

Bond issuers will retain quick access to Swiss debt capital market under new regime

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Introduction

As part of its effort to meet EU-equivalent standards, Switzerland is in the process of implementing a comprehensive reform package which will fundamentally change the Swiss financial market regulatory framework and introduce the country's first harmonised and coherent prospectus regulation. The new regime comprises the Federal Financial Services Act (FinSA) and its implementing ordinance, the Federal Financial Services Ordinance (FinSO), and is expected to enter into force by 1 January 2020.⁽¹⁾

One fundamental novelty is the introduction of the requirement for a prospectus to be approved by an official review body prior to its publication. The Swiss bond market is primarily a retail market with standard denominations of Sfr5,000, and for many issuers its scope is not broad enough to warrant the preparation of programme documentation. This means that a prospectus would have to be prepared and pre-approval obtained each time before the market is approached. Where quick access to benefit opportunistically from market movements is a key factor, such new requirements could potentially jeopardise the proper functioning of the bond market in its entirety. Appreciating the relevance of these particularities of the Swiss market, the Swiss legislature provided for an exemption from the *ex ante* approval requirement and a concept which arguably allows issuers under certain circumstances to prepare and publish the prospectuses only after the initial access to market.

In other words, in line with current practice in the Swiss debt capital markets, the new regime provides that the prospectus approval requirement will need to be complied with post-launch only for certain debt instruments (eg, bonds) and prospectuses may need to be published only after the market has been approached or securities have been admitted to trading.

Prospectus approval requirement post-launch or admission to trading

As indicated above, efficient access to the (Swiss) bond market is of great importance as it allows issuers to respond quickly on changing market conditions (eg, a change in demand or interest rate environment) and/or to limit risks resulting from adverse events.

A particularity of the existing prospectus approval process in the Swiss debt capital market is the possibility of the provisional admission of bonds to trading prior to the publication of a listing prospectus (and listing) to provide issuers with a timely placement and commencement of trading of the bonds. As part of the legislative process, it was

stressed that preserving this practice is crucial to a proper functioning Swiss capital market and should not be threatened by the new *ex ante* prospectus approval requirement.

On this account, and as a significant exemption to the general principle of the requirement of an *ex ante* prospectus approval, the new regime provides that a prospectus for, among other things, bonds (including convertible and warrant, mandatory convertible, contingent convertible and write-down bonds) must be reviewed and approved only after its publication.

As a general rule, a prospectus must be submitted to the review body by no later than two months after the beginning of the public offer or admission to trading which corresponds with SIX Swiss Exchange's current practice. This exemption applies only if a bank or a securities firm confirms that the most important information about an issuer and the securities is available to the market at the time of the prospectus's publication. Further, the FinSO provides for the assumption that the market has such information if the issuer already has equity securities or financial instruments listed on a recognised trading venue.

Prospectus publication post-launch or admission to trading

Although the text of the new law is not entirely clear on this point, arguably the publication of the prospectus can also be deferred to a point after launch of an offer or admission to trading if the assumption referred to above applies. In other words, if an issuer already has equity or debt securities listed on a recognised trading venue, the publication of the prospectus (and not only its approval) can take place after the launch of the offer. Evidently, such information must be available at the time of the launch or admission to trading and not at the time of the prospectus's publication. The main argument for this interpretation is that the concept of assumption would be irrelevant if a prospectus with the relevant information would need to be published in any event. Further, such interpretation would arguably undermine the legislature's efforts to ensure timely access to the Swiss debt capital market.

In practice, the process for (straight) bond issuers may be summarised as follows:

- If the assumption that the issuer has already listed equity or debt securities on a recognised Swiss or foreign trading venue applies, the issuers may access the market with a term sheet containing the most important information on the securities (including the terms and conditions) and publish a prospectus post-launch or post-admission to trading but prior to the approval by the review body (within two months post-launch).
- If the assumption does not apply, the bond issuer will publish a preliminary prospectus at the beginning of the public offer or before admission to trading in order to inform the market about the most important information about the issuer and the securities (a term sheet may be distributed separately as well) with the approval by the review body and publish the final prospectus at a later date.

Bank or securities firm confirmation

As a prerequisite for the *ex post* prospectus approval requirement, a bank or securities firm must confirm that the most important information about the issuer and the securities are or will be available at the time of the prospectus's publication. Such information includes the minimum information stipulated in the relevant annex to the FinSO (which is largely based on SIX Swiss Exchange's current corresponding prospectus scheme) and any other information of significance to investors when making their investment decision. A deviation from the minimum disclosure requirements set out in the applicable annex to the FinSO is permissible to the extent that the information is unimportant for an investment decision (eg, international securities identification number and common code) or not yet available (eg, a final offer price which will be determined as part of a book building process).

In addition, FinSO provides for the assumption that the most important information relating to an issuer, whose equity securities or debt instruments are admitted to trading on a Swiss trading venue or recognised foreign trading venue, are already known. This means that:

- if the assumption applies, a bank would issue its confirmation on the basis of the assumption whereby it probably will, in turn, seek confirmation from the issuer that such assumption is correct (ie, that there is no postponement of *ad hoc* relevant disclosure); or
- if the assumption does not apply, the bank confirmation will most likely be based on a rule check of the preliminary (and not yet approved) prospectus prepared by the issuer and its legal advisers.

The (bank) confirmation must be submitted to the review body together with the (preliminary) prospectus to be reviewed.

Comment

The new regime and the interpretation outlined above will ensure that bond issuers will continue to have efficient and quick access to the Swiss debt capital market – one of the legislature's key goals. It remains to be seen whether the final text of the FinSO, which is expected to be published in November 2019, will clarify the ambiguity and provide further support of such interpretation.

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Endnotes

(1) While the final version of the FinSA is already available, the final version FinSO is expected to be published in November 2019.

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