

Switzerland: Prospectus requirements for the offering of financial products under the Financial Services Act – 2017

by Lukas Wyss and Maurus Winzap, Walder Wyss Ltd.

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IN SWITZERLAND, THERE IS STILL STRONG FOCUS ON THE ONGOING DISCUSSIONS AROUND THE CONTEMPLATED OVERHAUL OF THE SWISS FINANCIAL REGULATORY FRAMEWORK. IN A GENERAL ATTEMPT TO BRING THE SWISS FINANCIAL REGULATORY FRAMEWORK IN LINE WITH INTERNATIONAL REGULATIONS, SUCH AS MiFID II AND THE EU PROSPECTUS DIRECTIVE, THE FINANCIAL MARKET INFRASTRUCTURE ACT (FINMIA) HAS BEEN ENACTED AS OF JANUARY 1, 2016. IN ADDITION, THE FEDERAL FINANCIAL SERVICES ACT (FINSA) AND THE FINANCIAL INSTITUTIONS ACT (FINIA) SHALL REPLACE MAJOR PORTIONS OF THE EXISTING FINANCIAL REGULATIONS. HOWEVER, THE FINSA AND THE FINIA ARE STILL IN DRAFT FORM AND UNDER (POSSIBLY FINAL) DEBATE IN SWISS PARLIAMENT. IT IS EXPECTED THAT THESE NEW PIECES OF LEGISLATION WILL NOT ENTER INTO FORCE BEFORE 2019. HOWEVER, GIVEN THAT SOME OF THE FUNDAMENTAL ELEMENTS OF SWISS FINANCIAL REGULATION WILL CHANGE QUITE SIGNIFICANTLY, IT IS WORTHWHILE KEEPING A CLOSE EYE ON THE CURRENT DRAFT LEGISLATION.

Overview

The FinSA and the FinIA shall strengthen client protection, promote competitiveness of the Swiss financial centre and, by creating a level playing field, competitive distortions between providers shall be minimised.

More specifically, the FinSA will govern the relationship between financial intermediaries and their clients with respect to all financial products. Financial service providers will have to seek and take into account necessary information on the financial situation, knowledge and experience of the client when rendering advice. Further, the

FinSA will introduce new uniformed prospectus requirements for all securities that are publicly offered or traded on a Swiss trading platform. Also, there will be a new general requirement to produce a basic information sheet for each financial product that can be presented to retail clients.

Private actions in the event of misconduct by financial service providers shall be improved; this includes the introduction of an ombudsman service. The ombudsman is contemplated to act exclusively as a mediator and will not receive any decision-making powers. Also, the introduction of either a court of arbitration or a fund for litigations costs is envisaged.

The FinIA will unify the supervision of all financial service providers that are active in the asset management business in whatever form. Existing licensing requirements for financial service providers and financial institutions that are now widespread in various bodies of law will be embedded in the FinIA, while essentially remaining unchanged as to substance, save for further alignments, as appropriate.

In addition, new licensing requirements will be introduced for managers of individual client assets and managers of assets of Swiss occupational benefits schemes. Asset managers shall be supervised by the Swiss Financial Market Supervisory Authority (FINMA). In relation to other asset managers, it is still unclear whether these will be subject to supervision by FINMA or by one or, under certain conditions, several supervisory authorities.

New prospectus requirements under Swiss law in particular

The revision of the prospectus requirements contemplated by the FinSA is conceptually a fundamental change of the Swiss prospectus requirements.

Current Swiss prospectus regime and regulations

Under the current Swiss legal regime, the relevant rules applicable to debt securities offerings depend on whether the offering is private or public. Private offerings are not regulated and, accordingly, there is no obligation to publish a prospectus. Nevertheless, prospectus or information memoranda are typically prepared in private offerings on a voluntary basis, in accordance with market standards and investor expectations.

The prospectus requirements for public offerings are reflected in the Swiss Code of Obligations (CO). Given that Switzerland is not a member of either the EU or the EEA, the EU Prospectus Directive and other EU/EEA capital market regulations do not apply. The prospectus requirement is exclusively based on civil law and breach thereof will trigger a liability based on civil law. The content requirements for such prospectus are rather slim

and only cover, essentially, disclosures on the issuer (and guarantor, if relevant) relating to corporate form, capital structure, board members, dividends distributed in the past five years and latest annual audited accounts (not older than nine months; otherwise, interim accounts will have to be established).

If debt securities are to be listed on a stock exchange in Switzerland, the respective listing requirements and rules of the relevant stock exchange will have to be complied with. In Switzerland, the most important stock exchange is the SIX Swiss Exchange in Zurich (SIX). Given that the prospectus requirements under the CO are rather slim, a listing prospectus that complies with SIX's regulations most often covers the CO requirements for an offering prospectus as well. Therefore, when issuing debt securities to be listed on the SIX, it is standard to only produce one prospectus which qualifies as offering prospectus under the rules of the CO and as listing prospectus under the rules of SIX.

In the framework of examining the listing application for debt securities, SIX will examine whether the prospectus meets the listing rules. Other than that, there are no general filing or approval requirements under Swiss law. In addition, it is important to note that SIX generally allows for a provisional admission to trading of debt securities (on the basis of an online short application form for provisional trading). The final listing application only needs to be filed with SIX within two months after the first trading day. Hence, a transaction can be closed and admitted to provisional trading, without any authorities or any stock exchange having formally pre-approved the prospectus. This makes issuances and listings of debt securities extremely efficient in Switzerland.

Regime under the new Federal Financial Services Act (FinSA)

The regime suggested by the FinSA will differ significantly from the current Swiss law regime reflected in the CO and, accordingly, will influence the Swiss debt capital market. The prospectus requirements will no longer be (exclusively) based on civil law concepts, but rather on regulatory law.

1. **Requirement to issue prospectus and exemptions.**

Articles 37 et seq. of the draft FinSA deal with the prospectus requirements for securities, including debt securities. The new rules state that "any person who offers securities for sale or subscription in a public offer in Switzerland or any person who seeks the admission of securities for trading in a trading venue as defined in the FinMIA must first publish a prospectus." In its dispatch to the FinSA, the Swiss Federal Council explained further that an offer is considered to be public in case an investor, acting in good faith, must consider the offer to be public. Given the lack of concrete information in relation to a financial product, general advertisement is typically not considered as a public offer.

The FinSA further provides for exemptions from the prospectus requirements, which are very similar to the exemptions provided by the EU Prospectus Directive. Accordingly, no prospectus is required, if the offer:

- is addressed to "professional clients" only; on the basis of the FinSA, professional clients are financial intermediaries for collective investment schemes, insurance companies, central banks and public corporations, pension funds and corporates with professional treasury departments;
- is addressed to less than 150 investors classified as retail clients;
- is addressed to investors acquiring securities at a value of at least CHF100,000 or in case the instruments have a minimum denomination of CHF100,000 and more per unit;
- does not to exceed an overall value of CHF100,000 over a 12-month period.

There are further exemptions that apply depending on the financial instrument to be issued.

2. **Requirements as to content of prospectus.** Contrary to the CO, the draft FinSA imposes quite extensive requirements as to the content of a prospectus. These requirements are generally considered to be in line

with standard market practice, international regulations and the listing rules of the SIX. Therefore, the new content requirements are not expected to have a material impact on the Swiss bond market.

Nevertheless, a couple of points should be noted. Incorporation of information by reference is explicitly permitted by the draft FinSA. Whilst this concept is recognised by the listing rules of SIX and even though this is market practice, there is still uncertainty at a civil law level, whether such incorporation by reference would be formally permissible. The FinSA should clarify this.

Furthermore, it is worthwhile noting that the draft FinSA provides for a new requirement to include forward looking statements in a prospectus. Given the increased liability risk around forward-looking statements, a prospectus should contain explicit disclaimers in this respect. Also, given the remarkable number of critical statements in the political debate around this new requirement, the provisions on prospectus liability now include a lower standard in this respect.

Finally, a prospectus must contain a summary containing all material information and a statement



Lukas Wyss

Maurus Winzap

Lukas Wyss

tel: +41 58 658 56 01

email: lukas.wyss@walderwyss.com

Maurus Winzap

tel: +41 58 658 56 05

email: maurus.winzap@walderwyss.com



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that such summary shall not form the basis for the investment decision and that the liability for the summary is limited to delusive or incorrect information or information that is contradictory to the entire prospectus.

3. **Relaxed standards.** The draft FinSA suggests that the Swiss Federal Council may, in the form of a federal ordinance, introduce relaxed standards on the prospectus requirements for small- and mid-size enterprises (i.e. enterprises not exceeding any two or all of the following: (i) balance sheet of CHF20,000,000, (ii) turnover of CHF40,000,000 per year, or (iii) 250 employees (full-time equivalent).
4. **Review of prospectus by review authority.** The new rules on the requirements to issue a prospectus, as well as the content requirements are not fundamentally different from SIX's listing rules. Whilst the FinSA will provide for a more explicit and possibly stricter legal framework, these elements do not have a material impact on the market.

However, the introduction of a new pre-approval requirement for the prospectus by a reviewing authority is a fundamental change to the current regime. In the review process, completeness, coherence and comprehensibility of the prospectus shall be checked against the requirements of the FinSA. The reviewing authority shall render its decision within 10 business days or, in case of first-time issuers, 20 business days.

Once the FinSA will be implemented, FINMA will appoint the reviewing authority. The reviewing authority further needs to meet certain requirements, such as independence, due organisation, reputation, infrastructure and knowledge. Given the lack of infrastructure and personnel, it is expected that a private organisations will be appointed.

The issuance and the admission to trading without prior listing approval or pre-approval of the prospectus is one of the key features of the Swiss bond market.

The listing application can be filed within two months after the commencement of trading. This ensures a high level of flexibility on the issuers' side when it comes to timing of issues. During the political debate, market participants raised concerns that this competitive advantage for the Swiss bond market shall not be put at risk by introducing a prospectus pre-approval requirement. This concerns have been addressed. The draft FinSA now gives the Swiss Federal Council authority to issue ordinances that may provide for exemptions. It is clearly expected that such carve out will be introduced for bonds and there is a hope that this will extend to convertible bonds, contingent convertible bonds and to other equity-based securities.

5. **Key information document.** Under current regulations, it is a requirement that a key information document be produced in relation to certain collective investment schemes. The FinSA will introduce a general obligation to produce and publish a key information document for any financial instrument offered to retail clients. There are only limited exemptions available and the current draft FinSA does not provide for an exemption for bonds. This creates a burden for issuers without really enhancing investor protection. On the basis of the draft FinSA, a prospectus must contain a summary. In particular in the context of a straight bond issuance, it is unclear what additional value a separate key information document will provide and accordingly, there is still some hope, that a carve out will be introduced for bond issuances.

Swiss withholding tax – update and outlook

Interest payments by Swiss issuers under collective fundraising transactions (such as bonds) are subject to Swiss withholding tax at a rate of 35%. Whilst Swiss investors may claim back the 35% relatively easily, but with a delay as to timing, the reimbursement process for foreign investors is more burdensome. Also, depending on

the jurisdiction of the investors and further depending on the legal structure of the investors, Swiss withholding tax may be claimed back only in part, if at all. This imposes a limitation on Swiss bond issuers to access the international debt capital markets. Exemptions are only available (temporarily) for certain types of debt qualifying as regulatory capital (such as CoCos issued by systemic relevant banks (“too big to fail” banks) as well as certain write-off and bail-in bonds).

In an attempt to strengthen the Swiss market, Switzerland is about to consider fundamental changes to its withholding tax system. On August 24, 2011, the Swiss Federal Council proposed new legislation under which the current deduction of Swiss withholding tax of 35% by the issuer of bonds on interest payments at source would have been substituted for by a respective deduction by Swiss paying agents (subject, in principle, to an exception for foreign investors). It was initially expected that the new regime would enter into force in the course of 2015 or 2016. However, in view of the negative outcome of the

consultation on the draft legislation in the course of 2014 and 2015, the Swiss Federal Council decided, on June 24, 2015, to postpone a complete overhaul of the Swiss withholding tax regime, as originally planned. It now remains to be seen when and, if so, under which form, the withholding tax reform will be launched again.

The substitution of the Swiss withholding tax regime by a more investor friendly regime would allow Swiss issuers to attract more international investors and the investor base would be substantially broadened and would definitively provide for a boost of the Swiss bond market.

Contact us:

Walder Wyss Ltd.

Seefeldstrasse 123, P.O. Box 8034 Zurich,
Switzerland

tel: +41 58 658 58 58

web: www.walderwyss.com