CAPITAL MARKETS - SWITZERLAND

Offering of financial instruments – a major change of direction

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Introduction

On November 4 2015 the Federal Council adopted the dispatch on the Financial Services Act, which notably governs the offering of financial instruments, and has submitted the draft act to Parliament for debate and enactment. On February 16 2016 the Economic Affairs and Taxation Committee of Council of States (the Swiss Assembly's upper house) unanimously agreed to accept further discussion in respect of the bill for the act. The bill is, however, expected to be amended in several respects.

The draft act's regime is largely inspired by the EU Prospectus Directive (2003/71/EC), without being entirely modelled on it. However, the contemplated revision constitutes a regulatory revolution for securities issuers, as well as manufacturers and distributors of financial instruments in Switzerland.

The Swiss primary securities market is regulated by different statutes, which does not allow for a comprehensive view of the prospectus regime. Moreover, with the exception of listing requirements and prospectus or key information document requirements applicable to certain types of collective investment schemes and structured products, the regime applicable in Switzerland regarding the offering of securities and other financial instruments is rather liberal. For example, a prospectus, when required, does not need to be filed with or approved by any authority or reviewing body, except in the case of a listing on an exchange. More generally, the offering of financial instruments targeting retail clients does not require the preparation of a key information document comparable to the key information document for packaged retail investment and insurance-based investment products (PRIIPs KID), or a simplified prospectus, unless the financial instrument constitutes a structured product or a share in a real estate fund (requiring a simplified prospectus), or a share in a securities fund or a fund for traditional investments (requiring a key information document).

The act will introduce not only new prospectus requirements with respect to all equity and debt securities, derivatives and structured products, but also impose the drafting of a key information document where an offer relating to a financial instrument is made to a retail investor. However, these requirements will be subject to numerous exemptions and reliefs.

Prospectus publication obligation

Under the draft act, a prospectus will be required in case of:

- a public offering of securities (ie, standardised certificated and uncertificated securities, derivatives and intermediated securities, which are suitable for mass trading); and
- the admission of securities to trading on a trading platform.

A 'public offering' is defined as the notification to the public for the purchase or subscription of a financial instrument which contains sufficient information on the conditions of the offer and the offered financial instrument itself. This definition entails a two-prong test. There must be an offer and the offer must be public (ie, according to the dispatch, not restricted to a limited number of persons). In principle, the test should exclude general advertisements, roadshows, tombstone advertisements or financial analyst recommendations. Conversely, it should capture secondary offerings, unless privately made.

The 'admission to trading on a trading platform' refers not only to the admission to trading on a stock exchange, but also to a multilateral trading facility, now regulated by the Financial Markets Infrastructure Act. The Financial Services Act requirements will apply concurrently with those deriving from the regulations issued by the relevant stock exchanges and multilateral trading facilities in accordance with Articles 35 and 36 of the Financial Markets Infrastructure Act.

Exemptions

In line with the EU Prospectus Directive, the draft Financial Services Act provides for certain exemptions from prospectus requirements as follows:

- Private placement exemption – this exemption applies in particular with respect to public offerings which target exclusively:
    - so-called 'professional clients' – the term covers, among others, financial intermediaries (eg, banks and asset managers, insurance companies and companies with a professional treasury); and
    - fewer than 150 non-professional clients (so-called 'retail clients').
- Minimum amount exemption – offerings with a minimum investment of Sfr100,000 and offerings of securities with a denomination of at least of Sfr100,000 should be exempt.
- Small offering exemption – the draft act provides for a *de minimis* exemption with respect to offerings of less than Sfr100,000 over 12 months.
- Exempt securities and transactions – the draft act exempts from prospectus publication requirements the offering of certain securities (eg, medium-term notes and money market instruments), as well as the offering of securities in a specific context (eg, the delivery of equity securities following a conversion of debt instruments of the same issuer or its affiliates, the offering of securities to executive or employees and the offering of money market instruments).
- Exemption with respect to the admission to trading of certain securities – this exception applies in particular to:
    - equity securities that over a 12-month period account for less than 10% of the number of equity securities of the same category already admitted to trading on the same trading platform;
    - equity securities issued on the conversion or exchange of financial instruments or following the execution of rights linked to financial instruments, provided that they are equity securities of the same category as those already admitted to trading;
    - securities admitted to trading on a foreign trading platform whose regulation, supervision and transparency are acknowledged as being appropriate by the domestic trading platform or whose transparency for investors is ensured in another manner (this exemption reflects SIX practice relating to its sponsored foreign shares segment); and
    - securities for which admission is sought for a trading segment open exclusively to professional clients trading for their own account or for the account solely of professional clients.

The draft act further provides the possibility for the Federal Council to adjust by way of ordinance the thresholds mentioned with respect to the private placement, minimum amount and small offering exemptions with a view to following international standards and trends.

Prospectus required content

Unless exempt, a public offering of securities, or the admission of securities to trading on a trading platform requires the publication of a prospectus drafted in a Swiss official language or in English setting out, among other things, information regarding the issuer and the relevant securities to be offered to the public or to be admitted to trading on a trading platform. It must also include a summary which should briefly convey in non-technical language the essential characteristics and risks associated with the issuer, any guarantor and the securities (the exact content of the summary remaining to be defined by way of ordinance). Alleviated requirements should apply with respect to offerings of small and medium-sized issuers, well-known seasoned issuers and offerings relating to pre-emptive subscription rights.

The prospectus could incorporate certain information by reference, as permitted by the SIX listing rules. The prospectus could also contain in a single document a set of several separate documents or a base prospectus that is completed with the final terms (eg, in the context of a debt issuance programme).

Consistent with the EU Prospectus Directive, the draft act provides that a supplement to the prospectus must be drawn up on the occurrence of any new factor which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a trading platform begins. In case of public offering, the investors which have already agreed to purchase or subscribe for the securities before the supplement is published should have the right (exercisable within a time limit not shorter than two working days after the publication of the supplement) to withdraw their acceptances.

Prospectus approval

Another significant novelty brought by the draft act is the obligation to have the prospectus approved by a reviewing body before its publication and, by way of consequence, the beginning of the offering or the admission to trading of the relevant financial instruments (to the exclusion of collective investment schemes, which remain subject of the authorisation regime provide by the Collective Investment Schemes Act). Under the draft act, the prospectus should be submitted to a reviewing body which should verify that the prospectus is complete, coherent and understandable. The reviewing body must notify the issuer, the offeror or the person seeking admission to trading on a trading platform within 20 working days for first-time issuers or 10 working days if the public offer involves securities issued by an issuer which does not have any securities admitted to trading on a trading platform and which has not previously offered securities to the public. However, these time limits are indicative in nature insofar as the absence of a decision in the timeframe should not be understood as a deemed approval.

The draft act allows the Federal Council to provide the possibility for certain types of securities to publish the prospectus without having to wait for approval, as is currently the case for the Swiss fixed-income and structured products markets under the SIX listing rules. However, this faster access to capital markets will presuppose that:

- a Swiss bank or broker-dealer verifies that the key information relating to the issuer and the securities is available at the time of the prospectus publication; and
- the provisional prospectus clearly indicates that it remains subject to approval by the reviewing body.

With respect to securities issued by non-Swiss issuers, the draft act allows the reviewing body to approve a prospectus for an offer to the public or for admission to trading on a trading platform, drawn up in accordance with the legislation of a foreign jurisdiction, provided that:

- the prospectus has been drawn up in accordance with international standards set by international securities commission organisations (eg, the International Organisation of Securities Commissions disclosure standards); and
- the information requirements, including information of a financial nature, are equivalent to

the requirements laid down by the act.

Moreover, the draft act leaves some leeway to the reviewing body to automatically approve a prospectus that has been approved in accordance with applicable foreign requirements. Such an automatic approval mechanism would relate mainly to a prospectus approved in accordance with the EU Prospectus Directive or US securities laws and regulations.

Prospectus publication and validity

Once approved, the prospectus will be filed with the reviewing body and published no later than the beginning of the public offer or the admission of the securities to trading. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a trading platform that is to be admitted to trading for the first time, the prospectus must be available at least six working days before the end of the offer. Publication can be in one or more newspapers or the *Official Gazette of Commerce*, in printed form to be made available free of charge to the public, or in electronic form.

A prospectus will be valid for offers to the public or admissions to trading on a trading platform for 12 months after publication. In the case of debt securities issued by a Swiss bank or a broker-dealer, the prospectus will be valid until no more of the securities concerned are issued in a continuous or repeated manner.

Obligation to publish key information document

In addition to the prospectus requirements, the act will introduce a general duty to prepare a key information document in connection with any offering relating to any financial instrument (except shares and comparable equity-related financial instruments) made to a retail client. The key information document will replace the existing simplified prospectus for structured products and real estate funds, and the key information document for collective investment schemes. Its content should be comparable to that of a key information document for collective investment schemes and should include:

- the name of the financial instrument and manufacturer's identity;
- the type and characteristics of the financial instrument;
- the risk/return profile of the financial instrument, specifying the maximum loss the that investor could incur on the invested capital;
- the costs of the financial instrument;
- the minimum holding period and the tradability of the financial instrument; and
- information on the authorisations and approvals relating to the financial instrument.

As regards non-Swiss financial instruments, it should be possible to use the information documentation (eg, a PRIIPs KID) established under the relevant foreign law, provided that such documentation is equivalent to a Swiss key information document.

The obligation to prepare a key information document should lie with the manufacturer of the financial instrument, although this responsibility may be assigned to a qualified third party. The manufacturer or, as the case may be, qualified third party should ensure that the key information document is up to date and make all necessary modifications.

In contrast with a prospectus required in case of public offering of securities or their admission to trading, no filing with or approval by any reviewing body is required with respect to the key information document. Moreover, manufacturers of financial instruments offered to retail investors in Switzerland should be obliged to publish the key information document only in connection with an offer which is deemed public.

Further, the obligation to prepare a key information document should be coupled with the obligation of all financial services providers to make such a document available to the retail investors, which are offered to purchase a financial instrument in connection with which a key information document has been drawn up.

Civil and criminal liability

As is the case under the existing regime, any person involved in the preparation or dissemination of the prospectus or key information document which contains false information should be civilly liable to the acquirer of a financial instrument for resulting losses. However, such liability would presuppose, among other things, that the prospectus or key information document contains information that is inaccurate, misleading or in breach of statutory requirements.

While the liability regime shifts the burden to the defendant to demonstrate that it did not act intentionally or negligently, the draft act does not assume any causal link between any misstatement and the purchase of the relevant financial instrument. In this context, the Federal Council renounced to import the 'fraud on the market' theory applied notably by US courts to civil enforcement of Securities and Exchange Commission Rule 10b-5. However, the draft act introduces protection for forward-looking statements in line with the US bespeaks caution doctrine.

The draft act further envisages administrative and criminal penalties in case of intentional breach of the act. Since the criminalisation of such behaviours constitutes a significant parting from the existing regime, its adoption by Parliament remains to be seen.

Entry into force and transitional period

The draft act is due to be debated before Parliament in 2016. However, the industry does not expect it to enter into force before 2018. Moreover, the draft act should provide for a two-year transition period with respect to:

- securities publicly offered or admitted to trading on a trading platform before the entry into force of the act; and
- financial instruments offered to retail clients before the entry into force of the act.

While the contemplated set of regulations brought by the draft act constitutes a radical departure from the existing regime, the financial and legal industry still has time to anticipate this paradigm shift.

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