Regulatory aspects of securitisation in Switzerland

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Introduction

The securitisation market in Switzerland is highly active and attractive for both issuers and investors. However, Switzerland has not enacted any specific securitisation legislation (for further details please see "Securitisation in Switzerland – an overview"). Therefore, securitisation transactions are subject to the general legal framework that applies to any other type of financial transaction. This article provides a short overview of several regulatory aspects to consider when setting up a securitisation transaction in Switzerland.

Supervisory authorities

A number of supervisory regulations and regulatory authorities are relevant, though not specific to, Swiss securitisation transactions. Depending on the structure of the transaction and the underlying asset category, the Financial Market Supervisory Authority (FINMA) is competent in respect of various regulatory matters, including:

- confirming non-licensing requirements;
- non-consolidation in bankruptcy; and
- the non-application of anti-money laundering rules.

Further, in the context of securitisations involving assets which are subject to consumer credit law, cantonal regulators may also need to be approached. Where asset-backed securities are listed on the SIX Swiss Exchange, the SIX Exchange Regulation is competent in respect of any listing-related matters. Transactions are typically upfront and presented to and signed off by the relevant tax authorities by way of tax rulings.

Licensing requirements

Currently, Swiss law does not impose any general licensing requirements on originators, issuers or other parties typically involved in securitisation transactions. However, as a matter of Swiss capital market regulations, the principal paying agent must qualify as a Swiss bank and hold a Swiss banking licence.

Nevertheless, each securitisation structure must be carefully analysed on a case-by-case basis, particularly in light of the specific underlying assets and the business conducted by the originator, which might be subject to licensing requirements. In this respect, special purpose vehicles (SPVs) set up for securitisations are subject to the same laws and regulations that apply to all other market participants.

For example, originators active in the consumer loan business are subject to the licensing requirements set out in the Consumer Credit Act. Therefore, it is important to structure transactions

so that issuers do not require a respective licence. Issuers typically do not require a licence as a bank under the Federal Banking Act, provided that they are refinanced through the issuance of publicly placed (listed) bonds or privately placed notes. However, in the absence of any specific legislation and established case law, each structure must be carefully checked and analysed prior to its implementation in order to provide the required legal certainty on such key matters.

In addition, the new federal act on financial institutions, the Financial Institutions Act (FINIG), is expected to enter into force on 1 January 2020. As the act defines 'financial institution' quite broadly, the exact arrangement of some roles, including trustees, may require further scrutiny (Article 17 of FINIG).

Disclosure requirements

Public issuances in the framework of securitisation transactions are not subject to specific disclosure requirements. Accordingly, when issuing securities to the public capital market in Switzerland, the general prospectus and listing requirements must be considered, depending on where and to what investor base the securities will be marketed. With a view to ongoing disclosure requirements issuing SPVs listed on the SIX Swiss Exchange must, like any other issuer, comply with general Swiss capital market regulations, such as the *ad hoc* publicity as per the listing rules of the SIX Swiss Exchange. As in any other jurisdiction, it is market standard that servicer reports and investor reports are provided on a monthly basis.

Upcoming legislative changes regarding prospectus duty

The Financial Services Act (FinSA) is expected to come into force on 1 January 2020 and will establish, as part of the new financial market architecture, a new comprehensive duty to publish a prospectus for the public offering and admission for trading of financial instruments (eg, asset-backed securities) on a trading venue in the sense of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act).

One of the principal goals of the FinSA is improved client protection. A prospectus must meet certain formal requirements in order for it to fulfil its purpose as an instrument of information. To this end, the FinSA and the Pertaining Federal Ordinance on Financial Services (Financial Services Ordinance (FinSO)) contain detailed regulations on prospectus content. The Federal Council initiated the consultation on this ordinance on 24 October 2018. The consultation procedure will last until 6 February 2019 and the FinSO is expected to enter into force, together with the FinSA, on 1 January 2020.

Under the FinSA, a prospectus will generally have to be submitted to a reviewing body duly authorised by the FINMA for review of its completeness, coherence and understandability prior to publication. The respective procedure is subject to the Federal Act on Administrative Procedure.

Similar to equivalent legislation in the European Union, the FinSA newly requires a prospectus to include a summary of the key information in short form and using language that is easily understandable, as well as the publication of a separate, easily understandable key information document for the respective financial instruments. The latter must be a standalone document clearly distinguishable from advertising materials. In addition, the law requires the originator of the key information document to regularly verify the information contained therein and revise it if significant changes occur.

Notably, the FinSA contains various exemptions from the Swiss prospectus duty with a view to:

- certain types of offer (eg, for offerings to investors qualifying as professional clients or minimum denominations per unit of CHF100,000);
- certain types of security (eg, securities with a term of less than one year and money market instruments); and
- admission to trading (eg, securities which are admitted to trading on a foreign trading venue if its regulation, supervision and transparency is recognised as appropriate by the domestic trading venue or if transparency for investors is ensured by other means).

While it remains to seen how the new regulations will be adopted in practice, care will surely be taken to provide for interpretation of this new Swiss financial market legislation in a pragmatic, business-oriented and efficient manner in order to avoid any friction with equivalent legislation in the European Union.

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