 3(I) of Convention XIV). An "outsider" could place only a small issue (less than eight million Swiss francs) or, alternatively, could participate in the unregulated international issue market. The purposes of Convention XIV were to maintain a market equilibrium, to guard against an excessive drain of funds and to prevent an excessive increase in interest rates that could jeopardize the economy. CARTELS 271. Membership of the Convention was open-ended.

166. Message of the Federal Council to the Federal Assembly, Sept. 8, 1971, in II FEUILLE FEDERALE 833 (1971); Law of Oct. 8, 1971, Concerning Protection of the Currency, [1971] ROLF 1446 (exceptional powers in monetary matters given by the legislature to the Government and the Central Bank "to curb undesired inflow of foreign funds and to provoke their exodus"); Federal Council's Decree of June 26, 1972, Concerning Barring the Investment of Foreign Funds in Immovable Property in Switzerland, [1972] ROLF 1074; Federal Council's Ordinance of June 26, 1972, Concerning the Investment of Foreign Funds, [1972] ROLF 1077 [hereinafter cited as Ordinance on Foreign Funds]; Federal Council's Ordinance of July 7, 1972, Concerning Interest Terms for Foreign Funds, [1972] ROLF 1551; Federal Council's Ordinance of July 7, 1972, Concerning the Authorization for Borrowing Money Abroad, [1972] ROLF 1554, *as amended,* [1973] ROLF 641; Federal Council's Ordinance of July 5, 1972, Concerning Minimum Reserves Against Foreign Funds, [1972] ROLF 1557.

167. Swiss regulation of capital influx attempts to discourage "hot money" influx and forced revaluation of the franc. Hot money is defined as excessive movements of capital due to international political crises or currency jeopardy. Hot money is always placed in highly liquid assets such as sight or short-term deposits. The banks receiving such highly liquid deposits cannot easily expand their credits on the basis of such funds or compensate for the influx of capital by

banks, undertook to bar interest payments on sight and short-term (less than six months) deposits. The June 1972 legislation prohibited the payment of interest on nonresident funds credited to a Swiss franc account after July 31, 1971,[168] and created a quarterly two per cent charge (penalty) on the highest credit balance (over 100,000 Swiss francs per bank) registered during any monthly period for funds credited after June 30, 1972.[169]

The Federal Council's Ordinance of June 26, 1972, precludes investment by foreign funds through banks and other money managers[170] in securities of domestic issuers, in securities of foreign issuers, in Swiss francs and in loans secured by mortgages on Swiss property.[171] Foreign currency or Swiss franc balances are characterized as foreign funds if held by nonresident individuals (except Swiss nationals abroad), corporations or partnerships (including residents of Liechtenstein).[172] These currencies are also considered to be foreign funds if held by resident corporations and partnerships that are foreign-controlled and either not engaged in an active trade or business in Switzerland (*e.g.*, base companies, domiciliary "mailbox" companies) or engaged in the investment of foreign funds in domestic securities.[173] In addition, the Ordinance applies to Swiss branches of foreign business associations that are not conducting an active trade or business in Switzerland. Exemptions from the ban on investment of foreign funds in domestic securities include the following:

---

placing money abroad, due to the uncertainty of withdrawal; this is usually done immediately after conditions abroad have changed favorably. The Government considers excessive capital influx as a major factor of inflation. HANDBUCH DES BANK-, GELD- UND BORSENWESENS DER SCHWEIZ 319 (Switzerland 1964); Dagon, *Regulation of Capital Influx: Recent Developments in France, Germany and Switzerland,* 14 AM. J. COMP. L. 38, 64 (1965).

168. Only savings booklets as large as Sw. fr. 50,000 may bear interest.

169. Federal Council's Ordinance of July 7, 1972, Concerning Interest Terms for Foreign Funds, *supra* note 166, §§ 4, 5, *as amended* on March 1, 1973.

170. "Money managers" are defined as follows: "Persons engaged professionally in Switzerland for their own account or for that of another, with the buying and/or selling of shares or who serve professionally as intermediaries for these operations. Included in this category are corporations and co-operative corporations whose main object according to the Articles of Incorporation, is the participation in other enterprises or whose assets consist, according to the latest statement, of more than 50% of participations, of shares and advances on shares (holding companies)." Federal Law on Stamp Duties, VI R.S. art. 33.

171. Ordinance on Foreign Funds, *supra* note 166, § 4.

172. Ordinance on Foreign Funds, *supra* note 166, § 2(2).

173. Commentary of The National Bank, July 3, 1972, § 2(2).

(1) resident foreign-controlled corporations actively engaged in a Swiss trade or business, subject to approval by the National Bank, and holding companies with more than 80 per cent of their assets held abroad;[174]
(2) the direct purchase of stock from a private shareholder without recourse to an intermediary bank or "money manager" (*e.g.*, takeover bids, minority interests);
(3) establishing or expanding branch establishments (conducting an active trade or business), subject to the approval of the National Bank;[175]
(4) the free quota ("pool" of Swiss securities) of the banks and the stockbrokers;[176]
(5) rights offerings for Swiss shares to existing shareholders to the extent that the shares were held prior to June 27, 1972;[177]
(6) mutual fund shares, if more than 80 per cent of the assets are situated abroad.[178]

C. *Foreign Issues*

While the Swiss Government is responsible for overall national economic policy, the National Bank regulates capital exports.[179] The National Bank consults with other government departments and reviews international political and economic conditions before approving issues of foreign debt securities.[180] All foreign securities issues, including the outright purchase of foreign shares valued at more than

174. Ordinance on Foreign Funds, *supra* note 166, §§ 2(2), 5(c).

175. Ordinance on Foreign Funds, *supra* note 166, § 5(e).

176. Ordinance on Foreign Funds, *supra* note 166, § 6. The law seeks to neutralize foreign nationals' portfolio investments in Swiss securities by allowing the purchase of Swiss securities for foreign accounts only to the extent that the sale of Swiss securities for foreign accounts compensates for such purchases.

177. Ordinance on Foreign Funds, *supra* note 166, § 5(a).

178. Ordinance on Foreign Funds, *supra* note 166, § 5(b). Holdings in real estate funds may not exceed 25% of the assets of the fund. The ban on purchases by nonresident aliens of immovable property rights enacted after June 27, 1972, extends to holdings of mutual fund shares of real estate funds. Federal Council's Decree of June 26, 1972, Concerning Barring the Investment of Foreign Funds in Immovable Property in Switzerland, [1972] ROLF 1074.

179. R. REIMANN, *supra* note 72, § 8.

180. W. JOHR, SCHWEIZERISCHE KREDITANSTALT 1856-1956, at 508 (Swiss Credit Bank 1956).

ten million Swiss francs, must be reported to and authorized by the National Bank. The National Bank also reserves the power to review transactions involving lesser amounts of capital.[181] Therefore, "private placements" of three million Swiss francs also are subject to the authorization requirements. In addition, the managers of a contemplated issue must obtain the National Bank's authorization to sell securities to nonresident investors.[182] Publicly subscribed loans of less than ten million Swiss francs do not require authorization. The purchase by nonresidents of franc-denominated debt securities of foreign issuers is exempted under certain conditions.[183] One of the conditions presently required by the National Bank is that a foreign issuer hold no Swiss franc balances. In an attempt to prompt the exodus of foreign capital, the Government demanded that the foreign issuer, after August 16, 1971, convert the total amount of his loan into foreign currency. The Government prescribed that after February 1972 at least 25 per cent of the proceeds be converted into dollars at the National Bank. The mandatory conversion rate accelerated to 40 per cent after May 1, 1972. The balance could be converted into any other currency at the issuer's choice. After January 1973, the policy changed again, and currently the total amount of the loan must be converted by the Swiss private banks into any foreign currency.

The issue calendar, or "queue system," provides for about two large monthly issues of 80 to 100 million francs, accompanied by a smaller issue of 15 to 25 million francs. While the National Bank's issue policy frequently changes, the principle of a vigorous policy to further capital export has been constantly maintained.

The managing group[184] will request in the underwriting agreement (or bond purchase agreement) that the issuer warrant full convertibility of any payments. Thus the issuer pays interest and capital in freely convertible Swiss francs without a deduction of

181. Law on Banks and Savings Banks, 10 R.S. 325, 329 (1934), *as amended,* Law of March 11, 1971, [1971] ROLF 808.

182. Ordinance on Foreign Funds, *supra* note 166, § 5(d).

183. Ordinance on Foreign Funds, *supra* note 166, § 5(d).

184. The "management group" for issues over Sw. fr. 10 million is composed of the Swiss Credit Bank, the Swiss Bank Corporation and the Union Bank of Switzerland, which determines the underwriting agreement. The "underwriting syndicate" then purchases its determined quota from the Management Group. Members of the Swiss Underwriting Syndicate are: Groupement des Banquiers Privés Genevois, Banque Populaire Suisse, Groupement des Banquiers Privés Zurichois, Leu & Co.'s Bank Ltd., A. Sarasin & Cie. (for a group of Basel private bankers) and Private Bank and Trust Company.

foreign withholding taxes or any other charges.[185] Moreover, the risk of revaluation rests on the issuer since the bonds are issued with face values expressed in Swiss francs.

A substantial period of time may elapse between the preliminary negotiations of the foreign bond purchase and the public subscription. A "triple A" debtor, however, may receive capital long before the bonds are offered to the public through a "prefinancement" procedure executed by the management group. The individual bondholders later assume the prefinancement risk.[186]

D. *International Issues (Eurobond Issues)*[187]

Because of their purchasing potential, Swiss banks often participate in Eurobond issues. The banks seldom, however, are in the management group, but instead participate in the selling group, usually through their foreign subsidiaries.[188] Eurobond issues with direct participation by Swiss banks (*i.e.* a Swiss tranche of more than ten million francs) are reported to the National Bank and reviewed in the same manner as foreign issues.[189] In practice, the banks tend to purchase in the after-issue market or to participate indirectly through their subsidiaries abroad in an attempt to avoid the stamp tax on the new issues.[190]

The federal tax authorities ordinarily have deemed a Eurobond issue to be a private placement for the institutional and large private investors, and, consequently, a nontaxable event. If the placement of

185. Budich, *Das Effektenemissionegeschäft in der Schweiz,* in BANKEN, *supra* note 11, at 354. For example: 4-3/4% Alusuisse International $60 million convertible bonds (prospectus, February 13, 1969); 6% N.V. Philips Sw. fr. 60 million convertible bonds (prospectus, September 4, 1969); and 5-1/4% Litton Industries International N.V. Sw. fr. 60 million convertible bonds (prospectus, November 19, 1969). One may define foreign issues in Switzerland as those that are syndicated exclusively by Swiss underwriters, and in Swiss francs, and with a foreign domicile or seat of the debtor.

186. Pfenninger, *Das Auslandgeschäft der Schweizerischen Banken,* in BANKEN, *supra* note 11, at 298.

187. *See* P. EINZIG, THE EUROBOND-MARKET (London 1969).

188. An outstanding exception is the $60 million Alusuisse International N.V. issue of February 13, 1969.

189. Law on Banks and Savings Banks § 8, 10 R.S. 325 (1934), *as amended,* Law of March 11, 1971, [1971] ROLF 808.

190. Loi Fédérale sur les Droits de Timbre, 6 R.S. 103 (1917), *as modified,* 6 R.S. 106 (1927).

Eurobonds extends to more than twenty individual clients, the tax officials have considered it a taxable event. Therefore, the stamp tax of 1.2 per cent on bonds and 2.1 per cent on convertibles[191] is payable by the issuer or shared equally between the issuer and resident Swiss investor. Because a stamp tax on issues is not levied in the EEC countries, the Swiss banks are at a disadvantage as direct underwriters of Eurobond issues. To avoid the tax, banks formed subsidiaries abroad that actively purchase nontaxable bonds for the accounts of nonresidents. On October 25, 1972, the Federal Council, however, submitted a message to the Chambers requesting the suppression of stamp taxes on foreign issues.[192]

191. Loi Fédérale sur les Droits de Timbre, 6 R.S. 103 (1917), *as modified,* 6 R.S. 106 (1927).

192. Message of the Federal Council to the Federal Assembly, Oct. 25, 1972, in II FEUILLE FEDERALE 1275 (No. 47 1972) (concerning a new federal law on stamp taxes).