

## Briefing November 2018

# New Rules on Prospectus and Key Information Document

On 15 June 2018, the Swiss parliament adopted the Swiss Financial Services Act (FinSA) and the Swiss Financial Institutions Act (FinIA). On 24 October 2018, the Swiss Federal Council opened a consultation process regarding the three ordinances implementing these acts, the Financial Services Ordinance (FinSO), the Financial Institutions Ordinance (FinIO) and the Supervisory Organisation Ordinance (SOO), which will last until 6 February 2019. The two acts are expected to enter into force together with the ordinances on 1 January 2020 and will introduce an entirely new regulatory framework governing the Swiss financial markets. Among other provisions, FinSA provides for a general obligation to prepare a prospectus in connection with public offerings of securities and their admission to trading on a trading venue as well as for an *ex ante* review and approval process by a Review Board. It also provides for an obligation to prepare a key information document in connection with the offering of certain financial instruments to retail investors.

### New Duty to Prepare and Obtain Approval of Prospectuses

Until now, Swiss prospectus requirements were incomplete and partially outdated. The duty to prepare an issuance prospectus was based on private law rules in the Swiss Code of Obligations and was not enforced by a public authority. Except for issuers listed at Swiss stock exchanges, there was no obligation to file or obtain the approval for a prospectus under Swiss law. FinSA takes on the model of the EU-Prospectus Regulation and introduces into Swiss law a **regulatory obligation to prepare a prospectus** in connection with any public offering of securities or the admission of securities to trading on a trading venue. This entails a radical change in the

Swiss regulatory regime, where securities offerings were previously only subject to limited disclosure requirements in connection with the issuance of new securities and more extensive ones applying to a listing in Switzerland. Under the new regime, all prospectuses will be subject to an **approval process**, carried out *ex ante*, as a rule, under a new regulatory body, the Review Board (*Prüfstelle*), which will review them for formal completeness, consistency and clarity.

### Scope and Exemptions

The obligation to prepare a prospectus will be **triggered by a public offering** to subscribe or purchase securities as well as by the **admission to**

**trading of securities** on a Swiss trading venue. It will therefore cover both primary and secondary market offerings and will apply not only to the issuer but to any person who makes a public offer or seeks the admission to trading of a security. From a territorial perspective, only public offerings in Switzerland and admission to trading on a Swiss trading venue will be subject to the act. In contrast, foreign offerings will not be subject to this obligation, even if they relate to securities issued by Swiss issuers.

The term '**offer**' is defined in FinSA to include any invitation to acquire financial instruments that includes sufficient information on the terms of the offering and the financial instrument. This definition also includes the transmission of offers, but will not extend to inquiries around a general investor interest in a security, through pre-sounding or 'testing the water'. The legislative material and the draft FinSO suggest that the term '**public offering**' should be construed broadly. Any offer to an undetermined circle of persons will be deemed to be a public offering.

The obligation to prepare a prospectus will be subject to **various exemptions** modelled to a large extent on the EU Prospectus Regulation. Among others, public offers

- to **professional investors**,
- to **fewer than 500 investors**,
- to investors who acquire securities for a **consideration in excess of CHF 100,000**
- for securities with a **denomination of more than CHF 100,000** or
- raising **less than CHF 8 million** in total over a period of **twelve months**

will be exempt from the obligation to prepare a prospectus.

Similarly, **various types of transactions** with securities will be exempt from the obligation to issue a prospectus. This includes, among others, securities offered in connection with the **exercise of options** or conversion rights, securities offered to directors, executive management or employees, or stock dividends. Also securities offered or issued in connection with public takeovers, and various **corporate**

**transactions** (e.g. mergers, spin-offs) are exempted, provided information that is equivalent to that required for a prospectus is available.

Furthermore, the FinSA provides for **exemptions** relating to the admission of trading for securities that are **already admitted to trading on another trading venue in Switzerland** or on a recognized **foreign trading venue** which is subject to appropriate regulation, supervision and transparency. Exemptions also apply to the admission of **new securities of the same type as already admitted securities** (i) of **less than 20%** 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.

## Content of the Prospectus

In line with EU law and, to a large extent, the rules of the SIX Swiss Exchange, but marking a departure from the outdated rules of the Swiss Code of Obligations, FinSA 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, and;
- the **offering**, including the placement and the estimated proceeds.

Furthermore, FinSA will **require issuers to prepare a summary**.

In this context, the draft FinSO includes five schedules detailing the minimum requirements concerning the content of the prospectus.

FinSA allows prospectuses to be **issued in several parts**, namely a registration document, a description of the securities and a summary. Furthermore, issuers, including banks and securities firms, will be allowed to issue securities under an offering program, based on a **base prospectus** that will be completed later with final terms.

As a significant development, FinSA officially **recognizes incorporation by reference** to financial statements, including interim financial statements, documents that were prepared in connection with certain corporate transactions such as mergers and de-mergers, Swiss and foreign prospectuses as well as other publicly available documents such as the articles of incorporation, ad hoc publicity releases and press releases more generally as well as foreign registration documents and annual reports.

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

## Review and Approval of the Prospectus

In addition to more detailed and substantive rules, FinSA proposes to introduce an **ex ante review** and approval of prospectuses. A Review Board (*Prüfstelle*) will review prospectuses to ensure that they are complete, coherent and understandable in advance of any offering. The review process will be subject to a formal administrative procedure under the Administrative Procedure Act and should, as a matter of principle, be completed within the deadlines set out in FinSA. As a result, we expect that the scrutiny of the review will increase in comparison to today's practice of the SIX Swiss Exchange.

The Review Board will not be a governmental body but a private institution licensed by FINMA. We currently expect that **at least two Review Boards** affiliated with one of the Swiss exchanges, namely SIX Swiss Exchange and BX Swiss, will be licensed, which is anticipated to lead to competition in terms of review time, client service and costs that would be beneficial for issuers.

Furthermore, to ensure a short time to market, FinSA allows **certain debt securities to be offered before** the prospectus is approved if a bank or a securities house confirms that the essential information regarding the issuer and the securities is available. This will be presumed to be the case if other (equity or debt) securities of the issuer are admitted to trading in

Switzerland or abroad. Pursuant to draft FinSO, securities eligible for early offering include bonds, such as all bonds which are not related to other securities, convertible bonds, warrant bonds, mandatory convertible bonds, contingent convertible bonds and write-down bonds as well as structured products with a term of at least 30 days.

More generally, the review regime **does not apply to collective investment schemes**. Prospectuses of domestic collective investment schemes will continue not to be subject to a specific approval regime, whereas prospectuses of foreign collective investment schemes will remain subject to the approval of FINMA.

To ensure access to foreign financial instruments, FinSA authorizes the Review Board to **recognize foreign prospectuses as equivalent** if they are established in accordance with international standards and provide equivalent information. It also provides for a **passporting mechanism** that would include automatic recognition of prospectuses approved by foreign authorities specified by the Review Board, subject to notification, filing and publication of the prospectus with the Review Board. However, it is still unclear to which jurisdictions this will apply.

## Validity of the Prospectus

Once it is approved by the Review Board, a prospectus is valid for **twelve months**. As an exception to this rule, a prospectus for debt instruments issued by banks and securities firms under an offering program will remain valid as long as the securities are no longer offered.

However, if a **new development occurs** during the period between the approval of the prospectus and the completion of the public offering or the admission to trading and the development is of such a nature that it would influence an investment decision, a **supplement** will need to be prepared, reviewed and approved. Furthermore, FinSA provides for an exception to the principle *pacta sunt servanda* in favour of investors who agree to invest in a public offering. 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.

## Publication and Advertisement

Once it is approved, the prospectus needs to be filed with the Review Board and, no later than upon the beginning of the public offering, the prospectus will **need to be published** and included on a publicly available list of the Review Board. Electronic publication on the website of the issuer, the trading venue, the Review Board or the agent in charge of the issuance and offering it free of charge in print form are sufficient. This obligation extends not only to the prospectus *per se* but also applies to any document incorporated into the prospectus by reference as well as any supplement.

Furthermore, FinSA will **regulate advertisements for financial products** by requiring all of these to include a reference to the prospectus and, if any, the key information document. FinSA additionally requires that any advertisement must be clearly designated as such and should be consistent with the information included in the prospectus and the key information document.

## Key Information Document

In addition to the obligation to draw up a prospectus, the FinSA sets out a requirement for certain financial instruments to have a **'key information document'**, which will provide essential information of:

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

**Most securities typically issued by (non-financial) corporate issuers are exempt** from this requirement, including shares and certain related equity securities

(such as participation certificates, convertible bonds, tradable subscription rights, options granted to employees by the employer or a related firm), as well as debt instruments without a derivative nature (including floating rate bonds, inflation protected bonds, callable bonds or zero-coupon bonds). Furthermore, collective investment schemes that are already subject to the requirement to prepare a Key Investor Information Document (KIID) under the Ordinance on Collective Investment Schemes (CISO) will be exempted from this requirement on an interim basis.

The key information document under the FinSA, which is comparable to the Key Investor Document required under the EU rules on packaged retail investment products (PRIIPs), **will not be subject to any review or approval.**

It will need to be prepared by the producer of the financial instrument, but will also have **to be made available to retail investors by a financial service provider** as part of its information duties when it makes a personal recommendation to purchase the financial instrument. By contrast, financial service providers will not be required to make the key information document available to investors if they only execute or transmit orders, unless a key information document is already available, so allowing financial service providers to continue to be able to service clients even if a key information document is not available.

The key information document must be prepared **in an official Swiss language, in English or in the language used for correspondence with the client**, provided, however, that key information documents for collective investment schemes are available in at least one official Swiss language. The key information document will **require regular updating**, at least on an annual basis, as long as the product is offered to retail clients or prices are quoted for it.

To avoid undue burdens for producers and distributors, FinSA expressly provides that the Federal Council may **recognize certain documents prepared in accordance with laws of other jurisdictions** as being equivalent to the Swiss key information document. In this context, the draft FinSO proposes to

recognize the key information documents pursuant to the EU-Regulation on key information document for packaged retail and insurance-based investment products (PRIIPs) as well as basic information documents pursuant to German law as being equivalent to the requirements of Swiss law. This will, in turn, allow producers to use their existing documents without needing to adjust them for the Swiss market.

## Prospectus Liability

The last aspect of the prospect rules is the *ex post* control through prospectus liability. In essence, the rules provided for by FinSA are **based on the existing rules on prospectus liability** under corporate law but will be extended to all prospectuses, key information documents 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, FinSA does **not depart from existing case law** and, as a result, does 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 Council, the applicable evidential standards should in practice lead to similar results. Moreover, after a long deliberation in parliament, the act does not provide for a specific rule on the burden of proof and, consequently, the plaintiff will need to prove that the defendant acted intentionally or at least through negligence.

FinSA introduces two **mitigating rules**: First, information published in the summary will trigger liability only if it is wrong, misleading or incomplete when read in connection with the other parts of the prospectus. Second, false or misleading information on future prospects will trigger liability only if the statements were made against better judgment or without a disclaimer regarding the uncertain nature of forward-looking statements.

Beyond civil liability, FinSA 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 a key information document or omits material facts or does not publish a prospectus or a key information document at the beginning of a public offering. However, this criminal sanction does not extend to supervised financial institutions and persons acting for them.

## Outlook

The new regulations will **require substantial changes in the offering of securities** and financial instruments more generally in Switzerland. The regulatory burden is likely to increase. Besides public offerings, also the distribution of financial instruments is affected. However, the exemptions provided for by the law and the ordinance ensure to a large extent that this burden will remain commensurate. In addition, certain outdated prospectus requirements that often resulted in an unnecessary burden have been abolished.

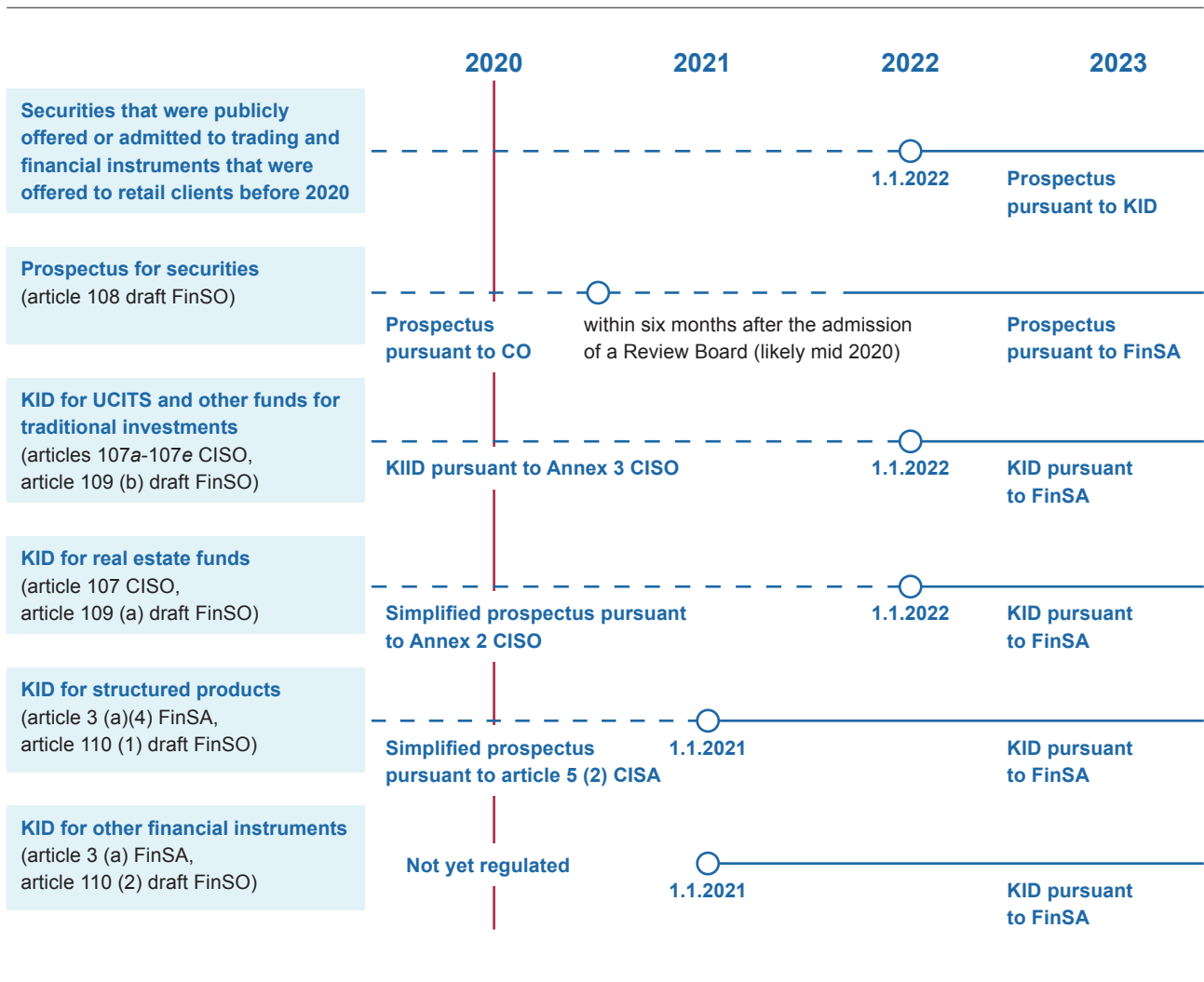
While FinSA has been approved by parliament, the implementing ordinances, which are important for the content of the prospectuses and certain exemptions, are still only available in draft form and subject to changes. Furthermore, determinations of the Review Body are not yet available and will also be relevant, e.g. for passporting purposes. Thus, it is worth keeping an eye on further developments in 2019. The two acts are expected to enter into force together with the ordinances on **1 January 2020**.

To facilitate the transition, the FinSA and the draft FinSO are phasing in over a period of two years as follows:

- As a general rule, securities and financial instruments that **have already been offered** or for which a request for admission to trading has been submitted prior to the entry into the force of the FinSA will be **grandfathered for two years**;
- **New public offerings and admissions to trading** will need to comply with the new prospectus regime **six months after the Review Board is admitted** by FINMA (the date of which is still unclear); until then the current rules will continue to apply.

Regarding the **key information document**, the following transitional regime is expected to apply to new offerings:

- **Structured products** may continue to prepare a simplified prospectus pursuant to the CISO instead of the key information document for one year after the act enters into force;
- **Securities funds as well as other funds** for traditional investments and **real estate funds** may continue to prepare a KIID and, respectively for real estate funds, a simplified prospectus pursuant to the CISO instead of the key information document for two more years;
- **All other financial instruments** will have one year to comply with the new requirements.





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