FMA

Financial Market Authority
Liechtenstein

FMA Communication 2019/2 – Obligations for issuers of securities and security tokens

Communication on the obligations of issuers who issue, offer to the public, or have offered to the public securities or security tokens

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Landstrasse 109 • P.O. Box 279 • 9490 Vaduz • Liechtenstein
Telephone +423 236 73 73 • Telefax +423 236 73 74 • www.fma-li.li • info@fma-li.li

1. General remarks

The current[1] Liechtenstein legal regime governing securities prospectuses is based on the EEA Securities Prospectus Implementation Act (EWR-WPPDG), the directly applicable Regulation (EU) 2017/1129, and the associated Commission Delegated Ordinances.[2]

Offering of securities to the public is increasingly relevant for the financing of small and medium-sized enterprises (SMEs) as well as for innovative blockchain-based business models. The presentation of the opportunities and risks of an investment is indispensable for the protection of investors and for reasons of transparency. The securities prospectus must not only draw attention to the risks, but may also contain information on the opportunities provided by the investments.

Given the increasing demand for securities issuances, the principles for prospectuses and securities issuances are set out below. Issuing securities may entail subsequent obligations, especially if the securities are admitted to trading on a trading venue (secondary market trading). The purpose of this Communication is therefore to provide an overview of the essential regulatory requirements and ancillary obligations both when securities are issued and after they have been issued. In addition, the specific features of security token offerings by way of a securities prospectus will be examined.

2. Issuance of securities

When securities are offered to the public, disclosure of information is a crucial component of investor protection, given that it eliminates information asymmetries between investors and issuers. The minimum content of securities prospectuses is specified in the annexes to Commission Delegated Regulation (EU) 2019/980. The annexes to Commission Delegated Regulation (EU) 2019/980 contain in particular the registration documents, the securities notes, and information on the minimum content. The nature of the underlying asset is decisive, i.e., the relevant applicable annexes must be observed depending on the focus and orientation of the security.[3]

The details governing submission of the application for approval of the securities prospectus are explained in FMA Instruction 2019/10.

[1] Until 20 July 2019, securities prospectuses were governed in Liechtenstein by the Securities Prospectus Act (WPPG) and by the directly applicable Regulation (EU) 809/2004. Prospectuses approved under the law applicable before 20 July 2019 continue to be governed by that law until they expire. The principles set out in this Communication nevertheless apply in the context of that law.
[2] Commission Delegated Regulation (EU) 2019/980 and Commission Delegated Regulation (EU) 2019/979.
[3] The annexes are differentiated in Articles 12 et seq. of Commission Delegated Regulation (EU) 2019/980: securities note for equity securities or units issued by collective investment undertakings of the closed-end type; securities note for secondary issuances of equity securities or of units issued by collective investment undertakings of the closed-end type; securities note for depository receipts issued over shares; securities note for retail non-equity securities; securities note for wholesale non-equity securities; or securities note for secondary issuances of non-equity securities.

3. Rights and duties of issuers

After approval of the prospectus, an issuer may advertise the prospectus and offer the securities to the public. The issuer must consider important aspects when making the offer, however. The following chapter describes the fundamental rights and duties of issuers.

3.1 EEA Securities Prospectus Implementation Act (EWR-WPPDG)

Issuers are permitted to offer the security to the public after approval of the prospectus. Commission Delegated Regulation (EU) 2019/979 provides that an offer to the public is a communication to the public in any form and by any means which contains sufficient information about the terms of the offer and the securities to be offered to enable an investor to make a decision to buy or subscribe for the securities. It must be noted in this regard that the offer must be limited to Liechtenstein. However, the option exists to notify the approved securities prospectus to other EEA countries (passporting). Details on notification are discussed in FMA Instruction 2019/10.

When offering the security to the public, it is important to note that the prospectus, whether a single document or consisting of separate documents, is deemed available to the public when published in electronic form on a website. Availability of the prospectus must be made recognisable and without access restrictions (see Article 21(3) of Regulation (EU) 2017/1129). It is not permissible to require potential investors to register in advance in order to download, open, or save the prospectus (see Article 21(4) of Regulation (EU) 2017/1129).

When advertising the offer to the public, it must be stated where investors can obtain the information and, in particular, the securities prospectus itself. Advertisement must also be identified as such, accurate in terms of content and not misleading. Please note that "approval" in this context is based merely on scrutiny of the completeness, the consistency, and the comprehensibility of the information given in the prospectus; no product approval as such is given (see Article 2(r) of Regulation (EU) 2017/1129). This implies in particular that the underlying business model is not subject to examination by the FMA. It is therefore wrong and misleading if incorrect formulations are used in the offer to the public and if the scope of approval is misrepresented.[4]

For the sake of completeness, please note that the FMA has various supervisory powers under the new legal provisions.[5] In this context, and in particular after approval of the securities prospectus, the FMA may obtain information on the issue volume achieved, distribution activities, and the allocation of resources.

3.2 Banking Act (BankG) and Asset Management Act (VVG) with their associated ordinances

The Markets in Financial Instruments Directive (MiFID II, 2014/65/EU) and the associated Markets in Financial Instruments Regulation, (MiFIR, Regulation (EU) No 600/2014), transposed into Liechtenstein law as the Banking Act (BankG) and Asset Management Act (VVG) with their associated ordinances, introduced numerous organisational requirements relating to client asset protection and product monitoring. Measures to protect investors include expanded conditions and requirements governing the distribution of financial instruments and asset management, to ensure that distribution is now permitted only by service providers operating on the financial market.

[4] For example, the following formulations are inadmissible and misleading: The FMA has approved the investment; the FMA has reviewed the business model; the securities prospectus has been reviewed and endorsed by the FMA; the impairment of the financial instrument has been tested; etc.

[5] Under Article 10 EWR-WPPDG, the FMA may in particular require the inclusion of additional information in the prospectus and the provision of information and documents, the suspension or prohibition of an offer, the publication of a notice or warning, an on-site inspection, etc.

Securities as defined in Regulation (EU) 2017/1129 are all transferable securities that can be traded on a market, with the exception of money market instruments with a maturity of less than 12 months (see Article 2(a) of Regulation (EU) 2017/1129). The three criteria of transferability, tradability, and standardisation are essential for classification as securities. Certification/securitisation of the security is not a mandatory requirement of a security, which is why the concept of "substance over form" is used. The transferable securities referred to in Regulation (EU) 2017/1129 are the financial instruments enumerated in Article 4(1)(15) in conjunction with Annex I, Section C MiFID II.

Offering transferable securities to the public by the issuer does not constitute an investment service or activity as defined in Article 4(1)(2) in conjunction with Annex I, Section A MiFID II. An issuer is therefore not directly subject to MiFID II with respect to securities. The obligations of the issuer under supervision law are determined in this respect by the rules set out in Regulation (EU) 2017/1129 in particular. This privilege applies only and exclusively to the issuer, but not to any subsidiaries or parent companies, so that these and any third parties must comply with the supervisory obligations under MiFID II.

In principle, it must be taken into account that there are other financial service providers or intermediaries which perform activities as part of the public offering which must be categorised as investment services or ancillary investment services as defined by MiFID II and must therefore comply with the legal requirements set out in the VVG and the BankG.

3.3 Market Abuse Act (MG)

The Market Abuse Act (MG) applies to market and off-market trading of a financial instrument on a supervised market. This means the MG also applies when a financial instrument is admitted to trading on a regulated market or is traded in a multilateral trading facility (MTF) or an organised trading facility (OTF).

Under these conditions, the issuer of a security may be subject to the Market Abuse Act, in particular the prohibition of insider dealing and unlawful disclosure of insider information as well as the prohibition of market manipulation. In that case, an issuer is obliged under Article 5a MG to make insider information directly concerning the issuer known to the public without delay. This obligation applies only to issuers which have applied for or have received admission to trading on a regulated market for their financial instruments.

Moreover, persons discharging managerial responsibilities within an issuer and persons closely associated with such persons may be subject to the rules on managers' transactions under Article 4 MG.

3.4 Disclosure Act (OffG)

The Disclosure Act transposes Directive 2004/109/EC (Transparency Directive) into national law. The Disclosure Act (OffG) establishes the requirements for the publication of regular and up-to-date information about issuers whose securities are already admitted to trading on a regulated market situated or operating in a Member State. According to Article 3(1)(a) OffG, the term "securities" is defined in accordance with the provisions of MiFID II. According to Article 3(1)(f) OffG, an issuer is a legal person "governed by private or public law, including a State, of which the securities are admitted to trading on a regulated market".

If a security is admitted to trading on a regulated market, the transparency requirements of the OffG apply to issuers (financial reporting under Articles 4 and 5, additional information under Articles 11-14) and investors (information about major holdings under Articles 25-34).

An issuer of shares that are admitted to trading on a regulated market must also, under Article 9(1)(c) OffG, appoint a bank or investment firm as an authorised agent through which shareholders can exercise their financial rights. In addition, an issuer of debt securities admitted to trading on a regulated market must,

under Article 10(1)(c) OffG, appoint a bank or investment firm as an authorised agent through which the holders of debt securities can exercise their financial rights. The issuer must take the necessary measures to ensure that holders of securities are able to perform the necessary actions with the paying agent. This means that the issuer as a rule concludes a paying agent agreement with the bank or investment firm.

3.5 Other laws

The above survey of legislation is not exhaustive, so that in principle any other relevant source of law may be applicable. When approving a securities prospectus, the business model underlying the investment is not examined, so that it may in particular happen that the business model should be classified as a fund. In the context of the scope of approval set out by law, it is the sole responsibility of the issuer to differentiate the business model from the applicability of other special laws (in particular fund legislation). The FMA therefore expressly reserves the right to reject applications for approval if it is evident that the scope of another financial market regulation would be controlling or if the issuer fails to make the differentiation. Similarly, approval does not rule out subsequent supervisory proceedings due to violation of other special laws.

4. Additional requirements for securities prospectuses relating to the issuance of security tokens[6]

In summer 2018, the FMA for the first time approved a securities prospectus which issued securities in the form of security tokens. These securities prospectuses combine the features of classic securities prospectuses on the one hand and the elements of blockchain technology on the other. Securities prospectus law and in particular the directly applicable Regulation (EU) 2017/1129 apply only if, however, the token fulfils the status of a security.

The status of a security is in principle assessed on the basis of the three criteria of transferability, standardisation, and tradability. A physical document need not be issued, however, i.e. the criterion of physicality is irrelevant. The relevant special laws and directives/regulations therefore do not differentiate in principle according to appearance and designation, but solely according to the relevant features, which is why the law is assumed to implement the principle of technological neutrality ("substance over form"). It is of essential significance in this regard that tokenisation is not deemed a separate or new legal form. Compliance with all the principles non-exhaustively enumerated above is therefore mandatory with respect to tokens and securities.

When examining individual cases, it must be verified whether the specific design of the token or tokenisation is compatible with the aforementioned requirements and the provisions of securities prospectus law, in particular the directly applicable Regulation (EU) 2017/1129.

Securities prospectus law and in particular the directly applicable Regulation (EU) 2017/1129 differentiate only according to the category of the underlying asset (see footnote 3), but the requirements for a securities prospectus are in principle the same depending on the relevant annex to Commission Delegated Regulation (EU) 2019/980. In the context of the principle of equal treatment, it should therefore be noted that all the aforementioned obligations also apply to securities prospectuses for the issuance of security tokens and must accordingly be observed. There are therefore no significant differences between securities

[6] Token: a piece of information on a TT System which can represent claims or rights of memberships against a person, rights to property, or other absolute or relative rights and is assigned to one or more TT Identifiers.
TT Systems: transaction systems which allow for the secure transfer and storage of Tokens and the rendering of services based on this by means of trustworthy technology.
TT Identifier: an identifier that allows for the clear assignment of Tokens.
(see Article 2 TVTG).

prospectuses for the issuance of securities and securities prospectuses for the issuance of security tokens with regard to the issuance itself and subsequent obligations.

It should be taken into account, however, that implementation of Directive (EU) 2018/843[7] in particular as well as the creation of the Law on Tokens and TT Service Providers (Token and TT Service Provider Act, TVTG) may have an impact on wallet providers or TT service providers.[8]

5. Data protection

The FMA processes personal data exclusively in accordance with the general data processing principles of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) as well as in line with applicable data protection law.

Information regarding the processing of personal data, as well as details about the processing purpose, the data controller and the rights of data subjects can be found in the FMA Privacy Policy: https://www.fma-li.li/en/fma/data-protection/fma-privacy-policy.html

6. Entry into force

This Communication was approved by the FMA Executive Board on 15 October 2019 and enters into force on 15 October 2019.

The FMA is available for any questions.
Telephone: +423 236 73 73
Email: info@fma-li.li

[7] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, often referred to as the 5th EU Anti-Money Laundering Directive

[8] According to Article 2 TVTG, "TT Service Provider" is an umbrella term encompassing Token Issuers, TT Key Depositaries, TT Token Depositaries, TT Exchange Service Providers, etc.