# Financial Services Act (FinSA)

30.11.2018

- **Expected to enter into force on 1 January 2020**
- **Rules of conduct**
- **New rules on adequate organization**
- **Retrocessions**
- **Registration of client advisors**
- **Prospectus requirements for offering securities**

## 1. Introduction

FinSA will ensure client protection and establish standard conditions for providing financial services in Switzerland. It intends to regulate all types of financial services provided by regulated as well as unregulated services providers to (retail, professional or institutional) clients in Switzerland. Different levels of protection apply depending on the type of client, with the possibility to opt out or to choose different levels of protection. Only a few financial services are outside FinSA's scope.

The regulatory framework includes, among others, (i) new rules of conduct for financial services providers; (ii) new rules on adequate organization; (iii) new rules in relation to retrocessions; (iv) registration obligations for client advisors and foreign services providers performing cross-border services into Switzerland; and (v) prospectus requirements regarding a public offering of securities in Switzerland.

Distributors of collective investment schemes may be subject to registration as client advisors, while the distribution license under the Collective Investment Schemes Act (CISA) will be abolished.

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

## 2. Overview of Proposed New Act

RULES OF CONDUCT

FinSA establishes rules of conduct for financial service providers which are essentially equivalent to the EU Financial Instruments Directive (MiFID I and MiFID II). Hence, the FinSA brings the Swiss requirements in line with EU regulations.

The rules of conduct include:

- extensive informational duties about the financial services providers as well as the products and services that the financial service providers offer;
- performance of a suitability test for financial services providers -those who engage in asset management activities or give investment advice- to ensure that both the services and financial instruments they offer match the risk appetite and the financial capacity of the investors;
- performance of an appropriateness test that takes into account the knowledge and experience of the client when the financial services providers perform investment advice in relation to a single transaction;
- documentation and reporting duties;
- transparency and due diligence obligations when handling client orders. In particular, financial services providers must ensure best execution.
- less stringent rules apply if the clients are not retail clients: Professional clients may waive certain rules of conduct duties. For institutional clients, the rules of conduct do not apply (unless they do not declare an opting-in). The financial services providers may assume that institutional clients not only have sufficient knowledge and experience but also the capacity to bear the risks when assessing suitability or appropriateness.

ORGANIZATION

Financial services providers are required to put an adequate organization in place to comply with their duties under FinSA, such as (i) rules of conduct and (ii) rules to prevent conflicts of interest. In addition, they must ensure that their employees and any third parties they instruct have the requisite qualifications, knowledge, and experience.

RETROCESSIONS

Financial services providers may only accept retrocession fees under limited conditions. A financial services provider will be required to pass on retrocessions it receives to the client unless (i) the client has waived such right explicitly or (ii) the financial services provider forwards the compensation to the client in full. As to the validity of a waiver, FinSA codified the existing jurisprudence of the Swiss Federal Supreme Court.

REGISTRATION OF CLIENT ADVISORS

Client advisors of Swiss financial services providers, which are not supervised pursuant to article 3 of the financial market supervision act (FINMASA), and client advisors of foreign financial services providers may only perform services in Switzerland if they are registered with a registration authority in Switzerland licensed by the Swiss Financial Market Supervisory Authority (FINMA). Additionally, they must have the necessary professional qualifications and must abide by the rules of conduct under FinSA. If a foreign financial service provider provides financial services to clients in Switzerland, its client advisors will need to be registered in the register of advisors, regardless of the domicile or place of work of the client advisor. The draft of the implementing Swiss financial services ordinance (FinSO) exempts client advisors of foreign financial services providers from the duty to register if (i) they provide their services in Switzerland exclusively for professional or institutional clients and if (ii) the respective foreign financial service provider is prudentially supervised in a foreign country that is part of a financial group legally subject to the consolidated supervision of FINMA.

## PROSPECTUS REQUIREMENTS FOR THE OFFERING OF FINANCIAL PRODUCTS

FinSA sets out new prospectus rules similar to the EU Prospectus Directive requirements. Issuers must draw up and publish a prospectus if they intend either to offer securities for subscription in a public offer or to request for authorization in order to trade securities on a trading platform. The prospectus rules will provide a number of exemptions including, among others, for offers addressed exclusively to professional investors or for a limited number of retail investors. More lenient prospectus requirements also may apply to small and medium-sized companies.

The prospectus shall include all material information so that investors may make an informed investment decision. It may be written in a Swiss national language or in English. As a novelty under Swiss law, a prospectus must contain a summary of the most significant information. An independent and FINMA authorized examiner will be in place to approve the prospectus prior to its publication.

## KEY INFORMATION DOCUMENT

Issuers must prepare and publish an easily understandable key information document (Basisinformationsblatt) ("KID") similar to a Key Investor Information Document (KIID) under EU regulations when they offer certain financial instruments to retail clients. The clients must be in a position to make an informed investment decision. It must be prepared in an official language of Switzerland. Financial instruments include not only securities, but also units of collective investment schemes, and structured products. No KID is, however, necessary for stocks. Foreign documents equivalent to the KID may be used instead of a KID.

## PROCEDURAL RIGHTS

Concerning the procedural rights, the following change shall be implemented under FinSA: a conciliation proceeding based on an Ombud system (i.e., all financial services providers will have to affiliate with an existing or newly created ombudsman).

The following initially proposed extensive clients' procedural rights have been abandoned (i.e., will not be implemented in the FinSA) due to fierce criticism in the financial industry during

consultation: (i) Reversal of the burden of proof for financial services providers in civil dispute proceedings concerning compliance with their information duties, (ii) creation of a procedural costs fund in favor of clients, and (iii) creation of instruments for collective legal protection. Thus, the draft FinSA provides more limited clients' procedural rights than originally expected.

## 3. Key Points for Market Participants

The rules of conduct under FinSA apply to a lesser or greater extent to all financial services providers active in the Swiss market, including investment advisors.

Client advisors and certain foreign financial services providers, offering cross-border services into Switzerland, face new registration requirements in Switzerland. The CISA requirement for distribution of investment schemes will be replaced by a new concept of the 'offer of financial instruments' which will be set out in the FinSA. Distributors of investment schemes will remain subject to registration requirements.

Issuers must be aware of new prospectus requirements when offering financial instruments in or from Switzerland.

Issuers are – in addition – obliged to prepare KIDs similar to Key Investor Information Documents (KIID) under EU regulations for offering certain securities to retail clients.

## Robert Furter

Senior Counsel
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 91 55
robert.furter@pestalozzilaw.com



## Oliver Widmer

Partner
Attorney at law
Head Financial Services

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 42
oliver.widmer@pestalozzilaw.com

