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Recent developments in the Swiss debt capital market 2020/21

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IN 2020 AND 2021 SWISS DEBT CAPITAL MARKETS WERE HEAVILY IMPACTED BY THE COVID-19 PANDEMIC, LIKE CAPITAL MARKETS IN GENERAL. HOWEVER, SWISS MARKETS RECOVERED RELATIVELY QUICKLY IN JUNE AND JULY 2020. ALSO, DURING 2020 AND 2021, THE NEW PROSPECTUS APPROVAL PROCESS UNDER THE NEW PROSPECTUS REGIME INTRODUCED BY THE SWISS FINANCIAL SERVICES ACT (FINSA) HAS BEEN FURTHER ESTABLISHED. FINALLY, DURING 2021, THE PROCESS TOWARDS THE ABOLISHMENT OF THE SWISS WITHHOLDING TAX HAS TAKEN SOME IMPORTANT STEPS FORWARD.

The Covid-19 pandemic in Switzerland

The Covid-19 pandemic has disrupted markets across the world and, obviously, Swiss debt capital markets were affected as well. On March 16, 2020, the Swiss Federal Council declared the “extraordinary situation” and introduced more stringent measures, including the lockdown of schools, shops, restaurants, bars, and entertainment and leisure facilities. Certain restrictions are still in force today, even though the restrictions have never been as harsh as in other European countries.

The Swiss government passed various regulations in response to the Covid-19 pandemic, including measures to avoid bankruptcies of businesses which may arise as a consequence of the Covid-19 pandemic (e.g. availability of an emergency moratorium for small and mid-cap size businesses of up to six months, subject to less formal requirements than a general composition moratorium, temporary standstill measures and others). Most of these regulations have been implemented into law that has been approved by parliaments (even though such laws are currently the subject of a referendum).

Capital markets in Switzerland reacted quite heavily and, as in most European countries, April and May 2020 were very difficult months for the Swiss capital markets in general. However, in June and July 2020, markets in Switzerland started to recover.

New prospectus regime

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 gave issuers the optionality to still prepare and publish prospectuses under the old regime. The transitional period ended 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. Initially, some uncertainties around the approval process remained, but those uncertainties have been further eliminated during 2020 and 2021.

The approval process under the FinSA

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 general 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. However, for bonds and other debt instruments, exemptions apply and, as described below, it has become standard to submit prospectuses for those instruments only post-settlement.

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).

It seems that a standard developed, whereby prospectuses seen in the market all contained an asterisk (*) for 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 Financial Services Ordinance (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 debt products.

During 2021, it became standard that bond issuers make use of the option to launch a transaction without pre-approved prospectus. In that case, 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. Again, during 2020 and 2021, standards developed for the form of such confirmation.

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 is 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 an 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 a list publicly available 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,



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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.

Tax

Unlike most other countries, Switzerland does not levy withholding tax on interest paid on private and commercial loans (including on arm's-length inter-company loans). Rather, 35% Swiss Federal withholding tax is levied on interest paid to Swiss or foreign investors on bonds and similar collective debt instruments issued by or on behalf of Swiss resident issuers, as well as on interest paid by Swiss banks.

International capital markets do not typically respond well to bonds subject to Swiss withholding tax. Therefore, the investor base is relatively often limited to Swiss investors, or, in the case of Swiss multinational groups, bonds are issued through a foreign subsidiary. However, the Swiss Federal Tax Administration (SFTA) reclassifies such foreign bonds into domestic bonds if the amount of proceeds used in Switzerland exceeds certain thresholds (i.e. the combined accounting equity of all non-Swiss subsidiaries of the Swiss parent company and the aggregate amount of loans granted by the Swiss parent and its Swiss subsidiaries to non-Swiss affiliates).

The Federal Council will, in response to its consultation document, submit a request to Swiss Parliament that withholding tax on bonds be abolished.

On April 3, 2020, the Swiss Federal Council initiated a consultation process (*Vernehmlassung*) regarding the planned reform of the Swiss Federal withholding tax. The

reform originally intended replacing the current debtor-based regime applicable to interest payments with a paying agent-based regime for Swiss Federal withholding tax.

Under such a paying agent-based regime, if introduced, a Swiss paying agent would need to levy and pay Swiss Federal withholding tax on interest payments on the Notes, if the beneficiary were an individual resident in Switzerland.

As a consequence of the consultation process, the Swiss Federal Council, on September 11, 2020, resolved on an abolishment of Swiss withholding tax on interest payments (with the exception of interest payments on domestic bank accounts and deposits to Swiss resident individuals), without substitution, and it submitted a corresponding legislative project to the parliamentary process on April 14, 2021.

The abolition of Swiss withholding tax on bonds and other collective debt financings should significantly strengthen Switzerland's position as a financial market and treasury centre. All types of financing and refinancing activity in Switzerland (e.g. raising of capital via bond issuances, crowdfunding platforms, ABS structures and other capital market transactions) will be facilitated. This fundamental change of the Swiss withholding tax regime is expected to come into force not before January 1, 2022.

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