# New prospectus regime under the Swiss Financial Services Act – 2018

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On June 15, 2018, Swiss parliament passed the last pieces of legislation of the overhaul of the Swiss financial regulatory framework, namely the Swiss Financial Services Act (FinSA) and the Swiss Financial Institutions Act (FinIA). The FinSA and the FinIA are expected to enter into force on January 1, 2020. Relevant authorities are now working on the finalisation of various implementing ordinances. The FinSA introduces a comprehensive prospectus regime that covers and harmonises disclosure requirement for different types of financial instruments.



## Overview

The legislative process towards passing the new FinSA and FinIA kicked off in November 2015. The FinSA and FinIA will create uniform competitive conditions for financial intermediaries and improve client protection. The acts shall further promote competitiveness of the Swiss financial centre and, by creating a level playing field, competitive distortions between providers shall be minimised. Swiss Parliament adopted both acts on June 15, 2018.

More specifically, the FinSA will govern the relationship between financial service providers and their clients with respect to all financial products and will contain code of conduct provisions. 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 venue. 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 get any decision-making powers.

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

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embedded in the FinIA, while essentially remaining unchanged as to substance, safe 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 (FINMA).

## New prospectus regime under the Financial Services Act (FinSA)

For the first time in Switzerland, the FinSA introduces a comprehensive prospectus regime that covers and harmonises disclosure requirement for different types of financial instruments.

### Duty to publish an approved prospectus

Under the FinSA, "any person offering securities for sale or subscription in a public offering in Switzerland or any person seeking 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. It remains unclear, whether the term "public offering" can be used independently in a manner that would go beyond the explicit exemptions as introduced by the FinSA (see below) so that it could create an independent exemption or whether the explicit exemptions provided by the FinSA are exhaustive.

Further, the FinSA expands the scope of the prospectus requirement:

- Secondary offerings: Also in the context of (public) secondary offerings, a prospectus must be published. The FinSA makes it clear that the issuer, to the extent not involved in the offering, has no obligation to cooperate in preparing the prospectus. Therefore, it remains unclear, how an offeror (other than an issuer) in a secondary offering can get access to relevant information to be disclosed in the prospectus.
- Admission to trading: Prospectus requirements not only apply to listings of securities, but to any admission to trading on any trading venue.

The FinSA also introduces a new requirement for prospectus pre-approval by a regulatory body prior to the launch of the offering or the request for admission to trading (see below).

### Exemptions from prospectus requirement based on type of offering

The FinSA provides for various exemptions from the prospectus requirements based on the type of the offering. These exemptions are very similar to the exemptions provided by the EU Prospectus Directive.

#### *Offerings to professional clients*

More generally, the FinSA introduces a concept of client segmentation by making a distinction between retail clients, professional clients and institutional clients. The FinSA also provides for certain opt-in and opt-out mechanisms.

Retail clients are clients that do neither qualify as professional nor institutional clients, unless, in the case of wealthy retail clients, the client opted out, in which case it qualifies as professional client. Professional clients may also opt in, in which case they qualify as retail clients.

Professional clients are financial intermediaries in accordance with the Swiss Banking Act, the FinIA and the Swiss Collective Investment Scheme Act, insurance companies, central banks as well as public corporations, pension funds and corporates in each case having a professional treasury department and wealthy private persons investing through investment structures with professional treasury departments.

Institutional clients are financial intermediaries in accordance with the Swiss Banking Act, the FinIA and the Swiss Collective Investment Scheme Act, insurance companies, central banks and national or supra national public corporations with professional treasury departments.

Whilst the client segmentation is mainly relevant in the context of the conduct rules of the FinSA, the segmentation forms also a basis for exemptions from the prospectus requirement. No prospectus is required for offerings to professional clients.

### *Offerings to less than 500 investors*

Offerings to not more than 500 (retail) investors are exempt from the prospectus requirement. It is remarkable that this goes well beyond the exemption rules of the EU Prospectus Directive. Initially, in line with the EU Prospectus Directive, the draft of the bill suggested by the Swiss Federal Council set this level at 150 investors.

### *Offerings with minimum investments of CHF100,000*

Offerings to investors with minimum investments of CHF100,000 are exempt from the prospectus requirement.

### *Offerings of securities with minimum denomination of CHF100,000*

Offerings of securities with minimum denominations of CHF100,000 are exempt from the prospectus requirement.



### *Offerings not exceeding an aggregate volume of CHF8,000,000 during a rolling 12-month period*

No prospectus is required in case the aggregate volume of securities issued does not, in aggregate, exceed the amount of CHF8,000,000 during every 12-month period.

## Exemptions from prospectus requirement based on type of securities

In addition, offerings of certain types of securities may be exempt from the prospectus requirement. Namely the following:

- equity securities issued outside a capital increase in exchange for equity securities of the same class already issued;
- equity securities issued or delivered in the context of a conversion or exchange for securities already issued by the same issuer or any of its affiliates;
- equity securities issued or delivered following exercise of an option or other right issued by the same issuer or any of its affiliates;
- securities offered in the context of an exchange offer, provided information is available that is equivalent to information contained in a prospectus;
- securities offered in the framework of a merger, spin-off, conversion or asset transfer, provided information is available that is equivalent to information contained in a prospectus;
- equity securities issued to holders of same equity securities in the form of dividends;
- securities offered or assigned by an issuer or any of its affiliates to current or former board members, members of the executive management or other employees;
- securities issued or guaranteed by the Swiss Confederation, any Swiss Canton, any inter- or supra national public corporation, the Swiss National Bank or any non-Swiss central bank and securities issued by issuers with non-commercial business for purposes of fundraising for non-commercial purposes;
- debentures (*Kassenobligationen*);
- money market instruments with a term of less than one year; and
- derivatives not offered in the framework of an issuance.

## Exemptions from prospectus requirement for admission to trading

No prospectus is required in the context of an admission to trading in the following cases:

- Admission for trading of equity securities which, in agg regate, do not exceed 20% of the volume of equity securities of the same class already admitted for trading at the same trading venue.
- Admission for trading of equity securities issued in the context of a conversion or exchange of financial instruments or following the exercise of rights related to financial instruments, provided equity securities of the same class are already admitted to trading at the same trading venue.
- Securities already admitted to trading at a trading venue outside of Switzerland which is considered to be equivalent in terms of regulation, supervision and transparency.

- Securities to be admitted for trading on a trading segment only opened for professional clients.

## Requirements as to content of prospectus

Contrary to the existing legislation, the 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 SIX Swiss Exchange. Therefore, the new content requirements are not expected to have a material impact on the Swiss debt capital market. Nevertheless, a couple of points should be noted.

Incorporation of information by reference is explicitly permitted by the FinSA. Whilst this concept has been recognised by the listing rules of SIX Swiss Exchange 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.

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

## Relaxed standards

The 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)). Relaxed standards may further be introduced by the Swiss Federal Council for other situations.

## 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 Swiss Exchange's listing rules. Whilst the FinSA provides 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 calendar days or, in case of first time issuers, 20 calendar 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. It can be expected that SIX Swiss Exchange Ltd and BX Berne eXchange will be appointed as review authority.

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. These concerns have been addressed. The FinSA now gives the Swiss Federal Council authority to issue ordinances that may provide for exemptions so that no pre-approval will be required, provided a duly licensed bank or securities dealer confirms that information on the issuer and the securities are available and further provided that the prospectus is available and published no later than the day on which the offering is launched or application to admission for trading is made. The approval will then occur afterwards. 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.

## 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 introduces a general obligation to produce and publish a key information document for any financial instrument offered to retail clients. However, equity securities and debt instruments without derivate characteristics are exempt. The detailed content requirements will be reflected in ordinances of the Swiss Federal Council yet to be published, but it can be expected that the rules will follow the EU market standard.

## Outlook

The FinSA introduces a new comprehensive prospectus regime establishing a level playing field with the EU Prospectus Directive. Given the existing listing rules and other regulations of SIX Swiss Exchange and other stock exchanges, it would appear that the new regulation would not fundamentally change current market practice. Nevertheless, certain areas will require specific attention and it is important, that new elements (such as the prospectus pre-approval requirement) will be implemented in a pragmatic, business oriented and efficient manner.


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