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Newsletter

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BANKING & FINANCE

Modernisation of Swiss Primary Market Regulation

The Federal Act on Financial Services (FinSA) passed on 15 June 2018 will bring about a paradigm shift in Swiss primary market regulation. The FinSA provides for the first comprehensive and coherent prospectus regulation in Switzerland for the public offering and admission of securities to trading. In the meantime, the draft of the Implementing Ordinance has also been published.

1 SWISS PRIMARY MARKET REGULATION TODAY AND TOMORROW

The **current Swiss primary market regulation** differs fundamentally from international standards in a number of respects. First, the **obligation to publish a prospectus** for the issue of securities is not regulated in a uniform way, but implemented differently for shares, bonds, structured products and units in collective investment schemes. Further, the listing of securities is subject to separate provisions in accordance with the rules of SIX Swiss Exchange (**SIX**). Second, if a prospectus is mandatory, **disclosure requirements** differ substantially depending on the type of securities (rudimentary information for shares and bonds, detailed information for units in collective investment schemes). Thirdly, prospectuses are not examined and approved in advance (*ex-ante*) by any **reviewing body** unless the securities are listed on SIX (or

where the prospectus relates to foreign collective investment schemes). Fourthly, Swiss law does not contain any uniform rules on **exemptions** from the prospectus requirement.

The FinSA, adopted on 15 June 2018 after lengthy preparatory work (cf. our newsletter of October 2014), places this outdated regime on a **new footing** that is strongly based on international standards, in particular EU prospectus law. The **draft Ordinance on Financial Services (Draft-FinSO)** was published in October 2018 and will be subject to consultation until 6 February 2019.

In this Newsletter, we shall provide an overview of various changes to the Swiss prospectus regulation (excluding the new key information document for financial instruments (**KID**)), which will be followed by further Newsletters on the FinSA in the near future.

2 PROSPECTUS REQUIREMENT: BASICS

According to the FinSA, anyone who submits a **public offer to purchase securities** in Switzerland or applies for **admission of securities to trading** on a Swiss trading venue in accordance with the Financial Market Infrastructure Act is obliged to publish a **prospectus in advance**:

- > An **offer** is any invitation to purchase a financial instrument that contains sufficient information about the terms and conditions of the offer and the financial instrument itself and (according to the Draft-FinSO) usually aims at its sale. Accordingly, not all advertisements have the required degree of concreteness and finality triggering the obligation to publish a prospectus (the same applies to presounding or testing the water exercises).
- > The offer is **public** if it is addressed to the public. According to the Explanatory Report on the Draft-FinSO, the terms “public” and “addressed to the public” should not be subject to strict requirements.
- > The FinSA prospectus requirement generally applies to public offers and admissions to trading of **securities** (i.e. standardised securities, book-entry securities, derivatives or intermediated securities suitable for mass trading). This includes not only **equity securities** (such as shares) and **bonds**, but also **derivatives** (if offered in the form of an issue), **structured products** and **units in collective investment schemes** qualifying as securities.
- > The obligation to publish a prospectus applies not only to **primary offerings**, i.e. public offerings of new securities, but also to **secondary offerings**, i.e. public offerings of existing securities. Exceptions exist for secondary offerings by supervised financial services providers if a valid prospectus is available and the issuer has consented to its use.
- > In the case of admission to trading, the FinSA requires a prospectus not only for the **listing** of securities on a Swiss stock exchange, but also for the mere **admission to trading** on a stock exchange or a multilateral trading facility in Switzerland (subject to certain exemptions, see point 3).
- > The Draft-FinSO also contains a more concrete definition of the term “**prospectus**”: This includes any document that meets the FinSA requirements and has been approved by a **reviewing body** (including voluntary prospectuses) or is still to be reviewed in connection with a public offering or admission to trading in Switzerland or is automatically recognised in accordance with the regulations of a reviewing body (see point 6). By contrast, private placement memoranda that have not been reviewed do not qualify as prospectuses in the meaning of the FinSA.

3 EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

In contrast to current law, the FinSA provides for detailed **exemptions from the prospectus requirement**.

For example, based on the **type of offer**, there is no obligation to publish a prospectus in the case of a public offer that is directed only at **professional investors** or at less than **500**

(private) investors (in the draft FinSA, this figure was limited to 150). In addition, subscriptions and denominations of at least CHF 100,000 and issues of a total of no more than CHF 8,000,000 within a period of 12 months are exempt.

There are also exemptions available based on the **type of securities**. For example, no prospectus is required for public offers in connection with **certain transactions**, such as conversions, exchanges and exercises of rights associated with financial instruments, in the context of mergers, demergers, conversions or asset transfers, as well as for takeovers, in some cases subject to further conditions in accordance with the FinSA. Exemptions may also apply in certain circumstances to the issue of equity securities distributed as **dividends** to holders of equity securities of the same class, to the allocation of shares to **employees**, to the issue of securities by the **Swiss Confederation or a Swiss Canton**, and to securities with a **short maturity**.

Finally, the FinSA provides for exemptions in connection with an **admission to trading**, for example in the case of equity securities which over a period of twelve months account for **less than 20 percent** (currently only 10 percent, according to SIX regulations) of equity securities already admitted to trading on the same trading venue. An exemption also applies to securities admitted to a **foreign trading venue** whose regulation, supervision and transparency rules have been recognised as appropriate by the domestic trading venue. The Draft-FinSO extends this exemption to securities already admitted to another **domestic trading venue**.

If no prospectus is required, offerors or issuers must **treat investors equally** if they provide them with material information about a public offering.

"The prospectus obligation applies not only to primary offerings, but also to secondary offerings."

4 PROSPECTUS CONTENTS AND STRUCTURE

As a framework law, the FinSA regulates the **disclosure requirements** for prospectuses only in a rudimentary way and leaves the concretization to the Federal Council. Against this background, the Draft-FinSO contains the relevant minimum disclosure requirements in its **Appendices 1-5** (equity securities; debt securities; derivatives; real estate companies; investment companies), which are largely based on the applicable SIX prospectus schemes. **Appendix 6** applies to collective investment schemes, in addition to the special statutory requirements which must also be taken into account. With regard to the **permissible accounting standards**, the Draft-FinSO refers to the regulations of the relevant Swiss trading venue or reviewing body(ies). The reviewing body may provide that certain information **need not be included in the prospectus**.

A prospectus must be drawn up in a **Swiss official language or in English**. In addition, it must contain a summary of the essential information in an understandable form which, according to the Draft-FinSO, must be segregated from the other parts of the prospectus (box). Except in the summary, **incorporation by reference** of other documents in the

prospectus is permitted to a greater extent than is currently the case with SIX. Reference to future documents (forward incorporation) is not permitted.

The prospectus may consist of a **single document** or **several individual documents**. In the context of issuance programmes for bonds, derivatives and structured products, the prospectus may be drawn up in the form of a **base prospectus**, which must contain all information about the issuer, the guarantor and collateral provider and the securities, but not the final terms. Approval of the final terms by the reviewing body is not required.

"Prospectuses must be checked for completeness, coherence and understandability by a reviewing body before publication."

5 RELAXATIONS FROM THE PROSPECTUS REQUIREMENT

According to the FinSA, the Federal Council may provide for **relaxations** from the prospectus requirement for **small and medium-sized enterprises**, provided these do not exceed certain thresholds. In addition, relaxations are possible for issuers with **low market capitalisation** on a trading venue, for **rights issues** and for **well known seasoned issuers**. According to the Draft-FinSO, the latter are issuers that have been listed in the leading Swiss index for at least two years and, cumulatively, have debt securities with a total nominal value of at least CHF 1 billion outstanding.

6 PROSPECTUS REVIEW

Before being published, the prospectus must, in principle, be submitted to a reviewing body newly established by the FinSA. Reviewing bodies must be **approved by FINMA**. In contrast to other jurisdictions, these are not state authorities, but private organisations which, however, act with sovereign competencies within the framework of their prospectus reviews. Accordingly, the procedure before a reviewing body is governed by the Administrative Procedure Act (**APA**).

The reviewing body must check the submitted prospectus for **completeness, coherence and understandability**. According to the Draft-FinSO, the completeness check is limited to formal compliance with the requirements (in the sense of a rule check). If the reviewing body finds that the prospectus does not meet the legal requirements, it notifies the person submitting the prospectus within 10 calendar days. It shall decide within **10 calendar days** of the submission of the prospectus (amended if necessary) on its approval (in the case of new issuers within **20 calendar days**).

As a **significant exception** to the requirement of *ex-ante* approval (but not prior publication) of the prospectus, the Draft-FinSO (Appendix 7) provides that for the purpose of rapid market access for **bonds** (including convertible and warrant bonds, mandatory convertible notes, contingent convertible bonds and write-down bonds) and **structured products** with a maturity of at least 30 days, the prospectus may be reviewed **after** its publication (i.e. *ex-post*). The exception requires a bank or securities firm to **confirm** that the most important information about the issuer and the

securities is available at the time of publication. According to the Draft-FinSO, the prospectus must be submitted to the reviewing body generally within two months of the start of the public offering or admission to trading.

Prospectuses for Swiss **collective investment schemes** must be submitted to the FINMA, but are not subject to approval. Foreign collective investment schemes subject to approval pursuant to CISA have to be submitted to FINMA in connection with the approval application.

The reviewing body may approve prospectuses drawn up not only in accordance with the FinSA, but also in **accordance with foreign law**, provided that certain requirements (including IOSCO standards) are met. In addition, the reviewing body may provide that certain prospectuses approved in other jurisdictions are **"automatically"** deemed to have been approved in Switzerland. For this purpose, it shall publish a corresponding list.

Once the prospectus has been approved by the reviewing body, it remains valid for **twelve months**.

If circumstances arise before the end of the offer period or before the opening of trading that could have an influence on the valuation of the securities, they must be listed in a **supplement requiring approval and publication**. The reviewing body shall decide on the approval of a supplement within a maximum of seven calendar days. The offer period shall end at the earliest two days after the publication of the supplement. In this case, investors may withdraw their commitments until the end of the offer period. The reviewing body shall draw up a list of supplements not requiring approval.

Where collective investment schemes are subject to approval, any amendments must be sent to FINMA.

7 PROSPECTUS PUBLICATION

Once approved, the prospectus must be **filed** with the reviewing body and **published** no later than the commencement of the public offer or admission to trading. The same applies to any supplements. Prospectuses (and supplements) may be published in both printed and electronic form. The reviewing body shall put the approved prospectuses on a list and make them available for twelve months.

8 CIVIL LIABILITY AND CRIMINAL LAW

Like the present law, the FinSA also provides for **prospectus liability**. Whoever discloses information in prospectuses that is incorrect, misleading or in violation of statutory requirements is liable for damages if he or she failed to exercise due care. Special rules apply to summaries and information on material perspectives.

By contrast to the current regime (with exception of the CISA), the FIDLEG also provides for a highly controversial **criminal sanction** for the violation of certain prospectus provisions. A fine of up to CHF 500,000 may be imposed on anyone who intentionally makes false statements in the prospectus or withholds material facts, or who fails to publish a prospectus when the public offer begins. Banks and other financial intermediaries supervised by FINMA as well as persons working for them are exempt from this criminal sanction regime.

9 OUTLOOK

The modernisation of Swiss primary market regulation - with the exception of the exaggerated criminal sanction for breaches of certain prospectus obligations - is **to be welcomed** and was largely undisputed in parliament. The consultation process on the Draft-FinSO will continue until 6 February 2019. The final ordinance is expected to be ready in the third quarter of 2019, in view of the planned entry into force of the FinSA on **1 January 2020**. According to the Draft-FinSO, the obligation to publish a prospectus in accordance with the FinSA will apply six months after the approval of a reviewing body by FINMA, i.e. probably from **1 July 2020**.

Contacts

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:



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