

Switzerland:

LISTING OF DERIVATIVES

in the world's third largest market

by Dr. Daniela Koenig, Dr. Christoph Heiz and Dr. Alexander Vogel,
Meyer Lustenberger Attorneys-at-law

The listing of warrants, certificates and other securitised derivatives has become increasingly popular in the past few years, in Switzerland as well as in other markets. Today, Switzerland is the third largest market worldwide for securitised derivatives in terms of trading volume, only behind Germany and Hong Kong. Eight thousand four hundred different derivative products are currently listed on the SWX Swiss Exchange (SWX), 69% of which are warrants and 31% structured products (i.e. capital protected products, maximum-yield products and certificates). In the first quarter of 2006 the product portfolio of derivatives traded on SWX has almost doubled, compared to the first quarter in 2005.

REGULATORY BACKGROUND

Not being a member state of the European Union (EU), Switzerland is not bound by the EU capital markets legislation. However, the modernisation of capital market laws in Switzerland over the recent years has resulted in updated rules and regulations, which to a large extent reflect international standards.

The Federal Act on Stock Exchanges and Securities Trading (SESTA) governs capital markets in Switzerland. It entered into force in 1997 and there are associated ordinances. The SESTA mainly serves as a secondary market regulation providing rules on

broker-dealers, stock exchanges and take-over offers. Based on the principle of self-regulation, the SESTA entitles the SWX to establish rules and regulations on the admission of securities to trading and implementing provisions. However, the Federal Banking Commission, Switzerland's supervisory authority for exchanges and broker-dealers, must approve the SWX rules and regulations. The Federal Banking Commission verifies the legality of those rules and regulations, and ensures transparency and the equal treatment of investors as well as the proper functioning of the securities markets.

The Code of Obligations rather than the SESTA regulates the primary markets. The Code of Obligations

contains provisions on the issuance of shares and bonds (i.e. the duty of an issuer to publish an offering prospectus). Unlike the US and many other markets, however, Switzerland does not require issuers to register their securities before or after issuance with a regulatory authority. Equity securities, bonds and derivatives may be issued solely on the basis of a decision by the respective issuer. Similarly, the offering document required by the Code of Obligations does not have to be approved by any governmental authority.

Whereas the Code of Obligations requires issuers of shares and bonds to publish an offering prospectus (to be distinguished from the listing prospectus required by the applicable listing rules of an exchange), no explicit rule exists for derivatives. The Federal Banking Commission, however, has recently stated in its position paper that derivatives issued in the form of structured products are to be considered as bonds and therefore the issuer has to publish an offering prospectus.

Moreover, the Federal Act on Collective Capital Investments (CCIA), expected to enter into force at the end of 2006, contains provisions on structured products. The CCIA will allow only banks, insurance companies and broker-dealers to issue structured products and will require the issuer to publish a short-form offering prospectus.

DERIVATIVE MARKET IN SWITZERLAND

There are two regulated exchanges for derivatives in Switzerland: SWX and Eurex.

SWX is the main exchange for trading securitised derivatives, in particular warrants and certificates. Eurex emerged from a joint venture of SWX and Deutsche Börse AG and is a specialised marketplace for standardised options and futures contracts. Unlike derivative instruments listed on SWX, the products traded on Eurex are usually not created by market participants but by Eurex itself.

The derivative products traded on SWX are usually divided into two categories: warrants and structured products. Structured products are subdivided into capital-protected products, maximum-yield products and certificates.

SWX REGULATIONS FOR LISTING OF DERIVATIVES

The listing of derivatives on SWX is governed by the general listing rules of the SWX (Listing Rules) and the directive for the Listing of Derivatives (Derivatives Directive). The Derivatives Directive came into force in the year 2000 and was last amended on June 1, 2006.

Derivatives that are suitable for mass trading may be listed on SWX. Pursuant to the Derivatives Directive, the following derivatives are, for example, eligible: options/warrants, synthetically hedged warrants, writers' warrants, shareholder and employee options, warrants associated with warrant bonds, combined derivative products, capital-guaranteed derivatives and reverse convertible with or without capital protection.

Derivatives listed on SWX are considered debt securities and are usually issued in the form of permanent global certificates.

ISSUER REQUIREMENTS

An issuer of derivatives has to meet the following requirements:

- (i) The issuer needs to be in existence for a minimum of three years and present the audited financial statements covering the three complete financial years;
- (ii) The issuer's equity must amount to at least SFr25m; and
- (iii) The issuer has to be a bank or securities dealer under the supervision of the Federal Banking Commission or any comparable foreign supervisory authority.

REQUIRED MARKET CAPITALISATION

Until recently, the SWX required a market capitalisation for derivatives issues of at least SFr6m at the time the listing application is submitted. Alternatively, depending on their legal nature, the market capitalisation of underlying instruments theoretically involved, had to range between SFr25m and SFr100m. As per June 1, 2006 the SWX eased these requirements. The minimum market capitalisation required for derivatives issues is now only SFr1m and the capitalisation for underlying instruments has been entirely deleted.

ELIGIBLE UNDERLYING INSTRUMENTS

Derivatives may be listed on SWX if they are directly or indirectly associated with underlying instruments that are regularly priced in the marketplace. In particular, the following instruments are eligible:

- equity securities or bonds which are listed, or have been admitted to trading, on the SWX;
- foreign equity securities or bonds, insofar as they are listed on, or have been approved by, the responsible authorities for trading on an official securities exchange in the country of domicile of the issuer of the underlying instruments or on some other internationally recognised exchange;



YOUR ARCHITECTS IN LEGAL MATTERS

M & L

MEYER LUSTENBERGER
RECHTSANWÄLTE – ATTORNEYS AT LAW

www.meyerlustenberger.ch

Swiss World Architecture:
Central Signal Box in Basle by
Herzog & de Meuron
Exclusively photographed for
Meyer Lustenberger

Zurich: Forchstrasse 452, P.O. Box 1432, CH-8032 Zürich, Phone: +41 44 396 91 91, Fax: +41 44 396 91 92, zurich@ml-law.ch
Zug: Grabenstrasse 25, CH-6340 Baar / Zug, Phone: +41 41 768 11 11, Fax: +41 41 768 11 12, zug@ml-law.ch
Geneva: In association with Croisier Gillioz & Associés, 61, Rue du Rhône, P.O. Box 3127, CH-1211 Genève 3, mail@cglaw.ch

- indices based on the prices of the aforementioned underlying instruments, insofar as the respective index is recalculated at regular intervals and publicised accordingly;
- freely convertible currencies;
- interest rates;
- banking-standardised precious metals, especially gold, silver and platinum;
- commodities traded on an official domestic or foreign futures exchange;
- investment funds which are listed in the main segment of the SWX or on another securities exchange recognised by the SWX and the offering or distribution of which either in or from Switzerland has been approved, and which primarily invest in the aforementioned underlying instruments;
- baskets consisting of the aforementioned underlying instruments.

LISTING PROSPECTUS

In order to list derivatives, the issuer has to publish a listing prospectus. The listing prospectus may be issued in German, French, Italian or English. It should provide sufficient information for knowledgeable investors to reach an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer as well as the rights attached to the securities. Special risks have to be mentioned. The specific information to be disclosed on the offered securities, the underlying instruments, and the issuer is set out in specific lists in the Annex to the Listing Rules. In any case, the information must be up-to-date, true, accurate and not misleading, and the listing prospectus must contain a responsibility statement.

The Derivatives Directive allows the following three types of listing prospectuses.

Complete listing prospectus

The complete listing prospectus contains all material information with respect to the issuer, the derivative instrument (including the terms and conditions) and the underlying instruments. It is prepared for each individual issue of derivative instruments.

Short-form prospectus

The Derivatives Directive provides the possibility to publish a short-form prospectus for the issuance of derivative instruments, if a basic documentation has been published previously or will be at the same time. The basic documentation contains all information on the issuer as required by the Listing Rules and must be approved by the SWX Admission Board. Once approved, the basic documentation entitles the issuer to publish a short-form prospectus for any additional issue of derivatives for a period of 12 months. The short-form prospectus contains information related to the derivative instruments and the underlying instruments. Reference to the basic documentation is required, and in all cases the basic documentation must accompany the short-form prospectus. The basic documentation and the short-form prospectus together comprise the listing prospectus.

Program documentation

The issuer of derivatives may choose to establish an issuance program with respect to various types of derivatives. The program documentation consists of one part containing all requisite information on the issuer and one or more additional sections in which the general terms and conditions for each type of derivatives are set out. The program documentation has to be submitted to the SWX Admission Board for approval. It is supplemented by the pricing supplement which contains the terms and conditions of each individual issue and the required information on the respective underlying instruments. The program documentation and the pricing supplement together form the listing prospectus.

In addition to the listing prospectus, the issuer of derivatives has to publish a listing notice pursuant to the Listing Rules.

LISTING PROCEDURE

Application for listing

An application for listing has to be filed with the SWX one month prior to the date scheduled for listing. The SWX approves the application if it complies with the requirements of the Listing Rules. If a particular product is newly developed and has never been listed in the same or a similar form on the SWX before, we recommend asking for a preliminary decision of the SWX regarding the suitability of the product for listing prior to submitting the application for listing.

Provisional admission

The SWX offers the possibility of provisional admission for derivative instruments allowing issuers to bring products to the market within a short period of time. Provisional admission to trading requires an application by the issuer accompanied by a term sheet describing the terms and conditions of the product. Provisional admission is granted if the applicant assures the SWX that:

- (i) all listing conditions pursuant to the Listing Rules have been fulfilled;
- (ii) a standard listing is intended; and
- (iii) the listing application will follow.

If the application for provisional trading is filed through the internet-based listing system, trading may commence as early as one exchange trading day after the SWX's receiving of the application. In case of an application filed by other means, the provisional trading may start at the earliest three exchange trading days after the receipt of the application.

If provisional admission is granted, the issuer will be required to submit a listing application within two months after the submission of the provisional application in order to ensure that the derivatives will be listed on the SWX.

Filing of documentation

The application for listing and the application for provisional admission to trading have to be filed with the SWX Admission Board by the issuer or a recognised representative in writing either in German or in French. Foreign issuers regularly mandate a Swiss law firm or the lead manager to handle the application process.

SPECIAL RULES FOR STANDARD WARRANTS

The directive on the listing of standard warrants (Warrants Directive) released on March 1, 2003, which supplements the Listing Rules and the Derivatives Directive, governs the listing of standard warrants on the SWX. The Warrants Directive introduces a simplified listing procedure for standard warrants issued on a large scale. The required documentation for standard warrants consists of:

- (i) the registration document, which is submitted each year and includes all the information on the issuer and the terms and conditions of the instruments; and
- (ii) the securities note, which is submitted for each individual issue and contains the information on the security and the underlying instrument.

LATEST DEVELOPMENTS

In May 2006, SWX and Deutsche Börse AG announced that they intend to jointly operate a European exchange for warrants, certificates and other securitised derivatives. The joint undertaking will be conducted via a jointly owned holding company in Zürich, which will operate two nationally regulated exchanges, one exchange in Switzerland and one in Germany.

SWX and Deutsche Börse AG intend to contribute their existing business in securitised derivatives to the new venture. For that purpose, SWX will spin off its business

in warrants and certificates into a new Swiss-based exchange, which will commence its operations on January 1, 2007. The new exchange in Germany will be founded under the organisation of the Bremen Stock Exchange and is scheduled to open in the fourth quarter of 2007.

Technologically, trading on these exchanges will initially be conducted on separate trading systems and then transferred to a common electronic platform by the end of 2009. While trading on the new German exchange will be conducted under German supervision, the Swiss-based exchange will be regulated by the Swiss Federal Banking Commission. Although no decision has been made by the

SWX, we expect the existing SWX rules and regulations for derivatives to apply to the new Swiss-based exchange. The SWX might even lower the listing requirements in order to further attract the trading of derivatives.

**Daniela Koenig, Alexander Vogel and
Christoph Heiz are Attorneys at law at Meyer
Lustenberger Attorneys-at-law in Zürich.
For further information, please
telephone +41 (44) 396 9191 or
e-mail: christoph.heiz@ml-law.ch**