

New Swiss prospectus regime in the making

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Introduction

As part of Switzerland's efforts to meet EU equivalence requirements, the Swiss legislature is working on a new federal Financial Services Act. Under the act, which may enter into force as early as mid-2019, a comprehensive and harmonised prospectus regime will be introduced and will be applicable to all public offerings of financial instruments and all securities to be admitted to trading on a trading platform in Switzerland.

Fundamental novelties of the Swiss capital markets regulation include:

- the requirement for offering prospectus approval;
- an obligation to publish a prospectus for primary and secondary public offerings; and
- the codification of the private placement exemption and other exemptions in line with accepted Swiss standards and the EU Prospectus Directive.

The draft act has passed both chambers of the Swiss Parliament and is currently subject to a procedure for the solution of differences.

Duty to publish a prospectus

Under existing Swiss law, the publication of a basic offering prospectus is required in the event of primary public offerings (ie, not for secondary offerings) and, according to self-regulatory stock exchange regulation, a listing prospectus must be prepared in the event of a listing on a Swiss stock exchange.

The draft act will introduce:

- an obligation to publish an offering prospectus in the event of a public (primary and secondary) offering of securities in Switzerland or an admission to trading of securities on a trading platform in Switzerland; and
- an approval requirement for all offering and listing prospectuses, irrespective of whether the securities are admitted to trading on a trading platform.

Under the draft act, a public offering will be deemed either an application for admission to trading or an invitation to the public for the purchase or subscription of a financial instrument containing sufficient information on the terms and conditions of the offering and the financial instrument.

A novelty to Swiss law is that the duty to publish an approved prospectus also applies to secondary public offerings. However, it remains unclear as to how a non-issuer in case of secondary offering transactions may access the information of a company to be disclosed in an offering prospectus given that a company is not obliged to provide this information.

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Content of prospectus

All material information for an investor's investment decision must be included. Further, the draft act requires prospectuses to include a summary of this information in an easily comprehensible and standardised format to allow its comparison with other summaries of similar financial instruments publicly offered in Switzerland.

The details of prospectus content and summary requirements will be set out in a Federal Council implementing ordinance – the draft of which has yet to be published. The content will likely follow existing SIX Swiss Exchange regulations.

New approval requirement

With the exception of an approval required by the relevant Swiss stock exchange in the event of a listing of financial instruments, Swiss statutory law currently does not require an offering prospectus to be filed with or approved by any Swiss governmental or other authority.

As a new feature under Swiss law, the draft act introduces the requirement for an offering prospectus to be approved by a new regulatory body (the so-called 'review body') licensed and supervised by the Financial Market Supervisory Authority (FINMA). The SIX Swiss Exchange Ltd and the BX Berne eXchange are expected to apply to be licensed as review bodies. Generally, the prospectus approval requirements will apply to all primary and secondary public offerings and to all admissions to trading, and not only in the event of a securities listing on a Swiss stock exchange.

Approval of the prospectus (and any supplement thereto) by the review body must be obtained before its publication. As part of the approval process, the review body will review the prospectus only as to its completeness, coherence and comprehensibility, but not as to material correctness of the information contained therein. The prospectus must be submitted by new issuers (ie, issuers who have neither published a prospectus approved by the review body nor have securities admitted on a Swiss trading platform) at least 20 days before the publication of the offering or admission of the financial instruments to trading. For other issuers, the deadline is 10 days.

To grant issuers efficient access to the market, the Federal Council may designate in its implementing ordinance certain debt securities (eg, bonds) whose prospectus may be approved only after its publication, provided that a Swiss bank or securities dealer confirms that the most important information about the issuer and the debt securities are available at the publication date. Issuers must nonetheless ensure that the prospectus:

- is published no later than the day on which the public offering commences or admission to trading is applied for; and
- contains a statement that review body approval has not yet been obtained.

Exemptions from the duty to publish a prospectus

Under the draft act, the general obligation to publish an offering prospectus is subject to a number of exemptions which, as stated in the Federal Council dispatch, are largely compatible with existing EU rules (particularly the EU Prospectus Directive) and regulations applicable to admissions to trading on the SIX Swiss Exchange. Further, the Federal Council's implementing ordinance may provide for additional exemptions not yet finally determined (eg, for small and medium-sized issuers).

The exemptions from the prospectus requirement under the draft act can be divided into three categories:

- exemptions based on the type of offering;
- exemptions based on the type of security; and
- exemptions for admission to trading.

Exemptions based on type of offering

The list of exemptions from the prospectus requirement for certain types of offering set forth in the draft act is exhaustive. Exemptions are deemed justified for reasons of investor protection (normally a close relationship between an investor and issuer or offeror) practically eliminating any misuse (see the first and second exemptions below) or the investors' economic circumstances require no

particular protection (see the third exemption below) and because preparing a prospectus would be deemed disproportionate.

No prospectus is required for:

- public offerings that are limited to:
 - professional clients (eg, financial intermediaries under the meaning of the Banking Act, the Financial Institutions Act and the Collective Investment Schemes Act);
 - insurance companies; or
 - companies with a professional treasury;
- offerings that are addressed to a limited number of investors – if the amendments suggested by the National Council are accepted, offers of up to 500 retail investors would be exempted from the prospectus requirement, whereas the draft act sets the threshold in line with the EU Prospectus Directive at 150 retail investors;
- public offerings with a minimum investment of Sfr100,000 per investor or public offerings of securities with a denomination of at least Sfr100,000; and
- offerings not exceeding a certain *de minimis* threshold – the relevant *de minimis* threshold is still subject to discussions in the procedure for the solution of parliamentary differences. While the Federal Council suggested a threshold of Sfr100,000, the National Council proposed to increase the threshold to Sfr2.5 million. The competent commission of the Council of States has now suggested a threshold of Sfr8 million.

Exemptions based on type of security

Certain types of security may be publicly offered in Switzerland without an approved prospectus. This category of exemptions is based on the idea that, for the exempt types of security, publishing a prospectus is not required for purposes of investor protection as investors have otherwise access to equivalent information (eg, an existing relationship between the investor and the issuer or offeror).

Among others, no prospectus is required for:

- the exchange of outstanding equity securities for equity securities of the same class beyond a capital increase;
- the exchange of outstanding equity securities following a conversion of financial instruments of the same issuer or any of its affiliates;
- the offering of securities in the context of a merger, spin-off, conversion or asset transfer transaction, provided that written information equivalent in content to a prospectus is available; and
- the offering of securities to executives or employees.

Exemptions for admission to trading

In line with the EU Prospectus Directive and the existing SIX Swiss Exchange regulations, the draft act stipulates certain exemptions from the prospectus requirement in the context of admission to trading.

No prospectus is required for the admission to trading of the following types of securities:

- equity securities that, calculated over a period of 12 months, account for less than 10% of the equity securities in the same class that are already admitted to trading on the same trading platform – depending on the outcome of the procedure for the solution of differences this figure may change (20% suggested by National Council);
- equity securities that are issued in connection with a conversion or exchange of financial instruments or a result of the exercise of rights in connection with financial instruments, provided that such equity securities are of the same class as the securities already admitted to trading;
- securities that are already traded on a foreign stock exchange that is either considered to be adequate by the Swiss trading platform or where transparency for investors is otherwise safeguarded; and
- securities that are available only to professional clients.

Comment

The Financial Services Act will usher in a new era of securities regulation in Switzerland and introduce a new harmonised prospectus regime that aims to establish a level playing field with corresponding EU prospectus regulations. While parts of the new regulation will be manageable and in line with well-established Swiss market practice (eg, content of prospectus and private placement exemptions), other areas will require special attention from market participants and advisers. It remains to be seen whether the prospectus approval process, which will have to be dealt with by new regulatory bodies, will continue to be as pragmatic, business oriented and efficient as today's self-regulatory bodies of the SIX Swiss Exchange and other stock exchanges.

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