

Newsletter No.

131

New Rules on Offering and Listing Prospectuses in Switzerland

With the entering into force of the Swiss Financial Services Act on 1 January 2020, new rules regarding offering and listing prospectuses were introduced. They are expected to become effective as from 1 October 2020. As a result, Switzerland will have a modern and comprehensive prospectus regime for all types of financial instruments (securities) and a uniform prospectus liability regulation. For the first time, issuers will be required to have their offering or listing prospectus approved by a statutory review body. At the same time, they will be able to benefit from a wide array of exemptions from the obligation to publish an offering or listing prospectus, which will increase structuring alternatives for securities offerings. Issuers and financial service providers should however carefully ensure that their general market communication does not trigger the obligation to publish a prospectus. The new prospectus regulation creates new opportunities for issuers while preserving proven market practices. This newsletter focuses on consequences for issuers of equity and debt securities.



By **Theodor Härtsch**
 Attorney at Law, Partner
 lic. iur., MBA (IE)
 Telephone +41 58 658 52 13
theodor.haertsch@walderwyss.com



and **Daniel Dedeyan**
 Attorney at Law, Counsel
 PD Dr. iur., LL.M. (Yale)
 Telephone +41 58 658 53 16
daniel.dedeyan@walderwyss.com

Legal Basis

On 1 January 2020, the new Swiss Federal Act on Financial Services (the **FinSA**) and its implementing ordinance entered into legal force. As a result, Switzerland will introduce a comprehensive prospectus regime including an array of exemptions from the obligation to publish a prospectus. For the first time, issuers will be required to obtain an approval prior to launching a public offering or listing their securities on a Swiss trading venue. The Swiss Ordinance on Financial Services (the **FinSO**) further sets out the details, in particular the content of an offering or listing prospectus (the Prospectus), exemptions from the obligation to publish a Prospectus as well as additional transitory rules. The new Prospectus regulation creates opportunities for issuers of all types of securities while preserving proven market practices, in particular the flexibility for issuers of bonds and similar instruments (exemption to obtain an *ex ante* approval of the Prospectus). The new Prospectus regime will become effective six months after the first review body (a **Review Body**) has been authorized by the Swiss Financial Market Supervisory Authority FINMA (the **FINMA**) but not earlier than on 1 October 2020. SIX Swiss Exchange has revised its listing rules accordingly which entered into force on 2 January 2020.

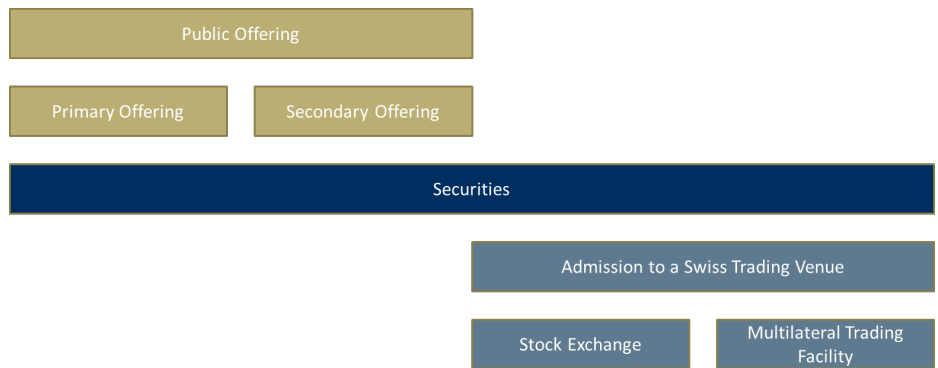
Key Aspects of the New Prospectus Regulation

The FinSA and the FinSO introduce a uniform Prospectus regulation. While it is – to a large degree – inspired by the European Prospectus Regulation and the standards set by the International Organization of Securities Commissions (IOSCO), it still is an independent regulation which aimed at specifically preserving market practices which had been proven efficient and successful in the past. Key aspects of the new Prospectus regulation encompass, among others, the following:

- Review of the Prospectus by a Review Body authorized 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);
 - Harmonized 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 also cross-border offerings into Switzerland are subject to the Swiss Prospectus regime.
- 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;

Obligation to Publish a Prospectus

The obligation to publish a FinSA-compliant Prospectus is triggered by a public offering of financial instruments (securities) in Switzerland or the admission to trading of securities on a Swiss trading venue as is shown in the overview on the right side.



Public Offering of Financial Instruments (Securities)

According to art. 35 para. 1 FinSA, issuers are required to publish an offering prospectus in case of a public offering (*öffentliches Angebot*) of securities in Switzerland. The term offering is further specified in art. 3 lit. g FinSA as any invitation to acquire financial instruments which contains sufficient information about the terms and conditions of the offering and the financial instrument. To be regarded as offering, the information provided must be such that it may induce and enable the recipient to accept the offer. Only such communication which in good faith must be understood as an offering by the recipients constitutes an offering. Neither an advertisement which is not specific enough to allow the immediate purchase of the financial instrument, nor mere factual information which is not intended to facilitate an investment decision (e.g. certain information about an issuer or its securities available on an online platform) qualify as offering.

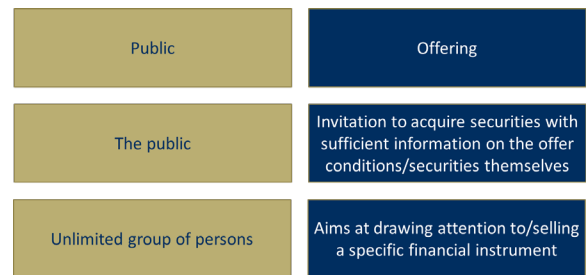
Accordingly, road shows in the context of an initial public offering would be specific enough to constitute a public offering, while pre-sounding meetings would not. Likewise, investor and analyst meetings in the ordinary course of business (such as "investor days" or "strategy days" or the like) do not qualify as public offering. In any case, under the new regime, issuers and financial service providers should carefully ensure that their general market communication does not lead to a public offering.

An offering is qualified as public offering if it is directed to the public (art. 3 lit. h FinSA). In very broad terms, an offering is

directed to the public if it does not target specific recipients which are clearly defined from the outset. Otherwise the offering is a private placement and does as such not trigger the obligation to publish an offering prospectus in accordance with the FinSA. Examples of such private placements could include rights offerings to existing shareholders in case of registered shares or offerings to selected officers and employees of an issuer (e.g. board of directors, executive management, specified circle of persons within the company). In all these cases, it would, in our view, be possible to structure the offering as a private placement even if there were no express exemptions from the obligation to publish a FinSA-compliant prospectus to rely upon.

Where an offer is directed to the general public, *i.e.* to an unlimited number of recipients, the offering qualifies as public offering in the sense of art. 35 para. 1 FinSA and triggers the obligation to publish an offering prospectus unless an exemption from publishing an offering prospectus applies. Again, the term "public" is to be interpreted in a qualitative manner. As soon as the targeted group of investors is not clearly defined anymore or very inhomogeneous, such as all members of a certain association or all people living in a specific part of Switzerland, the offer qualifies as public offering and not as private placement despite the

apparent restrictions on the recipients of the offer.



In a nutshell, the term public offering can be summarized as follow:

Admission to Trading

Likewise, the admission to trading (*Handelszulassung*) can trigger an obligation to prepare a listing prospectus. The issuer must seek the admission to trading of the securities on a trading venue in accordance with art. 26 lit. a of the Swiss Federal Act on Financial Markets Infrastructures (the **FMIA**). Typically, issuers will – in accordance with the practice under the former legal regime – seek to list their securities on a stock exchange. Accordingly, there is an obligation to publish a listing prospectus in case of an admission to trading on either a Swiss stock exchange or a multilateral trading facility. The admission to trading on an organized trading facility, such as OTC-X (a trading facility maintained by Berner Kantonalbank) does not trigger an obligation to publish a listing prospectus. As it

is the case with public offerings, there are numerous exemptions from the obligation to publish a listing prospectus.

Exemptions from the Obligation to Publish a Prospectus

Issuers can benefit from a number of exemptions from the obligation to publish a Prospectus. These exemptions are modeled along the precedent of the European Prospectus Regulation. Nevertheless, there are significant differences, e.g. in the area of offerings to retail investors (up to 499 retail investors vs. 149 retail investors under the Prospectus Regulation). Furthermore, the exemptions from the obligation to publish a listing prospectus are based on the exemptions set out in SIX Swiss Exchange's former Prospectus regime. In combination, these exemptions allow issuers to structure a public offering and/or listing without the need to publish a FinSA-compliant Prospectus. Accordingly, issuers will have to assess in each case whether an exemption is available in relation to a specific offering or listing or a combination thereof. In other words, it could be the case that an offering does not qualify as public offering but the shares will be listed on a stock exchange. In such case, the issuer will be required to publish a listing prospectus in accordance with the FinSA, except if the issuer can simultaneously benefit from an exemption from the obligation to publish a listing prospectus.

It is noteworthy that issuers will be able to benefit from combinations of exemptions. For example, it would be possible to structure a public offering to an unlimited number of professional investors and up to 499 retail investors without triggering the obligation to publish a FinSA-compliant offering prospectus. If a public offering is exempt from the obligation to publish an offering prospectus, the issuer is obliged to treat all (potential) investors equally in case it provides material information to some of them, e.g. in the course of a due diligence.

To avoid being subject to banking regulation, issuers of debt instruments which make use of an exemption must nevertheless make sure to publish certain minimum information (art. 5 para. 3 letter b Banking Ordinance as revised by the FinSO).

It may be noted that an issuance and listing of new shares is only exempt from the obligation to publish a prospectus, if an exemption from publishing an offering prospectus *and* an exemption from publishing a listing prospectus applies.

Exemptions from the Obligation to Publish an Offering Prospectus

The FinSA distinguishes exemptions based on the type of offering and exemptions based on the type of securities.

Accordingly, there is no need to publish an offering prospectus if the public offer:

- is addressed solely to investors classified as professional clients (in particular, institutional clients and other types of professional clients, such as institutional investors with professional treasury operations);
- is addressed to less than 500 (retail) investors, in which case the public offering must be technically restricted to this number of investors (and it is – in our view – not sufficient to declare that only the first 499 investors will be accepted);
- is addressed to investors acquiring securities with a value of at least CHF 100,000;
- concerns securities having a minimum denomination per unit of CHF 100,000;
- does not exceed a total value of CHF 8 million over a 12-month period; or
- is launched by a financial service provider based on an existing Prospectus within the period of its validity (12 months), if the issuer or responsible persons agree in the use of the Prospectus.

Furthermore, there is no need to publish an offering prospectus if the following types of securities are publicly offered:

- Equity securities issued outside the scope of a capital increase in exchange for previously issued equity securities of the same class (e.g. in case of the creation of a holding structure);
- Equity securities issued or delivered on the conversion or exchange of financial instruments of the same issuer or group of companies (e.g. convertible bonds or contingent convertible bonds);
- Equity securities issued or delivered following the exercise of a right linked to financial instruments of the same issuer or corporate group (such as option bonds);
- Securities offered for exchange in connection with a takeover, provided that information exists that is equivalent in terms of content to an offering prospectus (which is the case for a takeover offer prospectus in accordance with art. 127 para. 1 FMIA);
- Securities offered or allocated in connection with a merger, division, conversion or transfer of assets, provided that information that is equivalent in terms of content to a Prospectus exists;
- Equity securities that are distributed as dividends to holders of equity securities of the same class, provided that information exists on the number and type of equity securities and on the reasons for and details of the offer (the requirement is in our view satisfied with the respective resolution of the shareholders' meeting);
- Securities that employers or affiliated companies offer or allocate to current or former members of the board of directors or management board or their employees (in our

view, this extends to advisors as well);

- Securities issued by or with an unlimited and irrevocable guarantee from the Swiss Confederation or from a Swiss canton, from an international or supranational public entity, from the Swiss National Bank or from foreign central banks;
- Securities issued by non-profit institutions for raising funds for non-commercial purposes;
- Medium-term notes;
- Securities with a term of less than one year (money market instruments); and
- Derivatives that are not offered in the form of an issue (OTC derivatives).

Exemptions in Case of Admissions to Trading (*Handelszulassung*)

There is no need to publish a listing prospectus if the following types of securities are admitted to trading:

- Equity securities that over a period of 12 months account for less than 20% of the number of equity securities of the same category already admitted to trading on the same trading venue;
- Equity securities issued upon the conversion or exchange of financial instruments or following the exercise of rights linked to financial instruments, provided they are equity securities of the same category as those already admitted to trading;
- Securities admitted to trading on a foreign trading venue the regulation, supervision and transparency of which are acknowledged as being appropriate by the domestic trading venue or whose transparency for investors is ensured in another manner;
- Securities for which admission is sought for a trading segment open exclusively to professional clients

trading for their own account or solely for the account of professional clients.

It is noteworthy – and will provide greater flexibility for issuers – that the threshold for equity securities of the same category as securities already admitted to trading on the same trading venue that are issued (and admitted to trading) over a period of 12 months has been increased from 10% to 20% as compared with the former SIX listing rules. As with the offerings, the exemptions can be combined when structuring a listing.

Content of the Prospectus

As a general rule, the Prospectus has to contain all the information which is required to allow an investor to make an informed investment decision, *i.e.* an assessment of the issuer or guarantor, the securities, in particular the rights, obligations and risks associated thereto, as well as the offer itself. In accordance with existing practice for equity securities, the Prospectus must contain a summary. The summary must be designated as such and must be graphically marked (the so-called “boxed text”). The Prospectus shall be published either in a Swiss official language or in English. Contrary to the existing practice, a Prospectus for bonds will have to contain risk factors. With respect to straight bonds, we expect that the respective section will be rather lean, focusing on selected key risks which could lead to the issuer’s inability to pay interest or redeem the bonds on maturity.

SIX Swiss Exchange’s former Prospectus schemes (Schemes A to E) have been replaced by Annex 1 to Annex 6 FinSO. The Prospectus of collective investment schemes is also set out in the FinSO. There are specific Prospectus schemes for:

- Equity securities (Annex 1 FinSO);
- Debt securities (without derivatives but including conversion bonds, option bonds and asset backed securities (Annex 2);

- Derivatives (Annex 3);
- Real estate companies (Annex 4);
- Investment companies (Annex 5); and
- Collective investment schemes (Annex 6).

In essence, the minimum content set forth in the former Schemes A to E of SIX Swiss Exchange and the respective requirements under the Swiss Federal Act on Collective Investment Schemes (the **CISA**), have been transposed into the FinSO.

The issuer has various options when preparing a Prospectus. In particular, a Prospectus can consist of several documents to allow for the maximum flexibility for issuers. They can prepare a preliminary Prospectus which is then supplemented by a pricing supplement (alternatively, issuers may opt for publishing a preliminary Prospectus and a (complete) final Prospectus). The incorporation of documents by reference is permissible as well, provided the documents are available at the point in time the (preliminary) Prospectus is published. The various Prospectus schemes foresee possibilities to abridge the Prospectus. Such options are, for example, available in relation to small and medium enterprises as well as to well-known seasoned issuers (so called “WKSIs”) which regularly issue financial instruments.

It is noteworthy that the FinSA and the FinSO only harmonize the Prospectus requirements. The trading venues retain the authority to define the requirements as to the issuer and the securities, in order to admit securities to trading, and they have adapted their regulations to the new statutory law (for SIX Swiss Exchange see Regulatory Board Communiqué No. 7/2019).

Prospectus Review

The FinSA introduces a legal obligation to have any Prospectus pre-approved by a statutory Review Body prior to the offering or the first day of trading (subject to the exemptions discussed below). The Review Bodies must be approved by FINMA, SIX Exchange Regulation Ltd. and BX Swiss have applied for a license as review body. They are expected to receive these licenses in the first quarter of 2020. While being a private institution, the Review Bodies have public authority and issue their approval in accordance with the provisions of the Swiss Federal Act on Administrative Procedures (the **APA**), in particular art. 5 APA. Any such orders (*Verfügungen*) are subject to appeal to FINMA, the Swiss Federal Administrative Court and – ultimately – the Swiss Federal Court. The higher authorities are expected to respect a certain technical discretion of the Review Bodies.

The review is limited to a formal review referring to the completeness in terms of the minimal content requirements of the applicable scheme as well as the consis-

tency and comprehensibility of the Prospectus. The Review Bodies will continuously harmonize their requirements and practice relating to the Prospectus review.

The review process is straight forward and can be seen from the timeline below.

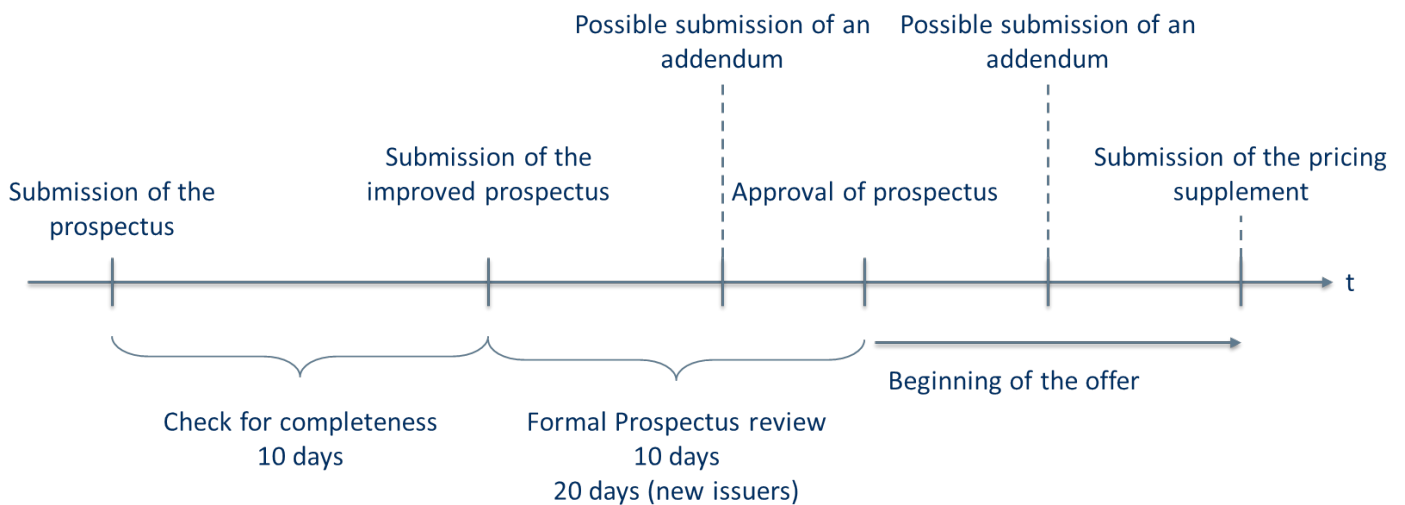
New issuers, *i.e.* issuers accessing the Swiss market for the first time, will have to submit the prospectus 20 calendar days prior to the offering or the first day of trading. In case of repeat issuers, this deadline is shortened to 10 calendar days. Following receipt of a Prospectus, the Review Body checks the Prospectus for completeness and may ask for supplemental information. Upon receipt of the (improved) Prospectus, the term for formal approval starts running.

In case of material developments, *i.e.* developments that could impact the investment decision by investors, issuers will be required to publish an addendum to the Prospectus. Such addendum needs to be filed with and approved by the Review Body. Review Bodies will publish

a list of facts or events which are deemed to be automatically approved. We expect that this will be the case for, among others, any facts disclosed in accordance with the rules on the ad hoc publicity (art. 53 of the listing rules of the SIX Swiss Exchange).

The FinSA clarifies at what point in time a Prospectus must be available to investors. In case of public offerings of equity securities, the Prospectus must be available at least six business days prior to the end of the offering period. By this, the legislator has defined a minimum offering period. In case of all other securities, the Prospectus must be published prior to the start of the public offering or the first day of trading.

Once approved, a Prospectus remains valid for 12 months (subject to any addenda as set out above). The Prospectus, including any documents incorporated by reference and any supplements will have to be deposited with the Review Body.



Exemptions from the Obligation to Obtain an *Ex-Ante* Approval by a Review Body

To allow for a short time to market and flexible pricing of securities in accordance with proven market practice, the Swiss Federal Council has designated certain types of securities for which a Prospectus can be approved following the publication or offering. This applies to both, the offering and the listing prospectus. This regime applies to straight bonds, convertible and option bonds, mandatory convertible notes, contingent convertibles and write-down bonds as such exempt securities. Likewise, structured products with a duration of 30 or more days are exempt securities (Annex 7 to the FINSO). However, the exemption applies to securities entailing a right of conversion into or acquisition of other securities only to the extent that such other securities are admitted to trading on a Swiss or recognized foreign trading venue.

In such case, a bank or a securities firm (*Wertpapierhaus*) according to the Swiss Federal Act on Financial Institutions (the *FinIA*) has to confirm that at the point in time of publication of the Prospectus the most relevant information on the issuer as well as the securities is available. The most relevant information is in each case the information set out in the Annexes to the FinSO (*cf.* art. 62 para. 2 FinSO). It is available if it is either published or can be published at the time of the launch of the public offering or on the first day of trading. Typically, this will be the case with respect to issuers or guarantors who have securities outstanding which are listed on a Swiss or foreign trading venue. There is also a legal presumption that in such case the most relevant information with regard to the issuer is publicly available (art. 62 para. 3 FinSA). It is expected that the financial intermediaries involved in the public offering (investment banks) will require the issuer to provide certain confirmations to get comfortable that they can issue their confirmation.

The respective financial intermediaries will – in other words – act as gatekeepers, thereby ensuring a minimum transparency for investors.

The information can be provided by way of a preliminary Prospectus or an (electronic) dissemination of summary terms. In the latter case, it is expected that there will be no need to include any issuer-related information (subject to certain minimum information in order not to engage in deposit taking in accordance with Swiss banking laws and regulations).

In all these cases, the Prospectus has to be submitted to a Review Body for approval within 60 calendar days from the start of the public offering or the first day of trading. Shorter deadlines apply to financial products of a term of 180 days or less. In these cases, the Prospectus or similar document has to be clearly marked as a Prospectus subject to the approval of a Review Body. Furthermore, even though the Prospectus is reviewed only following the completion of the offering or the admission to trading, there is no obligation (and no possibility) to update the Prospectus following the approval. Instead, the issuer is subject to the rules regarding updates of Prospectuses (during the offering) or ad hoc publicity (following the completion of the offering and listing).

Automatic Recognition of Foreign Prospectuses

The new Prospectus regulation allows certain foreign issuers to have their Prospectus automatically approved, provided such Prospectus has been approved by a "recognized" foreign prospectus authority and that it is in an official Swiss language or in English language. It is expected that the Review Bodies will make extensive use of their possibility to recognize foreign prospectus authorities (at least in relation to certain markets or market segments). If the requirements are met, the foreign issuer can simply file the Prospectus with a Review Body. Accordingly,

it will become much easier to access the Swiss market – also on very short notice, as issuers will not be required to factor in a separate approval process.

Form of Publication of the Prospectus

The Prospectus must be published either in a pertinent newspaper, the Swiss Official Gazette of Commerce, through free-of-charge distribution in printed form by the issuer or a financial intermediary involved in a capital markets transaction (*i.e.* an investment bank) or in electronic form on the website (e.g. of the issuer or the trading venue or the Review Body). In case of electronic publication, a paper version must be made available on request free of charge to investors.

Prospectus Liability

In essence, the prospectus liability regime is a reflection of the previously existing civil law liability. While an initial draft of the FinSA provided for a reversal of the burden of proof with respect to willful misconduct or negligent acts or omissions, the parliament did not follow these proposals. As a result, the burden of proof with regard to the damage, the breach of law, the causal link and fault (*Verschulden*) still is on the claimant. The unified prospectus liability foresees that whoever in a Prospectus, in a basic information document or in similar communications makes incorrect, misleading or incomplete statements, without using the diligence required, is liable to the purchaser of a financial instrument for any damage caused (art. 69 para. 1 FinSA). Therefore, apart from the Prospectus, any other communication concerning the offering or the listing of securities, including marketing material, may be subject to prospectus liability. The new prospectus liability regime extends to all types of securities and replaces the previous prospectus liability provisions (including the ones set out in the CISA).

In turn, the law provides for some limitations to prospectus liability. There is no liability for the summary of the Prospectus

tus unless it is wrong, misleading or contradictory if read together with other parts of the Prospectus. In other words, there is no liability for completeness of the summary. Furthermore, liability for material forward looking statements is limited to statements against one's better knowledge or statements made without the usual reference to the uncertainty of future developments.

As a true novelty, the FinSA contains a criminal prospectus liability for incorrect statements, omission of material facts or delayed publication, if committed with direct or conditional intent. In our view, criminal liability for incorrect statements should equally be limited to *material* statements. Sanctions are fines of up to CHF 500'000. Given the peculiarity of such a criminal provision in the international context and its poor wording, this insertion is rather unfortunate.

Transitory Provisions

The obligation to use a FinSA-compliant Prospectus will become effective six months after the first Review Body has been authorized by FINMA but not earlier than on 1 October 2020. Simultaneously, SIX Swiss Exchange and BX Swiss will repeal their rules concerning listing prospectuses. SIX Exchange Regulation AG and BX Swiss have submitted a request to be approved as Review Body to FINMA and are expected to receive such authorization in the first quarter of 2020.

As long as the obligation to publish a prospectus is not yet effective, the previous provisions regarding the issuance of equity securities and bonds of the Swiss Code of Obligations (art. 652a and 1156) as well as the previous listing rules of the SIX Swiss Exchange and BX Swiss continue to apply. Alternatively, the issuer may choose to submit a Prospectus which is already compliant with the FinSA (cf. art. 109 para. 2 FinSO).

As for the obligation to publish a listing prospectus, the revised listing rules of SIX Swiss Exchange allow for a recourse to the exemptions of the FinSA as from 2

January 2020 (art. 27 in connection with art. 116b of the listing rules of SIX Swiss Exchange dated 2 January 2020). Even though it is debated, in our view, the exemptions from the obligations to publish an offering prospectus under the new prospectus regime should equally be available as from 1 January 2020, given that the FinSA has generally entered into force on 1 January 2020 and the respective transitory provision only refers to the effectiveness of the obligation to publish a Prospectus and does not make reference to the exemptions at all.

Closing Remarks

Overall, the revised Prospectus regime brings additional flexibility to issuers in terms of structuring securities offerings in Switzerland as well as greater transparency for investors. For the first time, issuers will be required to have their Prospectus approved by a Review Body. At the same time, they will be able to benefit from a wide array of exemptions from the obligation to publish an offering or listing prospectus, which will increase structuring alternatives for securities offerings. The exemptions that are available will be particularly interesting for foreign issuers who intend to access the Swiss investor base. The exemptions from the obligation to publish a listing prospectus reflect current practice which has proven to be efficient and effective. The revised Prospectus regulation creates new opportunities for issuers while preserving proven market practices. All in all, the reform will strengthen the Swiss capital market.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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