

The new Swiss prospectus regime

What an IPO candidate needs to know

Switzerland introduced a new prospectus regime which entered into force on 1 January 2020 as part of the new Financial Services Act (FinSA; Finanzdienstleistungsgesetz; FIDLEG). **By Patrick Förg and Sandro Fehlmann**



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On 28 May 2020, the Swiss Financial Market Supervisory Authority FINMA informed that it granted BX Swiss AG and SIX Exchange Regulation AG licences as reviewing bodies for prospectuses effective 1 June 2020. The two prospectus reviewing bodies (Prospectus Offices; “Prüfstelle”) review and approve the prospectuses to be published in connection with a public offer of securities or the admission of securities to trading on a stock exchange with regard to their completeness,

coherence and understandability. With the licencing of the Prospectus Offices, the six-month transitional period provided for in the Financial Services Ordinance (FinSO) started to run and, hence, the duty to publish a FinSA approved prospectus will take effect as of 1 December 2020.

The new regime is largely modelled along the EU Prospectus Regulation framework. It provides for a set of rules for public offerings including the introduction of a regulatory body to review and approve offering prospectuses. Up until now, Switzerland – unlike all EU and EEA countries – did not have a regulatory body overseeing public offerings. Overall, the regime aims to enhance transparency and legal certainty for issuers. In this context, there are a few fundamental novelties a candidate for an initial public offering (IPO) needs to know as new and more disclosure and approval requirements for public offerings will be introduced.

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Ex-ante approval of prospectuses

Under the old regime, there were only limited requirements in the case of public offerings and they did not require offering prospectuses to be filed with, or to be approved by, any reviewing body in Switzerland. Only in the case of a listing in Switzerland, e.g. on the Swiss Stock



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Overall, the new regime aims to enhance transparency and legal certainty for issuers.

Exchange operated by SIX, an approval requirement by the relevant stock exchanges' authority (SIX Exchange Regulation) as the competent self-regulatory body applied. Under the new regime, all prospectuses will be subject to an approval process which – as a general rule – will be carried out ex-ante by the Prospectus Office.

First-time issuers will be required to submit the prospectus for approval in advance to account for the Prospectus Office's review period of 20 calendar days (for all other issuers, the review period amounts to 10 calendar days). Within such review period, the Prospectus Office will approve the prospectus or ask for a revision. In case of the latter, the applicable period may start from scratch after re-submission of the revised prospectus to the Prospectus Office.

Exemptions to publish a prospectus

The obligation to prepare a prospectus will be subject to various exemptions modelled to a large extent along the EU

Prospectus Regulation. The set of exemptions, among others, will include offerings that:

- ◆ are limited to professional investors; or
- ◆ are addressed to less than 500 investors; or
- ◆ are addressed to investors who acquire securities for a consideration of at least CHF 100,000; or
- ◆ raise not more than CHF 8 million (in total over a period of 12 months)

Furthermore, the new regime provides for exemptions, e.g. relating to the admission of trading for securities that are already admitted to trading on a recognised foreign trading venue which is subject to appropriate regulation, supervision and transparency. Both Prospectus Offices published identical lists of such recognised foreign trading venues including selected venues across Europe, the United States, Australia, Hong Kong and China.

For already listed companies, further exemptions to publish a prospectus apply, e.g. in the case of the admission of new securities of the same type as already admitted to trading on the same trading venue (i) of less than 20% of that respective security type outstanding during twelve months or (ii) issued in connection with the conversion or exchange of financial instruments or the exercise of rights related to such instruments.

Other new aspects of which an IPO candidate should be aware of:

- ◆ In case of an IPO, the approved prospectus must be published at least six

business days prior to the end of the subscription period.

- ◆ Issuers will be required to prepare a summary section and a section on forward-looking statements.
- ◆ The new regime officially recognises for prospectuses the incorporation by reference to financial statements, including interim financial statements.
- ◆ If a new development which triggers the obligation to prepare a supplement occurs before the end of the offering period, investors who had agreed to invest will have withdrawal rights until the end of the subscription or offering period.
- ◆ Beyond civil prospectus liability, the new regime also provides for administrative criminal liability sanctioned by a fine of up to CHF 500,000 for whoever wilfully makes a false statement in a prospectus or omits material facts or does not publish a prospectus at the beginning of a public offering.

Novelties for already listed companies include a passporting mechanism that includes automatic recognition of prospectuses approved by certain foreign authorities specified by the Prospectus Offices, subject to registration, filing and publication of such prospectuses with the Prospectus Office no later than the beginning of the public offering or admission of the securities to trading. In addition, foreign prospectuses may be recognised as equivalent if they are established in accordance with international standards

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and in essence provide equivalent information as contemplated by the applicable annexes pursuant to FinSO.

The new Swiss Prospectus Office concept

For securities to be listed on the Swiss Stock Exchange, the process will be split into two streams which may operate separately:

- ◆ In principle ex-ante review and approval of the prospectus by the Prospectus Office pursuant to FinSA; and
- ◆ The application for admission to listing and trading to SIX Exchange Regulation in the case of a Swiss Stock Exchange listing.

The scope of the review will increase as prospectuses will not only be reviewed as to formal completeness (“Rule check”

with the content guidelines annexed to FinSO which are largely based on the well-established content requirements [i.e., schemes] known under the listing rules) but also as to coherence and understandability. Coherence means that the prospectus may not contain any internal contradictions, e.g. (i) risks mentioned in the summary must also be included in the risk factors section and (ii) all amounts concerning the use of issue proceeds must correspond with the amount of the expected proceeds from the offering. However, the Prospectus Office is not required to investigate if any other information about the issuer must be included in the prospectus. The Prospectus Office also needs to review prospectuses which are required to be published in the absence of a listing on a stock exchange, e.g. the offering of asset-tokens (that are not

admitted to trading on a trading venue) could require a prospectus which needs to be approved by a Prospectus Office.

In respect to the process and deadlines to approve prospectuses, see also the section “Ex-ante approval of prospectuses”. It is noteworthy that deadlines are subject to the provisions regarding legal holidays pursuant to the Swiss Federal Act on Administrative Procedure (APA, article 22a); however, in order to meet the demands of the capital market participants, both SIX Exchange Regulation and BX Swiss have partially suspended the deadlines according to the legal holidays. According to the currently available directive, SIX Exchange Regulation suspended the deadlines for its Prospectus Office during the following days:

- ◆ Good Friday and Easter Monday;
- ◆ August 1 (Swiss National Day);
- ◆ from 24 December up to and including 26 December; and
- ◆ from 31 December up to and including 2 January.

Concluding thoughts

The new rules must be applied as of 1 December 2020. Until then, the currently applicable regime and the new rules run in parallel and both can be applied. Overall, the new Swiss prospectus and reviewing regime becomes largely compatible with European and other international settings. This comes at the cost of potential new challenges in terms of planning and timing as well as longer review periods compared to the past. However, although the new regime entails a profound change in the Swiss prospectus universe, the exemptions provided (i) ensure to a large extent that the additional burden for IPO candidates will remain commensurate and (ii) address certain needs of small, medium as well as large, frequent issuers. The transparency for investors will be increased while the legal certainty for issues will be improved, and both will positively impact the Swiss IPO market in the long-run. ■