Rules of Conduct – Impact of the New Financial Market Regulation

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- **Affected financial services providers**
- **Three categories of clients**
- **Information and documentation duties**

1. Introduction

The rules of conduct are the cornerstone to the Financial Services Act (FinSA). The rules of conduct under FinSA are based on EU regulations (MiFID I and MiFID II) and facilitate market entry to the EU for Swiss financial services providers. As of 1 January 2020 and through the codification of the rules in FinSA, compliance becomes subject to the supervision of the Swiss Financial Market Supervisory Authority (FINMA). The rules of conduct go beyond the information, documentation and investigation obligations existing under current Swiss civil and supervisory laws (pre-FinSA). Indeed, the rules of conduct apply to a vast array of financial services providers while the scope of the rules of conduct is different for each category of clients (retail, professional and institutional clients).

An effective implementation of the rules of conduct and preparation of information packages for clients regarding the services and products offered is key for each market participant.

2. Overview of the New Financial Market Regulation

AFFECTED FINANCIAL SERVICE PRODIVERS

The following financial service providers must abide by the rules of conduct:

- Banks;
- Portfolio managers;

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- Trustees;
- Managers of collective assets;
- Fund management companies;
- Securities firms (formerly: securities dealers);
- Any other person or entity that offers financial services (within the meaning of FinSA) on a professional basis in Switzerland or to clients in Switzerland.

RULES OF CONDUCT UNDER FINSA WITH RESPECT TO THE THREE CATEGORIES OF CLIENTS

1. Retail Clients

1.1. Information Duties:

All financial services providers are subject to extensive disclosure duties regarding products and services they offer and regarding themselves prior to providing any financial services or soliciting any financial products to retail clients. The aim is to give the investors a clear overview of the offered services and products.

1.2. Performance of Suitability and Appropriateness Test:

Financial services providers providing asset management and / or investment advisory services are subject to additional obligations. In particular, they have to carry out an adequacy or suitability test.

A financial services provider who provides investment advice for individual transactions without taking the entire client portfolio into account, must inquire about the client's knowledge and experience and, before recommending financial instruments, must ensure that the recommendations are appropriate for the client (appropriateness test).

If he provides investment advice while taking into account the client's portfolio, he must take into account the client's financial situation and investment objectives as well as his or her knowledge and experience with respect to the proposed individual transactions prior to any recommendation (suitability test).

If the financial services provider does not deem that a financial instrument is appropriate or suitable for its client, it must advise the client against investing into this particular product or service.

Exceptions to the suitability and appropriateness test apply for execution-only transactions initiated by the client.

1.3. Documentation and Reporting Duties

Financial services providers shall keep a written record of the information collected from and the services provided to their clients. When providing investment advice, they also document the needs of the client and the reasons for each recommendation leading to the purchase or sale of a financial instrument. The clients have the right to obtain a copy of that documentation.

1.4. Transparency and Due Diligence Duties

Financial services providers are subject to transparency and due diligence obligations when handling client orders, in particular they must act in good faith and in line with the principle of equal treatment and provide best execution to their clients.

2. Professional Clients

Professional clients are (a) financial intermediaries that are subject to prudential supervision in Switzerland (such as banks, securities dealers and fund management companies), (b) insurance companies, (c) foreign clients who are subject to prudential supervision, (d) central banks, (e) public entities with professional treasury operations, (f) retirement benefit schemes with professional treasury operations, (g) companies with professional treasury operations, (h) large companies and (j) private investment structures with professional treasury for wealthy private clients. In addition, professional clients are high-net-worth individuals and institutional clients who declare in writing that they want to be qualified as professional clients.

Financial services providers may assume that professional clients have sufficient knowledge and experience as well as the capacity to bear the risks when assessing suitability or appropriateness unless certain indications suggest otherwise. Therefore, these rules apply on a case-by-case basis only. The other rules of conduct (i.e. transparency and due diligence duties) apply to professional clients without restriction.

3. Institutional Clients

Some professional clients also qualify as institutional clients, i.e. (a) regulated financial intermediaries that are subject to prudential supervision in Switzerland (such as banks, securities houses, fund management companies and portfolio managers), (b) insurance companies, (c) foreign clients who are subject to prudential supervision and (d) central banks. But they also specifically include national and supranational public entities with professional treasury operations.

FinSA neither provides for a suitability or appropriateness test for institutional clients nor for any documentation duties. In fact, none of the rules of conduct of Art. 7 to 19 FinSA apply to institutional clients.

3. Key Points for Market Participants

Financial services providers should revisit their existing guidelines and amend them or issue new ones and establish an internal procedure to assess appropriateness and suitability, as appropriate, to comply with the rules of conduct.

Financial services providers are required to follow strict disclosure rules regarding the services and products they offer.

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