

Newsletter No.

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FINMA approves SIX and BX as Prospectus Offices – The new Swiss prospectus regime including prospectus review will be mandatory as from December 1st, 2020

The Swiss Financial Market Supervisory Authority (FINMA) has approved SIX Exchange Regulation AG and BX Swiss AG to act as Prospectus Offices as from June 1st, 2020. Their appointment represents a major step in the implementation of the new Swiss prospectus regime. As a consequence, the new Swiss prospectus requirements will be mandatory and offering as well as listing prospectuses will generally require approval by one of the Prospectus Offices as from December 1st, 2020.

This newsletter outlines the regulatory implications and proceedings of the new statutory prospectus review.

The news



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The Swiss Financial Market Supervisory Authority (**FINMA**) has approved SIX Exchange Regulation AG (**SER**), which is the independent regulatory body of SIX Swiss Exchange AG, and BX Swiss AG (**BX**) to act as prospectus offices (the **Prospectus Offices**) as from June 1st, 2020. Since June 2nd, 2020, the two Swiss stock exchanges offer their services to approve offering and/or listing prospectuses (the **Prospectus**) according to the new Swiss prospectus regime.

The appointment of SER and BX represents a major step in the implementation of the new Swiss prospectus regime. Following the appointment of SER and BX and the lapse of the six months transitory period, i.e. as from December 1st, 2020, the new Swiss prospectus requirements will be mandatory and Prospectuses will generally require approval by one of the Prospectus Offices. In the meantime, issuers may continue to publish prospectuses under the old regime without prior approval.

SER and BX have updated their listing rules accordingly which enter into force concurrently with the new prospectus regime. Both SER and BX offer a web-based special digital interaction system handling submissions of approval requests and related documents.

Regulatory background

The new Swiss prospectus regime is a core part of the Swiss Financial Services Act (**FinSA**) and the implementing ordinance (**FinSO**) which have entered into force on January 1st, 2020. The FinSA was drafted under the impression of the financial crisis of 2008 and 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 (for the new Swiss prospectus regime in general see [Walder Wyss Newsletter No 131, January 2020 "New Rules on the Offering and Listing Prospectuses in Switzerland"](#))

Following the appointment of SER and BX as Prospectus Offices, as from December 1st, 2020 any offering and any listing of securities on a Swiss trading venue will be subject to the prospectus and approval requirements of the FinSA and FinSO unless an exemption applies. In compari-

son, under the old regime, only the issuance of new shares and bonds required a (hardly regulated) issuance prospectus, while listings required a comprehensive listing prospectus based on the listing rules of the respective stock exchanges. There was no statutory prospectus review. In addition, as from December 1st, 2020 the specific information requirements as set out in the annex to the FinSO apply.

SER and BX have adjusted their listing rules which apply to the listing of securities on the respective trading venue concurrently to the statutory requirements.

The Prospectus Office: Remit and legal status

The Prospectus Offices ensure that the rules of the FinSA are complied with. Like under the European regime, the Prospectus Offices do not review the content of a Prospectus and the accurateness of the information but only check formal compliance of the Prospectus with the applicable regulations.

Unlike their European counterparts, Swiss Prospectus Offices are not charged with checking marketing materials. It remains to be seen whether the Prospectus Offices will respond to preliminary ruling requests of market participants on the non-qualification of certain marketing materials as an offer of securities requiring a Prospectus.

The Prospectus Office may grant exemptions in respect of certain specified information or prevailing confidentiality interests or for lack of materiality. The Prospectus Offices may also rescind reliefs from information requirements provided by the FinSO if an issuer has been sanctioned for repeated and serious breaches of stock exchange regulations.

The Prospectus Offices have been assigned the further task to respond to preliminary ruling requests on whether a prospectus is required in the context of an acquisition of securities in exchange for securities or in merger scenarios (which is not the case if equivalent information is available). A tender offer prospectus is generally regarded as information equivalent to a Prospectus, however the Prospectus Offices may demand pro forma financial information in case of material structural changes.

The Prospectus Offices are supervised by FINMA, must at all times comply with the standards of independence and proper business conduct, exchange non-public information with FINMA and other regulatory authorities and publish an annual report. The review process is subject to the Swiss Administrative Proceeding Act. The Prospectus Office levies fees pursuant to the respective administrative regulations.

Obligations of issuers and offerors

Within six months since the approval of the Prospectus Offices, candidates for an offering or listing of securities may choose to follow the new prospectus rules or to stick with the old regime. With the approval of SER and BX as Prospectus Offices, the new prospectus requirements and prospectus review obligation will be mandatory as from December 1st, 2020. Along with the new prospectus requirements, a broad range of exemptions from the obligation to publish a Prospectus apply, which increases structuring alternatives for securities offerings.

The FinSA generally requires that the Prospectus be submitted to the Prospectus Office prior to the publication of the prospectus. However, the Federal Council has designated certain securities – namely bonds and structured products – for which a prospectus may be published already prior to the review if a financial institution confirms to the issuer that at the time of publication the material information on the issuer and the securities is publicly available. The confirmation by the financial institution must be submitted to the Prospectus Office. For various securities, the FinSO sets different deadlines for a subsequent submission of the prospectus.

A particular regime applies to prospectuses of collective investment schemes (investment funds), which must only be submitted to FINMA and must not be approved by a Prospectus Office.

The Prospectus Offices may approve a Prospectus which complies with international standards deemed equivalent to the Swiss requirements, and will declare Prospectuses complying with certain jurisdictions as approved. The Prospectus Offices have published lists of such jurisdictions (EU, EEA, United Kingdom, USA, Australia). Further lists of the Prospectus Offices designate foreign stock exchanges on which a prior listing exempts a security from prospectus require-

ments under Swiss law. In addition, the Prospectus Offices have published lists of accepted international accounting standards.

Review process

The Prospectus Office performs a formal review of the Prospectus only, with focus on its completeness, coherence and intelligibility. In particular, it does not assess the accuracy of the content.

If the Prospectus Office notices that a Prospectus does not comply with the legal requirements, it informs the applicant within 10 calendar days from the submission of the draft Prospectus, demands amendments and decides on the amended Prospectus within further 10 days. If the Prospectus Office does not issue a decision within these deadlines, the Prospectus is deemed approved.

Once approved, the Prospectus is valid during 12 months as from the approval for securities of the same kind of an issuer. A bond Prospectus in a bond program is valid until no further securities are permanently and repeatedly issued under the program.

If material information arises in the time between the publication of the Prospectus and the end of the offering period or, in the case of a listing, the first day of trading, a Prospectus supplement must be submitted to the Prospectus Office together with an approval request. The Prospectus Office must then decide on the approval of the supplement within 7 calendar days. The Prospectus Offices have published lists of supplements which do not require approval; nevertheless such information must be communicated to the Prospectus Office simultaneously with their publication. According to the current lists of SER and BX, 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 Prospectus Office 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 Prospectus Office. The Prospectus Office makes publicly available a list of all Prospectuses approved in the past 12 months.

The issuer or offeror may fulfill its obligation to publish the Prospectus by making an electronic version available on the website of the Prospectus Office. 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 start 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.

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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