Financial Regulatory Alert

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Switzerland: New Laws on Financial Services

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Key Points

- Following the 2008 crisis, Switzerland launched a legislative project to create uniform competitive conditions for financial intermediaries and improve client protection.
- Swiss Parliament adopted the FinSA on 15 June 2018.
- The FinSA is part of the new financial market architecture and contains rules for offering financial services and distributing financial instruments.
- On 24 October 2018, the Swiss Federal Counsel initiated the consultation on the ordinances containing the implementing provisions for the FinSA.
- The FinSA is to enter into force together with the Counsel's implementing ordinances on 1 January 2020.

The background of the proposed rules

Following the 2008 crisis, Switzerland launched a legislative project to create uniform competitive conditions for financial intermediaries and improve client protection. The Financial Services Act (FinSA) is part of the new financial market architecture, which covers four areas:

- Supervision, governed by the Financial Market Supervision Act, which entered into force on 1 January 2009
- Infrastructure, governed by the Financial Market Infrastructure Act, which entered into force on 1 January 2016
- Supervised entities (Financial Institutions Act)
- Services (FinSA)

Key points of the FinSA

The rules of the FinSA are based on the EU directives (MiFID II, Prospectus Directive, PRIIPs), with adjustments to comply with specific Swiss circumstances. The FinSA contains cross-sector rules for offering financial services and distributing financial instruments. The purpose of the FinSA is to enhance the protection of the clients of financial services providers, to create a level playing field for the provision of financial services and to reinforce the Swiss financial market's reputation.

The FinSA's scope of application extends to any financial service providers, to client advisors, and to producers and issuers of financial instruments. Under the FinSA, a service provider has to comply with rules of conduct and organisational requirements. A client advisor has additional obligations, in particular, to follow specific training programs and to register with a register.

Financial services are defined as any of the following activities carried out for clients: acquisition or disposal of financial instruments, reception and transmission of orders in relation to financial instruments, portfolio management, investment advice and granting loans for transactions with financial instruments.

Client categorisation

The client classification determines the rules of conduct applicable to each category of client. A financial service provider will be required to distinguish between:

- *Retail clients*: clients that are not professional clients
- *Professional clients*: Swiss financial intermediaries, Swiss insurance companies, foreign clients subject to prudential supervision, central banks, public entities with professional treasury operations, occupational pension schemes with professional treasury operations, companies with professional treasury operations, large companies and private investment structures with professional treasury established for wealthy clients
- *Institutional clients*: certain professional clients (Swiss financial intermediaries, Swiss insurance companies, foreign clients subject to prudential supervision and central banks).

Certain retail clients (wealthy clients and private investment structures established for them) may declare that they wish to be treated as professional clients (opting out). Professional clients that are not institutional may declare that they wish to be treated as retail clients (opting in). Therefore, different levels of protection will apply, depending on the type of client, with the possibility to choose a different level of protection.

Rules of conduct

The FinSA establishes rules of conduct for all financial services providers. These rules include an obligation to inform the clients prior to concluding any agreement, an obligation to verify if a financial instrument (or service) is suitable and appropriate, a documentation obligation and reporting duties, and transparency and due diligence requirements for the execution of client orders. These rules of conduct do not apply for transactions involving institutional clients.

Organizational requirements

Under the FinSA, financial service providers must comply with certain organisational requirements (appropriate governance and internal procedures to ensure a proper organisation), ensure that their staff possess the necessary skills, knowledge and experience to perform their work; and avoid conflicts of interest. Retrocessions are allowed, provided that they are fully disclosed to, and receipt thereof is waived by, the clients or if they are forwarded to the clients in full.

Register of client advisors

Client advisors of domestic financial services providers that are not subject to prudential supervision and client advisors of foreign financial services providers may perform services in Switzerland only if they are registered with a registration body that is licenced by the Swiss Financial Market Supervisory Authority FINMA.

Prospectus

The FinSA introduces uniform prospectus rules: any person who makes a public offer for acquisition of securities in Switzerland or any person who seeks the admission for trading of securities has the duty to publish a prospectus. The prospectus has to contain all material information for the investor's decision, in particular, the issuer, the guarantor and the security provider; the securities to be offered publicly or admitted for trading on a trading venue (i.e., the associated rights, obligations and risks for investors); and the offer (i.e., the type of placement and the estimated net proceeds of the issuance). The prospectus has to be submitted to a reviewing body prior to publication, and the completeness, coherence and understandability will be checked. The FinSA provides for a number of exceptions from the prospectus requirement, in particular, if the public offering is limited to professional clients, addressed to fewer than 500 investors and does not exceed an overall value of CHF 8 million over a 12-month period.

Key information document

The FinSA also introduces the obligation to draft a key information document (KID) for any offering of securities (other than equity securities and debt instruments without derivative elements) to private clients in Switzerland. The KID has to contain the information for making a well-founded investment decision and a comparison of different financial instruments.

Entry into force

- It is currently expected that the FinSA is to enter into force together with its implementing ordinances on 1 January 2020.