

New Rules on Prospectus and Basic Information Sheet Consultation for FIDLEG and FINIG - Part II

The Swiss government opened a consultation process for the draft bills of a Financial Services Act and a Financial Institutions Act. These two projects will completely reshape the regulatory framework governing the Swiss financial markets. It includes new rules of conduct for financial intermediaries, a regulatory regime to prepare a prospectus in connection with public offerings of securities, registration obligations for client advisors and foreign service providers, licensing obligations for asset managers, as well as a comprehensive rules aiming to facilitate access to justice, including through a form of class actions.

The consultation process runs until 15 October 2014. The Federal Council plans to send the bill of the Financial Services Act and the Financial Institutions Act to parliament in Q2 2015.

In this second briefing on the draft bills, we examine the new rules on prospectuses and basic information sheets.

Scope and Exemptions

Until now there were no regulatory obligations to prepare, file or obtain the approval for a prospectus under Swiss law except under the listing rules of stock exchanges. The draft FIDLEG now takes on the model of the EU-Prospectus Directive and introduces into Swiss law a **regulatory obligation to prepare a prospectus** in connection with any public offering of securities or the admission to trading on a trading place.

This entails a **radical change in the Swiss regulatory regime**, where securities offerings were only subject to limited disclosure requirements in connection with the issuance of new securities and a more extensive one in connection with a listing in Switzerland.

The obligation to prepare a prospectus will be subject to similar **exceptions** as currently known under the Prospectus Directive. Namely, **offerings to professional clients**, to **less than 150 private clients** as well as offerings for securities with a **denomination of more than CHF 100'000** or offerings that require a **minimum investment** in excess of that amount will not be subject to a prospectus requirement. Similarly, the offering of certain securities will not trigger a prospectus requirement.

Unlike the EU regulation, the same requirements apply for the admission to trading without any additional exemptions. It remains to be seen if this approach will be followed in the final version of the statute.

Content

In line with EU law and marking a departure from the outdated rules of the Code of Obligations, the draft FIDLEG provides that the prospectus must include information on

- the **issuer**, including its board, management, auditor and any other relevant body, the financial statements, and important prospects, risks and litigation,
- the **securities**, namely the rights, obligations and risks associated with them, as well as
- the **offering**, including the placement and the estimated proceeds.

The prospectus may be drawn up in an **official Swiss language or in English**.

As a significant development, the draft FIDLEG officially **recognizes incorporation by reference** and explicitly allows prospectuses to be issued in several parts or through a base prospectus that is to be completed with final terms. At the same time, the draft FIDLEG will **require issuers to prepare a summary**, a novelty under Swiss law, even under the listing rules of SIX Swiss Exchange.

Furthermore, the draft FIDLEG contemplates **simplifications for prospectuses for offerings** by small and medium enterprises, listed issuers with a small or medium capitalization as well as rights offerings.

At this stage, the rules remain at a high level and will need to be implemented to a very significant extent by secondary legislation issued by the Federal Council.

Ex Ante Control

In addition to more detailed substantive rules, the draft FIDLEG also proposes to introduce an *ex ante* control of prospectuses. A newly created Review Board (*Prüfstelle*) will review prospectuses to ensure that they are clear and include all information required by law in advance of any offering.

However, this regime **does not apply to all securities**. Prospectuses of domestic **collective investment schemes** are not subject to an approval regime, whereas prospectuses of foreign collective investment schemes are subject to the approval of FINMA. Furthermore, to ensure a short time to market, the draft FIDLEG provides that the Federal Council may allow **certain debt securities** to be offered before the prospectus is approved if a bank or a securities house guarantees that the essential information regarding the issuer and the securities are available.

To ensure access to foreign financial instruments, the draft FIDLEG authorizes the Review Board to **recognize foreign prospectuses as equivalent** if they are established in accordance with international standards and provide equivalent information.

Validity of the Prospectus

Once approved, a prospectus is valid for **twelve months**. To the extent a supplement is required because of new developments, it will also be subject to a review and approval.

Furthermore, FIDLEG provides for an exception to the principle *pacta sunt servanda* in favor of investors who agreed to invest in a public offering. If a **new development occurs** before the end of the offering and the delivery of the securities and the development is of such a nature that it would influence an investment decision, investors who had agreed to invest will have the right to withdraw their commitment within two days.

Basic Information Sheet

In addition to the obligation to draw up a prospectus, the draft FIDLEG contemplates requiring for all financial instruments other than shares and similar equity securities, a **'basic information sheet'**, which will provide key information on

- the financial instrument and its issuer/producer,
- the nature and risks related to the financial instrument and

- the risk/return profile of the financial instrument, including the likelihood of a loss of principal, the costs associated with the instrument, its minimum term and liquidity profile as well as any information related to its licensing and approval.

This document, which is comparable to the Key Investor Document required for certain Swiss collective investment schemes and European UCITS and the draft EU rules on packaged retail investment products ("PRIIPs"), will **not be subject to any review or approval** but will need to be made available to private investors as part of the information duties.

Publication and Advertisement

Upon its approval and before the public offering may start, the prospectus will **need to be filed with the Review Board and published**,

- by printing it in the Swiss Official Gazette of Commerce,
- by offering it free of charge at the seat of the issuer or any agent in charge of the issuance,
- electronically on the website of the issuer, the trading venue, or the agent in charge of the issuance or on the website of the Review Board.

This obligation extends not only to the prospectus *per se* but also applies to any document included into the prospectus by reference.

In addition to the rules on the prospectus, the draft FIDLEG also proposes to **regulate advertisements for financial products** by requiring all advertisements to include a reference to the prospectus and, if any, the basic information sheet and providing that any advertisement must be clearly designated as such and be consistent with the information included in the prospectus and the basic information sheet.

Prospectus Liability

The last aspect of the prospect rules is the *ex post* control through prospectus liability. In essence, the rules provided for by the draft FIDLEG are **based on the existing rules on prospectus liability** existing under corporate law but are extended to all prospectuses, basic information sheets and similar documents for any financial instrument and regardless of whether such documents are prepared in connection with a primary or a secondary offering.

Notably, the draft FIDLEG decided **not to depart from existing case law** and does consequently not introduce the fraud on the market theory in the statute. At the same time the legislative materials indicate that, in the view of the Federal Department of Finance, the applicable evidentiary standards should in practice lead to similar results.

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