November 2021

Newsletter No. 159

FINMA gives the go-ahead for SPACs on SIX Swiss Exchange

As of 6th December 2021, Special Purpose Acquisition Companies (**SPACs**) may be listed and traded on SIX Swiss Exchange (**SIX**). FINMA has approved the related regulatory framework proposed by SIX Exchange Regulation, the regulatory body of SIX. SPACs create new investment opportunities, particularly in times when such opportunities are scarce, and reduce transaction costs for many highly promising companies which otherwise would not access the equity market. The new regulatory framework opens the door for the further development of the Swiss capital market while mitigating concerns around investor protection.

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SPACs

While in usual initial public offerings (**IPOs**) private companies go public and raise money for their business, SPACs take the opposite direction. They raise funds in an IPO as shell companies with the purpose to acquire a non-listed company. Following the acquisition, the non-listed company remains an affiliated (non-listed) subsidiary or, through a (triangular) merger transaction, becomes the listed company (**De-SPAC Event**).

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The new listing standard for SPACs

While SPACs have already seen their rises and falls abroad, the Swiss Financial Market Supervisory Authority FINMA called a halt to SPAC IPOs in Switzerland earlier this year and requested SIX to establish a well-balanced regulatory framework first, which has now been approved.

Additional requirements have been added to address specific risks and concerns in terms of transparency and investor protection, based on the general listing standards for regular companies, in particular:

- Only stock corporations under Swiss law can be listed as SPACs on SIX.
- The sole purpose of a SPAC must be to purchase an acquisition target directly or indirectly.
- A De-SPAC Event must be completed within no more than three years. Otherwise the funds must be returned to the investors.
- A majority vote of a special investor meeting is required to execute the De-SPAC transaction
- The SPAC must grant all shareholders a right to return the shares acquired in the IPO.
- The funds raised must be placed in an escrow deposit account at a bank which is subject to the Swiss Banking Act.
- Instead of shares (equity SPACs), SPACs can offer investors portions of a convertible bond in the IPO (convertible-bond SPACs).
- The freely tradable securities (free float) must exceed 20% of the outstanding shares and must have a market capitalization exceeding CHF 25m.
- As a relieve, the usual track record requirement of being in existence or presenting correspondent historical financial information for at least three business years does not apply to SPACs.
- The board of directors, management, founders and sponsors of a SPAC must be subject to lock-up agreements preventing them from selling shares in the business combination for at least six months after the De-SPAC Event.

Additional prospectus requirements

The company is required to publish additional information in the IPO prospectus to be published according to the Swiss Financial Services Act, or in an additional document, in particular:

- Information on its founders, on their economic interests in the company (incl. compensation schemes), on potential conflicts of interest, and on lock-up periods;

- the conditions under which additional capital may be raised (incl. private placements);
- the costs to be borne by a shareholder if the shares are returned;
- the amount an investor would receive if she/he/it opposes a De-SPAC Event or if the SPAC is delisted and liquidated;
- the details on the targeted industry;
- disclosures on dilutive effects, e.g. due to warrants and other instruments.

Post-listing obligations

Additional requirements for maintaining the listing of a SPAC apply, apart from the usual ad-hoc publicity, disclosure of management-transactions, financial and regular reporting:

- in view of the De-SPAC Event, ahead of the shareholders' meeting: publication of an information document about the De-SPAC Event, the target company and about the structure of the combined entity, including a fairness opinion of an independent party (e.g. an auditor), to be published in accordance with the rules on ad-hoc publicity;
- from the IPO until one month after the end of the lock-up agreements: ongoing disclosure of management-transactions not only by the members of the board of directors and the management but also by the sponsors and founding shareholders of the SPAC and their related parties.

Foreign SPACs: regulatory requirements and selling restrictions

According to the new listing standards, foreign SPACs cannot be listed on SIX.

While SPACs incorporated and listed in Switzerland are *per se* exempt from the Swiss regulation on collective investment schemes (*cf.* art. 2 sec. 3 of the Collective Investment Schemes Act, **CISA**), foreign SPACs are not. The legal debate on whether SPACs may qualify as collective investment schemes is ongoing.

In our view, regular SPACs generally qualify as operating or holding companies which are exempt from CISA. The proceeds from the IPO are typically not invested until the De-SPAC where the SPAC is turned into an operating or holding company. Moreover, given that the shareholders ultimately decide on the De-SPAC, SPACs lack discretionary third-party management of the assets, a key element of the legal definition of a collective investment scheme. One might see FINMA's approval of the new listing standards for SPACs as a signal that SPACs would rather not be regarded as collective investment schemes.

However, FINMA and the Swiss courts generally decide on a case-by-case basis, based on the specific facts of the individual case and the overall picture, and not on a set of formal criteria, whether a certain activity qualifies as a collective investment fund (*cf.* decision of the Swiss Federal Supreme Court 2C_571/2009 dated 5 November 2010, consid. 2.4).

Should a particular foreign SPAC qualify as a collective investment scheme, the advertising or offering of shares and units to Swiss investors is restricted to certain classes of qualified investors unless it has been approved by FINMA. For the advertising or offering of the shares or units to high net worth individuals in Switzerland, no FINMA approval but the prior establishment of a Swiss representative and paying agent is required. Furthermore, specific standards and criminal provisions apply to the advertisement of any collective investment scheme in Switzerland.

We regularly issue legal opinions in connection with the advertising and offering of shares or units of foreign SPACs.

Conclusion

Whether SPACs will grow into butterflies or dragons much depends on the regulatory environment. With the new framework, the Swiss regulators open the door for the further development of the Swiss equity market. We will keep you up to date.

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