

SWITZERLAND

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New prospectus requirements in full effect

On January 1 2020, the new Swiss Financial Services Act (FinSA) and Financial Services Ordinance (FinSO) on November 6 2019, implementing the provisions of the FinSA, have entered into force. These laws are part of an entirely new regulatory framework governing the Swiss financial markets.

While the majority of the rules entered into force immediately, certain obligations were or still are subject to transition periods. In particular, until December 1 2020, prospectuses could still be established in accordance with the previous, arcane rules of the Swiss Code of Obligations and, as far as SIX Swiss Exchange-listed companies were concerned, in accordance with the former listing rules of the SIX Swiss Exchange. However, since December 1, all new offerings and admissions to a Swiss trading venue must comply with the new prospectus rules.

The new prospectus rules entail a radical change for securities offerings in Switzerland, departing from the outdated rules of the Swiss Code of Obligations and converging to the model of the EU Prospectus Regulation. This article provides an overview of the new prospectus requirements that are generally relevant for corporate issuers.

New duty to prepare and obtain approval of prospectuses

The new framework introduces a regulatory obligation to prepare a prospectus in connection with any public offering of securities or, independently, the admission of securities to trading on a Swiss trading venue.

The term 'public offering' is construed broadly. The obligation applies indistinctly to primary and secondary offerings, and any offer to an undetermined circle of persons is deemed to be a public offering. In contrast,

offerings outside of Switzerland are not subject to this obligation, even if they relate to securities issued by Swiss companies. Furthermore, in our view (albeit not addressed in the law with clarity), only offerings to issue or dispose of, and not offerings to acquire, securities are subject to the new requirements.

The obligation to prepare a prospectus is subject to various exemptions. They include public offers:

- to professional investors;
- to fewer than 500 investors;
- to investors who acquire securities for a consideration in excess of CHF 100,000 (currently about. \$110,000);
- for securities with a denomination of more than CHF 100,000; or
- raising less than CHF 8 million in total over a period of 12 months.

Similarly, various types of transactions with securities are 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 amounting to less than 20% of the originally admitted securities during 12 months.

Content

The prospectus must broadly include material information in respect of the issuer, the offered securities and the offering, as well as a summary. The minimal contents of a prospectus are specified in Annex 1 of the FinSO.

The FinSA provides that the prospectus may be drawn up in an official Swiss language or in English. It also officially allows for incorporation by reference to a variety of publicly available documents, including, as specified in the FinSO, financial statements, Swiss and foreign prospectuses, and press releases.

Review and approval

The FinSA requires that a review board (*Prüfstelle*) reviews prospectuses to ensure that they are complete, coherent, and understandable.

The review board is not 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. Two such review boards – Swiss Exchange Regulation AG (affiliated with SIX Swiss Exchange) and Regservices AG (affiliated with BX Swiss) – have been licensed since June 1 2020. Issuers can freely choose their review body. The fact that there are two is expected to lead to competition in terms of service and costs, even if the FinSO provides for a tight cost framework.

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 a review board to recognise foreign prospectuses as equivalent. It also provides for a passporting mechanism that includes automatic recognition of foreign prospectuses. Both review boards have published lists of jurisdictions and authorities eligible for passporting, which include EU jurisdictions, the UK, the US, and Australia.

Validity

Once it is approved, the prospectus needs to be filed with a 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. Furthermore, 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.

Prospectus liability

Prospectus liability rules of the FinSA are based on the existing Swiss corporate law rules. Notably, the act does not provide for a specific rule on the burden of proof and, consequently, the plaintiff will in principle 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

INTERNATIONAL BRIEFINGS

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

Outlook

As applicable transition periods have now expired, all new offerings and admissions to a Swiss trading venue must now comply with the new prospectus regulations, which result in substantial changes to the way securities are offered in Switzerland. The regulatory burden is likely to increase, but the exemptions provided for by the law and the ordinance ensure, to a large extent, that this burden remains commensurate. It remains to be noted positively that outdated prospectus requirements have been abolished and that the new regime is largely compatible with the EU prospectus regime and international standards.

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