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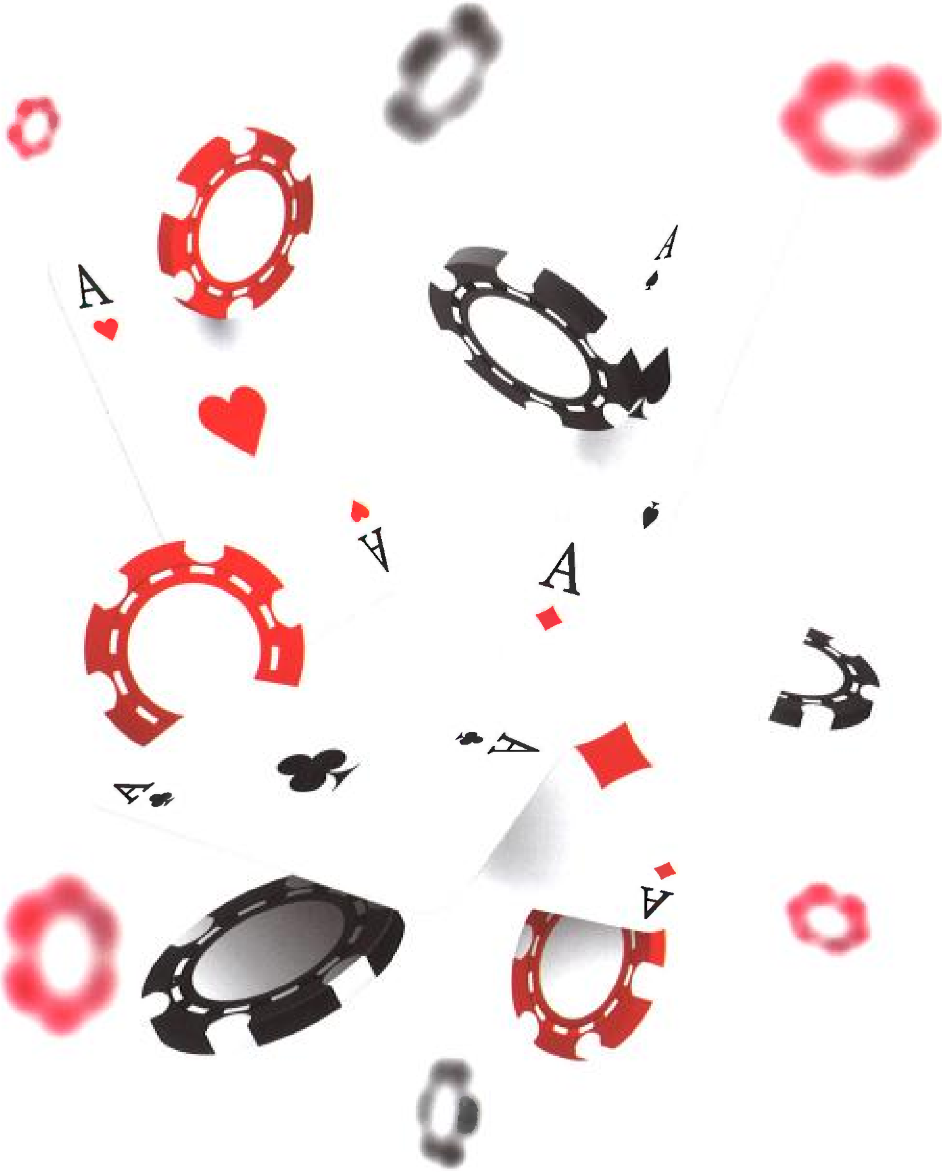
Knowing when to fold

Even if parties are dealt a good hand, an M&A deal can fall apart



Inside China: impact of US/PRC trade war

New bankruptcy law in Saudi Arabia

EU SBBSs: why they don't work yet

Borrower KYC and the secondary loan market

> **Once Switzerland has recognised foreign bankruptcy proceedings, auxiliary Swiss proceedings must take place**

counterparty. The register is thus an important source of creditworthiness assessments. In practice, before entering into binding agreements, it is customary for landlords, employers, banks, and so on, to request a register excerpt from a prospective counterparty. An unjustified payment order – which shows in the register – can thus have a substantial adverse impact on the ability of an individual or entity to do business.

To mitigate the negative effects of unjustified payment orders, the DEBA will be amended, effective January 1 2019, such that three months after receipt of a payment order, an objecting debtor may request the debt enforcement office not to disclose the payment order. The office then sets a 20-day deadline to the creditor to prove that it has initiated a judicial action to continue with enforcement proceedings. If the creditor fails to provide such evidence within 20 days, the payment order will no longer be visible. However, if the creditor later provides evidence of initiation, or if debt enforcement proceedings are continued following court approval, third parties (with a legitimate interest) will once again have the right to see the payment order.

Some critics believe that while so far the register may in some cases have shown unjustified enforcement efforts of creditors, going forward there will be an unpredictable element as to which information will be shown in the register, depending on the stage of the enforcement proceedings.

Easier recognition of foreign bankruptcy proceedings in Switzerland

Under the prevailing Swiss Act on Private International Law (PILA), the recognition of foreign bankruptcies requires, inter alia, that the bankruptcy be initiated at the legal seat of the debtor and that the requesting foreign state reciprocally recognises bankruptcies initiated in Switzerland. These requirements can lead to unsatisfactory situations where foreign bankruptcies may not be recognised because they have been opened at the debtor's centre of main interest (instead of at the location of its legal seat) or because the reciprocity condition was not met; or recognition was delayed because reciprocity could only be proved with substantial effort.

Under the prevailing law, once foreign bankruptcy proceedings have been recognised in Switzerland, auxiliary Swiss bankruptcy proceedings must take place, encompassing the debtor's assets located in Switzerland. The aim of these proceedings is to safeguard pledges and privileged creditors (for example employees, or certain social security claims) in Switzerland. Such auxiliary proceedings, however, make little sense, if no such pledges or privileged creditors exist.

As of January 1 2019, the PILA will be amended to correct these shortcomings. Going forward, foreign bankruptcies will be recognised, whether they are initiated at the debtor's legal seat or at the location of the debtor's centre of main interest. The reciprocity requirement will be abolished entirely. Auxiliary Swiss bankruptcy proceedings may be dispensed with if no pledges exist and no privileged creditors file claims. In such a case, the foreign bankruptcy trustee may to a large extent directly administer the debtor's Swiss assets, including repatriating them. Foreign trustees may not exercise sovereign powers on Swiss territory, however.

Together with the described changes to the DEBA and PILA, related and more technical amendments to existing debt enforcement provisions will enter into force on January 1 2019.

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New prospectus requirements: a corporate issuer's perspective

On June 15 2018, the Swiss Parliament adopted the Swiss Financial Services Act (FinSA). In the meanwhile, the Swiss Federal Council opened a consultation process regarding the Financial Services Ordinance (FinSO), implementing the provisions of the FinSA, which will last until February 6 2019. Together with the new Swiss Financial Institutions Act, the FinSA and the related implementing ordinances are expected to enter into force on January 1 2020. These laws are part of an entirely new regulatory framework governing the Swiss financial markets.

The new prospectus rules entail a radical change for securities offerings in Switzerland. This article provides an overview of those new prospectus requirements which are generally relevant for corporate issuers.

New duty to prepare and obtain approval of prospectuses

Until now, Swiss prospectus requirements were incomplete and partially outdated. Except for issuers listed at Swiss stock exchanges, there was no obligation to file or obtain the approval for a prospectus under Swiss law. In contrast, the FinSA takes on the model of the EU Prospectus Regulation and introduces a regulatory obligation to prepare a prospectus in connection with any public offering of securities or the admission of securities to trading on a Swiss trading venue. The term 'public offering' should be construed broadly. The obligation will apply indistinctly to primary and secondary offerings and any offer to an undetermined circle of persons will be deemed to be a public offering. In contrast, offerings outside of Switzerland will not be subject to this obligation, even if they relate to securities issued by Swiss issuers.

The obligation to prepare a prospectus will be subject to various exemptions modelled to a large extent on the EU Prospectus Regulation, including public offers:

– to professional investors;

– to fewer than 500 investors;

– to investors who acquire securities for a consideration in excess of CHF 100,000 ($100,100 approximately);

– for securities with a denomination of more than CHF 100,000; or

– raising less than CHF 8 million in total over a period of 12 months.

Similarly, various types of transactions with securities will be exempt from the obligation to issue a prospectus, including offerings made in connection with employee participation plans and various corporate transactions. Furthermore, the FinSA provides for exemptions relating to the admission of trading for securities that are already admitted to trading on a Swiss or recognised foreign trading venue, including securities of the same type as already admitted securities of less than 20% during 12 months.

Content

Similar to EU law and the rules of the SIX Swiss Exchange, but marking a departure from the outdated rules of the Swiss Code of Obligations, the prospectus must broadly include material information in respect of the issuer, the offered securities and the offering, as well as a summary.

The FinSA provides that the prospectus may be drawn up in an official Swiss language or in English. It also officially recognises incorporation by reference to all types of publicly available documents, including, for example, financial statements, Swiss and foreign prospectuses and press releases.

Review and approval

The FinSA introduces a new review and approval of prospectuses before the offering or the admission to trading. A review board (*Prüfstelle*) will review prospectuses to ensure that they are complete, coherent and understandable, leading presumably to a more thorough scrutiny than is the case now, even for listed securities at the SIX Swiss Exchange.

The review board will not be a governmental body but a private institution licensed by the Swiss Financial Market Supervisory Authority (Finma), acting, however, as an administrative authority under the Administrative Procedure Act. We expect that at least two review boards will be licensed, which may lead to competition and lower costs for issuers.

Furthermore, to ensure a short time to market, the 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.

To facilitate cross-border securities offerings, the FinSA authorises the review board to recognise foreign prospectuses as equivalent. It also provides for a passporting mechanism that would include automatic recognition of foreign prospectuses (eligible jurisdictions still need to be determined by the review board).

Validity

Once it is approved, the prospectus needs to be filed with the review board and published. It is sufficient to publish it in electronic form and offer it free of charge in print form upon request. A prospectus is then generally valid for 12 months (subject to certain exemptions).

However, if a new development occurs before the end of the offering or the admission to trading that would influence an investment decision, a supplement will need to be prepared, reviewed and approved. If such a new development occurs before the end of the offering, investors will have withdrawal rights until the end of the subscription or offering period.

The FinSA further limits liability for the summary and for forward-looking statements

Prospectus liability

Prospectus liability rules of the FinSA are based on the existing Swiss corporate law rules. Notably, the 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 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 negligently. The FinSA further limits liability for the summary and for forward-looking statements.

Beyond civil liability, the FinSA also provides for administrative criminal liability sanctioned by a fine of up to CHF 500,000 for wilfully making false statements, omitting material facts or failing to publish a prospectus in a timely fashion.

Outlook

The new regulations will require substantial changes in the offering of securities in Switzerland. The regulatory burden is likely to increase. 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 the 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. Thus, it is worth keeping an eye on further developments in 2019. The FinSA is expected to enter into force together with the ordinances on January 1 2020, subject to certain transitional rules.

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