New prospectus approval process under the Swiss Financial Services Act – 2020

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As part of the general overhaul of the Swiss financial market's regulatory framework, the Swiss Financial Services Act (FinSA) entered into force on January 1, 2020. In addition, the Swiss Federal Council issued the Swiss Federal Financial Services Ordinance (FinSO) on November 6, 2019 which contains implementing provisions relating to the FinSA (effective as of January 1, 2020).

The FinSA introduced, *inter alia*, a comprehensive prospectus regime that covers and harmonises disclosure requirement for different types of financial instruments. Also, the FinSA introduced a new approval regime for prospectuses by a prospectus review body (the Review Bodies). A Review Body can be a private organisation but must be formally approved by the Swiss Financial Market Supervisory Authority (FINMA) upon approval request. The first two Review Bodies have been authorised and formally approved by FINMA in May 2020 with effect as of June 1, 2020.

Following the authorisation of the two Review Bodies, SIX Exchange Regulation Ltd. and BX Swiss AG, by FINMA, a transitional period started running, which gives issuers the optionality to still prepare and publish prospectuses under the old regime. However, the transitional period will end six months following the authorisation of the first Review Body, i.e. on November 30, 2020. Therefore, starting from December 1, 2020, issuers have to prepare their prospectuses in compliance with the FinSA and submit their prospectus for review to one of the Review Bodies, unless an exemption applies.

Overview and key aspects of new prospectus regime

The new Swiss prospectus regime is one of the core parts of the Swiss Financial Services Act (FinSA) and the implementing ordinance (FinSO) which have entered into force on January 1, 2020. As part of the general overhaul of the Swiss financial market's regulatory framework that was initiated following the financial crisis of 2008, the FinSA essentially aims to protect investors by enhancing transparency, preventing unfair practices and create a level playing field for financial service providers. In particular, the new prospectus regime shall ensure that investors have access to essential and objective information on financial products.

The new Swiss prospectus regime follows, to a large extent, the European Prospectus Regulation and the standards set by the International Organization of

Securities Commissions (IOSCO). Still, it is an independent piece of legislation which aims at preserving market practices in Switzerland which had been proven efficient and successful in the past (such as short time to market for Swiss bond transactions). Key elements of the regulation include the following:

- obligation to publish a prospectus in case of a public offering *(öffentliches Angebot)* or an admission to trading *(Handelszulassung)* of securities on a Swiss stock exchange (SIX Swiss Exchange or BX Swiss) or a multilateral trading facility;
- comprehensive set of exemptions from the obligation to publish a prospectus;
- review of the prospectus by a Review Body authorised by the FINMA;
- uniform prospectus content including summary and abridgement possibilities across all types of financial instruments (equity and debt securities, collective investment schemes, structured products); and
- harmonised prospectus liability regime for all types of securities.

Under the new prospectus regime, not only primary but also secondary offerings (with or without concurrent admission to trading of the offered securities) require an offering prospectus (subject to exemptions). Furthermore, under the new regime cross-border offerings into Switzerland are also subject to the Swiss prospectus regime.

The approval process in particular

The new prospectus regime under the FinSA introduced a requirement to get prospectuses approved by a Review Body approved by FINMA (such as SIX Exchange Regulation Ltd. and BX Swiss AG approved by FINM with effect as of June 1, 2020). The new prospectus approval regime started to apply as of June 1, 2020, but issuer may, at their option, benefit from a transitional period, which will end six months following the authorisation of the first Review Body.

Therefore, starting from December 1, 2020, issuers have to prepare their prospectuses in compliance with the FinSA and submit their prospectus for review and pre-approval to one of the Review Bodies, unless an exemption applies.

Pre-approval of prospectus

The FinSA generally requires that the prospectus be submitted to a Review Body prior to its publication and prior to its distribution to potential investors. Therefore, the standard process is to submit a preliminary prospectus to either SIX Exchange Regulation Ltd. or BX Swiss AG for approval, before a transaction is launched and a preliminary prospectus is made available to potential investors.

The preliminary prospectus should be in final form, such that the updates in the final prospectus will ideally be limited to the final volume and the pricing of the transaction (see below in relation to the additional approval of prospectus supplements).

The first FinSA approved prospectuses seen in the market in the last couple of weeks all contained an asterix (*) for


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any information that is to be updated in the final prospectus such that potential investors are aware of the update to come. Once a Review Body approved a prospectus and rendered its decision to the issuer, the transaction can be launched and the approved preliminary prospectus can be made available to potential investors.

Post-approval of prospectus

Under the former prospectus regime, the prospectus was only reviewed by the stock exchange in connection with the listing application, which was to be submitted only post settlement. Only in case a new or complex structure was set up, it was a requirement that the structure was pre-approved by the stock exchange.

As a consequence of this post settlement approval of the listing application "time to market" for Swiss domestic straight bond transactions was very short under the old regime. Transactions were launched on very short notice, which was considered to be efficient and advantageous to issuers.

Therefore, it was one of the key objectives of the FinSA, that this market advantage continues to apply. Accordingly, the FinSA gives the Swiss Federal Council the authority to deviate from the pre-approval requirement for certain types of securities by way of issuing an ordinance. Within the framework of that authority, the Swiss Federal Council has designated in the FinSO certain types of securities, for which the issuer has the option to launch the transaction and publish a prospectus, that has not been pre-approved by a Review Body. Such securities include bonds and structured products.

In case the issuer does make use of the option to launch a transaction without pre-approved prospectus, a confirmation from a licensed bank or licensed broker dealer is needed confirming that relevant information on the issuer and the securities are available to investors upon publication of the prospectus. The confirmation must be submitted to the Review Body.

First transactions seen in the market during the last couple of months showed that such confirmations are made easily available by financial institutions on the basis of arrangements with the issuer.

Once the transaction priced, the final prospectus will be prepared, and the final prospectus will be submitted to the Review Body for approval. Normally, such submission must occur within 60 calendar days from the publication of the preliminary prospectus (which has not been approved), but shorter time periods apply for securities with a term of less than 180 calendar days.

Actual review

The review to be performed by the Review Body is limited to formal completeness, coherence and comprehensibility of the prospectus as provided for by the FinSA and the FinSO. In particular, there is no review of the accuracy of the information contained in the prospectus. The review by the Review Body shall be completed within 10 to 20 calendar days from submission of the prospectus.

In case the Review Body notices that a prospectus is not compliant with the legal requirements, it informs the applicant within 10 calendar days from the submission of the draft prospectus and requests and update of the prospectus. The updated prospectus shall be reviewed by the Review Body within a further 10 calendar days upon submission.

If the Review Body does not issue a decision within these deadlines, the prospectus is deemed approved.

Once approved, the prospectus is valid for a period of 12 months as from the approval for securities of the same kind of that relevant issuer. A bond prospectus in a bond programme is valid until no further securities are permanently and repeatedly issued under the programme.

If new material information becomes available between the date of publication of the prospectus and the end of the offering period or, in case of a listing, the first day of trading, a prospectus supplement must be submitted to the Review Body together with an approval request.

The Review Body must then decide on the approval of the supplement within seven calendar days. The Review Bodies have published lists of supplements which do not require approval; nevertheless, such information must be communicated to the Review Body simultaneously with their publication. According to the current lists of SIX Exchange Regulation Ltd. and BX Swiss AG, supplements on pricing and volume as well as material price sensitive information which is published ad hoc in line with the applicable listing rules are exempt from the review requirement.

Deposition and publication of the approved prospectus

The approved prospectus must prominently display the name of the Review Body and the date of the approval. A hard copy or electronic version of the prospectus and documents to which the prospectus refers as well as the pertinent key information document (if any) must be deposited with the Review Body. The Review Body makes publicly available a list of all prospectuses approved during the last 12 months.

The issuer or offeror may fulfil its obligation to publish the prospectus by making an electronic version available on the website of the Review Body. Alternatively, the issuer or offeror may publish the prospectus in an adequate newspaper or the Swiss Gazette of Commerce or make free hard copies available at the registered office of the issuer or an appointed investment bank or electronically on their website.

The publication of the offering and/or listing prospectus is due at the beginning of the offering period or, respectively, on the first day of trading. If a category of equity securities is to be admitted to trading on a Swiss trading venue for the first time, the FinSA requires that the prospectus must be published at least six working days in advance, thereby stipulating a minimum offering period. For debt instruments, no such minimum period applies.

Outlook

Already prior to December 1, 2020, a number of issuers decided to launch transactions with pre-approved prospectuses, even though they could have benefited from the transitional periods. The experience with the Review Bodies was positive and the process turned out to be very efficient. As to the substance of the review, the Review Bodies did indeed limit their review of the prospectuses to completeness, coherence and comprehensibility.

It is to be expected that during the next couple of months, market participants will have to get further familiar with the process. Also, there will be further developments in relation to descriptions in the prospectuses for approved and non-approved (preliminary) prospectuses. However, the market is confident that the new process for prospectus approval as per the new regulatory regime will not cause any major issues in the future. Rather, the new regime is expected to be a success, in particular for bond issuances.

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