Go Public on SIX Swiss Exchange and Concurrently Access the US Capital Markets

By including a Rule 144A offering in your company's IPO on SIX Swiss Exchange, you have the advantage of being able to access the US capital markets. This could help maximize the value of your company going public.

Many companies considering an initial public offering ("IPO") on SIX Swiss Exchange are pleased to learn that they would be able to target the US institutional investor segment as part of their IPO. How can this be done? In short, issuers are able to carry out what is known as a "Rule 144A offering", which is an offering in the US to so-called qualified institutional buyers ("QIBs") that relies on a safe harbor from the US registration requirements (see "What is a QIB?" and "What is Rule 144A about?").

Why Include a Rule 144A Offering in Your Company's IPO?

By including a Rule 144A offering in your company's IPO on SIX Swiss Exchange, you have the advantage of gaining access to the US institutional investor segment without triggering the application of certain US laws and regulations that would automatically apply in the case of an IPO on a US stock exchange. These laws and regulations include the wide-ranging provisions of the Sarbanes-Oxley Act ("SOX")[1] and certain US stock exchange-specific regulations (such as the Minimum Bid Price Rule[2]).

Although conducting a Rule 144A offering in connection with an IPO on SIX Swiss Exchange may not be suitable in every case, it has the potential to help maximize the value of your company going public (see also: "SIX IPOs That Included a Rule 144A Offering").

"What Is a QIB?"

Simply speaking, a qualified institutional buyer – commonly referred to as a "QIB" – is an institution acting for its own account (or the account of other QIBs) that owns and invests on a discretionary basis at least USD 100 million in securities. A QIB can be a US or a foreign institution. An individual cannot be a QIB, no matter how wealthy or sophisticated he or she is.

[1,2] Details see back page

Homburger

2021 SIX IPOs That Included a Rule 144A Offering

Issuer	PolyPeptide	Montana Aerospace	Medmix
Industry classification	Pharmaceuticals	Industrial	Industrial
First trading day	29 April 2021	12 May 2021	30 September 2021
Transaction size (CHF million; including exercised greenshoe)	848	506	315
Market capitalization (CHF million; end of first trading day)	2,590	1,646	1,794
Ticker Symbol	PPGN	AERO	MEDX

Source: SIX

What Is Rule 144A About?

An IPO on a US stock exchange – such as the New York Stock Exchange ("NYSE") or the NASDAQ – entails what is known as a "registered offer" under the US Securities Act. A registered offer involves filing a type of prospectus known as a "registration statement" with the US Securities and Exchange Commission ("SEC") and meeting detailed disclosure and financial statement requirements. In addition, a registered offer triggers the wide-ranging provisions of SOX and a comprehensive liability scheme under US law.

Rule 144A under the US Securities Act is designed to provide an exemption to the general rule that all securities must be registered with the SEC before being sold. As a technical matter, a Rule 144A offering in connection with an IPO on SIX Swiss Exchange would involve two steps:

1. the sale by the issuer of offered shares to the underwriting banks in a private placement exempt from registration under the US Securities Act; and
2. the resale of such shares by the underwriting banks to QIBs in reliance on the Rule 144A safe harbor.

In contrast to an SEC-registered offer, an issuer that carries out a Rule 144A offering will avoid:

- the potential delay associated with an SEC review of the registration statement;
- the SEC's detailed disclosure requirements applicable to offering documents;
- the on-going reporting requirements of the US Securities Exchange Act;
- reconciliation of financial statements to US GAAP (if not already prepared in accordance with US GAAP); and
- the disclosure, corporate governance and auditing requirements of SOX;

and will benefit from reduced liability under the US securities laws.

An Insight into Documentary Aspects

Generally, including a Rule 144A offering will not require any significant deviation from the standard suite of listing and offering documentation for a SIX Swiss Exchange IPO without a Rule 144A offering. However, there are some differences to be aware of, including:

> **"Galenica went public on SIX Swiss Exchange with a market capitalization of CHF 2.15 billion. At the beginning of the IPO preparation process, I was not familiar with Rule 144A and I needed to be convinced to make use of it. Ultimately, I was very happy that we opened the offering of shares to US QIBs. I believe that it helped to maximize the value of the transaction and broadened our investor base – both of which are essential for the future development of Galenica."**

Felix Burkhard, CFO, Galenica

> **I routinely advise Swiss and foreign issuers in connection with cross-border securities offerings and listings on SIX Swiss Exchange, including IPOs. As a Swiss and US lawyer who has worked in both jurisdictions for over a decade, it seems to me that a Swiss company gets the best of both worlds by going public on SIX Swiss Exchange and simultaneously accessing the US institutional market via a Rule 144A offering.**

Lorenzo Togni, Partner, Homburger

1. 10b-5 Disclosure Letters

Typically, the underwriting banks will engage both Swiss and US counsel and will expect the issuer to do so as well. This is in large part because, while one of the advantages of a Rule 144A offering compared to a registered offer is reduced liability under the US securities laws, it does not provide an exemption from the broad anti-fraud provisions of Rule 10b-5 under the US Securities Exchange Act. The issuer, its directors, the underwriting banks and others may potentially be liable under the anti-fraud provisions of Rule 10b-5 if the prospectus or any other offering material contains any untrue statement of a material fact or omits material facts necessary to make the statements that are made in the prospectus (or other offering material) not misleading. Since the elements of a claim under Rule 10b-5 by a private plaintiff include the intent to deceive, manipulate or defraud, or recklessness, the underwriting banks will expect their US counsel, as well as the issuer's US counsel, to issue what are known as "10b-5 disclosure letters" or "negative assurance letters" to help them establish a defense against possible claims. A 10b-5 disclosure letter confirms that, after performing certain due diligence procedures, nothing has come to the attention of US counsel that would cause it to believe that the prospectus is not accurate and complete in all material respects.

The Swiss prospectus liability regime also prohibits such misstatements or omissions. Consequently, in cases in which an IPO on SIX Swiss Exchange does not include a Rule 144A offering, Swiss counsel to the issuer will be expected to provide a disclosure letter similar to a 10b-5 disclosure letter and will perform comparable due diligence measures in connection therewith. As a result, issuers can usually expect a significant due diligence process and the related cost of a disclosure letter irrespective of the offering's geographical reach.

2. US Comfort Letters and the 135-Day Rule

The underwriting banks involved in an IPO will expect a comfort letter issued by the auditors of the company. In the context of a Rule 144A offering, underwriting banks customarily require a so-called "SAS 72 comfort letter" under the American Institute of Certified Public Accountants' Statements on Auditing Standards to be delivered at the time the underwriting agreement is signed. In addition, the underwriting banks will expect a "bring-down" comfort letter to be delivered on the closing date and, if applicable, on the closing date for any "greenshoe" option. Generally, in order to issue these SAS 72 comfort letters with the appropriate level of assurance on specified financial statement line items, the most recent audited or reviewed financial statements included in the prospectus must be as of a date and for a period ended not more than 135 calendar days prior to the date of such letters. This requirement may affect the timing of the IPO and/or the financial statements included in the prospectus. Although the 135-day rule is associated with the constraints placed on auditors issuing SAS 72 comfort letters, many jurisdictions outside the US will also apply the 135-day rule to comfort letters as a matter of customary market practice.

Date of the Last Audited or Reviewed Financial Statements	Last Possible Cutoff Date for Comfort Letter (134th Day)
31 March	2 August
30 June	11 November
30 September	11 February
31 December	13 May or 14 May (depending on leap year)

3. US-Driven Provisions

US counsel will require certain US-driven provisions to be included in the underwriting agreement entered into between the issuer and the underwriting banks. In the case of the prospectus, the inclusion of a Rule 144A offering in an IPO on SIX Swiss Exchange will not subject the contents of the prospectus to SEC regulation, or mean that the format and style of the prospectus must mirror that of an SEC-registered offer in the US. However, while most of the disclosure that one would expect to see in a US Rule 144A offering prospectus will typically be included in a Swiss prospectus, there are a number of additional disclosure elements that will need to be addressed. These typically relate to an expanded US-style Management Discussion & Analysis ("MD&A") section, and any pro forma information necessitated by significant acquisitions or other corporate events. In addition, appropriate US tax disclosure and selling restrictions will need to be included in the prospectus and, for certain industries, additional US-driven disclosure may need to be added.

Market-Oriented and Pragmatic Regulations at SIX

Exchange	SIX Swiss Exchange	NYSE	NASDAQ
Regulator	SIX Exchange Regulation	The SEC and the Financial Industry Regulatory Authority	The SEC and the Financial Industry Regulatory Authority
Regulators' review period after filing	20 calendar days	Iterative process that lasts approx. 10 to 12 weeks	Iterative process that lasts approx. 10 to 12 weeks
Accounting standards	IFRS, US GAAP, Swiss GAAP FER	US GAAP, IFRS	US GAAP, IFRS
Minimum (free float) market capitalization	CHF 25 million	USD 40 million	USD 45 million (or other criteria)
Minimum free float	20%	400 round lot shareholders and 1.1 million shares publicly held	450 round lot shareholders and 1.25 million publicly held shares
Minimum share price	CHF 0.01/share	USD 4.00/share	USD 4.00/share
Earnings test	No	Yes (or other criteria)	Yes (or other criteria)
Listing charges (excl. VAT, etc.)	CHF 14,000 (example for a market capitalization of CHF 100 million)	The first time an issuer lists a class of common shares, a listing fee at a flat rate of USD 295,000 is charged (depending on the number of shares listed)	USD 150,000–295,000 (including USD 25,000 application fee) (depending on the number of shares listed)

Note: The above-described amounts and requirements are applicable for a "standard case" initial public offering. Depending on the facts and circumstances, amounts or the requirements may be different and/or exemptions therefrom may be granted. Source: Websites of the above-mentioned exchanges; March 2022

SIX Supports an Efficient Listing Process with Market-Oriented and Pragmatic Regulations

SIX is committed to a fast regulatory approval process, whereby an applicant may submit the listing application for its shares as late as 20 calendar days prior to the intended listing date. Furthermore, SIX Exchange Regulation's listing rules accommodate small-, mid- and large-size IPOs. Compared to an IPO on the NYSE or the NASDAQ, listing fees are lower in connection with an IPO on SIX Swiss Exchange. Last but not least, SIX often employs a "comply or explain" approach rather than a "comply" approach only. The "comply or explain" approach is believed to have certain advantages over straightforward compliance, including promotion of innovation, proportionality, substance over form and long-term learning.

Concluding Thoughts

By including a Rule 144A offering in your company's IPO on SIX Swiss Exchange, you have the advantage of being able to access the largest capital market in the world by targeting QIBs, the key investor base in the US. In particular, including a Rule 144A offering could help maximize the value of your company going public, provide transaction security and broaden your company's investor base, all of which may be beneficial for the future growth of your company. Some US-driven specifics and requirements could increase the transaction complexity and related costs – however, these additions have been successfully managed by many issuers in the past. Conducting a Rule 144A offering in connection with an IPO on SIX Swiss Exchange may not be suitable in every case – but it should be considered in the case of mid- and large-size IPOs, as well as in the case of IPOs with a US-centric business (or with existing US anchor investors).

We look forward to hearing from you:
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[1] The average annual cost of compliance with SOX varies and is dependent upon, among other things, the size, the industry, the complexity and the number of locations of the relevant company. Based on a 2017 survey ("Fine-Tuning SOX Costs, Hours and Controls") conducted by consulting firm Protiviti, US stock exchange listed companies with a free float market capitalization of >USD 75 million reported an average annual internal SOX compliance cost of approximately USD 800,000/year, of which about 10% spent more than USD 2 million.
[2] If a company's share price closes below USD 1.00/share bid price for 30 consecutive days, the company is non-compliant with the Minimum Bid Price Rule and will have 180 days to regain compliance or face a transfer to another market segment or even a delisting.

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