

The New Swiss Prospectus Regime

What You as an IPO Candidate Need to Know

Switzerland is introducing a new prospectus regime which enters into force on 1 January 2020 with a phase-in period of at least nine months as part of the new Financial Services Act (FinSA; Finanzdienstleistungsgesetz; FIDLEG).

The new regime is largely modeled along the EU Prospectus Regulation framework. It provides for a detailed set of rules for public offerings including the introduction of a regulatory body to review and approve offering prospectuses. Up until now, Switzerland – unlike all EU and EEA countries – did not have a regulatory body overseeing public offerings. Overall, the regime aims to enhance transparency and legal certainty for issuers.

In this context, there are a few fundamental novelties a candidate for an initial public offering (IPO) needs to know as new and more disclosure and approval requirements for public offerings will be introduced. However, the rules and exemptions provided under the new regime ensure to a large extent that the additional burden for IPO candidates will remain commensurate and strive to keep a sufficient degree of flexibility in order for the Swiss stock exchange to remain an attractive venue for listings.

Ex-Ante Approval of Prospectuses

Up to now, there are only limited requirements in the case of public offerings and the current regime does not require offering prospectuses to be filed with, or approved by, any reviewing body in Switzerland. Only in the case of a listing in Switzerland, e.g. on the Swiss stock exchange operated by SIX, an approval requirement by the relevant stock exchanges' authority (SIX Exchange Regulation) as the competent self-regulatory body applies.

Under the new regime, all prospectuses will be subject to an approval process, carried out ex-ante, as a rule, by a new regulatory body, the Review Board (*"Prüfstelle"*), which will review the prospectus for formal completeness, consistency and clarity.

// The new prospectus regime in Switzerland introduces, in our view, a modern and practical prospectus framework that will enhance transparency and establish a level playing field with corresponding EU prospectus regulations while keeping a sufficient degree of flexibility for issuers making the Swiss stock exchange an ideal listing venue for an IPO candidate. //

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First-time issuers will be required to submit the prospectus for approval well in advance to account for the Review Board's review period of 20 calendar days (for all other issuers, the review period amounts to 10 calendar days). Within such review period, the Review Board will approve the prospectus or ask for a revision. In case of the latter, the applicable period may start from scratch after re-submission of the revised prospectus to the Review Board.

An IPO candidate needs to know that the planning and timing of an IPO needs to be more careful and diligent given that a prospectus needs to be approved and might need to be re-submitted triggering a restart of the applicable period.

Exemptions to Publish a Prospectus

The obligation to prepare a prospectus will be subject to various exemptions modelled to a large extent along the EU Prospectus Regulation. The set of exemptions, among others, will include offerings that:

- are limited to professional investors; or
- are addressed to less than 500 investors; or
- are addressed to investors who acquire securities for a consideration in excess of CHF 100,000; or
- raise less than CHF 8 million (in total over a period of 12 months)

An IPO candidate needs to know that it hardly benefits from any of the above exemptions in the context of a customary IPO alongside a listing on a Swiss stock exchange.

What is the definition of a "professional investor" under the FinSA in Switzerland?

Professional investors are defined as: (1) financial intermediaries in the meaning of the Banking Act (BankA), the Collective Investment Schemes Act (CISA) and the Financial Institutions Act (FinIA), (2) Swiss regulated insurance institutions, (3) foreign financial intermediaries and insurance institutions subject to a prudential supervision, (4) central banks, (5) public entities with professional treasury operations, (6) pension funds with professional treasury operations, (7) companies with professional treasury operations, (8) large companies that reach at least two of the following thresholds (balance sheet of CHF 20 million, turnover of CHF 40 million or equity of CHF 2 million), and (9) private investment structures with professional treasury operations set up for high net worth individuals. In addition, certain high net worth individuals have the ability to request to be treated as professional clients (opting-out).

Furthermore, the new regime provides for exemptions e.g. relating to the admission of trading for securities that are already admitted to trading on a recognized foreign trading venue which is subject to appropriate regulation, supervision and transparency. For already listed companies, further exemptions to publish a prospectus apply e.g. to the admission of new securities of the same type as already admitted securities (i) of less than 20% of that respective security type outstanding during twelve months or (ii) issued in connection with the conversion of exchange of financial instruments or the exercise of rights related to such instruments.

Other New Aspects of Which an IPO Candidate Should Be Aware:

- In case of an IPO, the approved prospectus must be published at least six business days prior to the end of the subscription period
- Issuers will be required to prepare a summary section and a section on forward-looking statements
- The new regime officially recognizes for prospectuses the incorporation by reference to financial statements, including interim financial statements, etc.
- If a new development which triggers the obligation to prepare a supplement occurs before the end of the offering, investors who had agreed to invest will have withdrawal rights until the end of the subscription or offering period
- Beyond civil prospectus liability, the new regime also provides for administrative criminal liability sanctioned by a fine of up to CHF 500,000 for whoever wilfully makes a false statement in a prospectus or omits material facts or does not publish a prospectus at the beginning of a public offering

Novelties for already listed companies include a passporting mechanism that would include automatic recognition of prospectuses approved by certain foreign authorities specified by the Review Board, subject to notification, filing and publication of such prospectuses with the Review Board. In addition, foreign prospectuses may be recognized as equivalent if they are established in accordance with international standards and provide equivalent information.

An IPO candidate needs to know that the reviewing periods may become longer if they fall within legal holidays which will need to be considered in the planning of the timing of the intended first day of trading.

The New Swiss Review Board

For securities to be listed on a Swiss stock exchange, the process will be split into two streams:

1. In principle ex-ante review and approval of the prospectus (and other relevant documents) by the Review Board ("*Prüfstelle*"); and
2. The admission to listing and trading by SIX Exchange Regulation

The scope of the review will increase as prospectuses will not only be reviewed as to formal completeness ("Rule check") but also as to coherence and understandability. Coherence means that the prospectus may not contain any internal contradictions. However, the Review Board is not required to investigate if any other information about the issuer must be included into the prospectus.

The Review Board also needs to review prospectuses which are required to be published in the absence of a listing on an exchange, e.g. the offering of asset-tokens (that are not admitted to trading on a trading venue) could require a prospectus which needs to be approved by the Review Board. The Review Board is approved by the Swiss Financial Market Supervisory Authority FINMA and it will issue its decisions in the form of decrees ("*Verfügungen*").

The review process will be subject to a formal administrative procedure under the Swiss Federal Act on Administrative Procedure and should, as a matter of principle, be completed within the deadlines set out in the new act. In respect to the process and deadlines to approve prospectuses, see also the section "Ex-ante approval of prospectuses". It is noteworthy that deadlines will be subject to the provisions regarding legal holidays pursuant to the Swiss Federal Act on Administrative Procedure (APA, article 22a) extending the statutory review periods by the Review Board. The main periods of legal holidays to be kept in mind are:

- 7 calendar days before and after Easter
- From 15 July to 15 August
- From 18 December to 2 January

Concluding Thoughts

The new rules set out above will apply only after the lapse of six months after FINMA licensed the first Review Board, but in no event before 1 October 2020. Until then, the currently applicable regime for public offerings and/or listings in Switzerland continues to apply.

Overall, the new Swiss prospectus and reviewing regime becomes largely compatible with European and other international settings. This comes at the cost of potential new challenges in terms of planning and timing as well as longer review periods compared to the past. However, although the new regime entails a profound change in the Swiss prospectus universe, the exemptions provided (i) ensure to a large extent that the additional burden for IPO candidates will remain commensurate and (ii) address certain needs of small, medium as well as large, frequent issuers. The transparency for investors will be increased whereas the legal certainty for issues will be improved.

We look forward to hearing from you:
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For more information for equity issuers, please visit:
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