# New FINMA Circular 2025/2 on Rules of Conduct under FinSA/FinSO

02.12.2024

## Key takeaways

- **The new FINMA Circular 2025/2 on Rules of Conduct under FinSA/FinSO will enter into force on 1 January 2025.**
- **The new circular aims to present FINMA's interpretation and practice in implementing certain the code of conduct duties under FinSA and FinSO.**
- **In particular, the draft circular provides for disclosure rules concerning the type of financial instruments and services, risk disclosure rules, conflicts of interest disclosure rules as well as minimum requirements of appropriateness and suitability tests.**

## Introduction

On 15 May 2024, FINMA published a draft of a new circular on the rules of conduct under the Financial Services Act (FinSA) and the associated ordinance (FinSO). The public consultation ended on 15 July 2024. The new circular sets out the administrative practice and only provides selective guidance on the specific implementation of the rules of conduct duties under FinSA and FinSO. The new FINMA Circular 2025/2 on Rules of Conduct under FinSA/FinSO will enter into force on 1 January 2025.

## Summary and addressees

The circular further specifies certain requirements for implementing the rules of conduct under FinSA. It not only includes explanations concerning rules of conduct (Articles 7-20 FinSA), but also covers certain general definitions (Article 3 FinSA), the organizational requirements for financial service providers (Articles 21-27 FinSA), and client segmentation guidelines (Articles 4 and 5 FinSA).

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

In particular, the circular clarifies the expected scope of action and client information in the following areas:

- General information duties regarding the type of financial instruments and services and related risks
- Appropriateness and suitability reviews
- Use of financial instruments of clients / securities lending
- Conflicts of interest
- Compensation from third parties (retrocessions)

The circular is aimed at financial service providers supervised by FINMA or a supervisory organization within the meaning of Article 2 para. 1 let. a FinSA.

**General information duties**

According to the explanatory notes, FINMA recognizes that valid contracts under civil law may be concluded in oral form and that advisory contracts may be concluded verbally or implicitly. However, financial service providers are subject to certain information duties and must, among other things, provide information about the personally recommended financial service and the associated risks and costs. Pursuant to FINMA's circular, financial service providers are required to identify and document whether the investment advisory service they offer to clients is transaction-related or portfolio-related. The circular requires that the documentation should be made in a form that allows text verification, which may as well consist of a notice at the time of service provision.

Furthermore, the circular provides for a list of particular information to be handed to clients within the risk disclosure in contracts for difference, which include any additional funding obligations, a potentially unlimited risk of loss or any leverage effect. For the purposes of informing clients about the risks associated with financial services, FINMA specifies indicators of risk concentrations that are unusual in the markets (concentrations of 10% or more in individual securities or concentrations of 20% or more in individual issuers).

**Appropriateness and suitability tests**

The circular intends to clarify what kind of information financial service providers must gather in order to effectively perform the appropriateness and suitability assessments. Various comments were received concerning the section in the draft circular regarding the assessment of clients' knowledge and experience. In the final circular, FINMA reflected on the differences between asset management, portfolio-related investment advice and transaction-related investment advice.

Specifically, financial service providers are required to enquire about clients' knowledge and experience with each relevant investment category offered. For asset management and portfolio-related investment advice, this should take into account the features of the investment

strategy and the types of financial instruments used. The level of detail should match the complexity and risk level of the investments and strategies. Needless to say, the assessment of clients' knowledge and experience is only required in the case of private clients. Only a limited suitability test and no appropriateness test is required in the case of professional clients.

**Use of financial instruments of clients / securities lending**

Pursuant to Article 19 FinSA, financial service providers may borrow financial instruments from clients' portfolios as a counterparty or act as an agent for such transactions only if the clients have given their prior and express consent to these transactions in writing or in another form demonstrable in text in an agreement that is separate from the general terms and conditions. The circular now requires the minimum details to be made available to clients and documented as part of the risk disclosure in order for such consent to be valid. Such information includes:

- whether the financial service provider is acting as a counterparty (principal) or merely as an agent;
- that the ownership of the financial instruments is transferred to the counterparty and only a claim to replacement of the same type and quantity will exist;
- that in the event of the bankruptcy of the counterparty or, if applicable, a guarantor, there is only a non-privileged monetary claim of corresponding value;
- that the property and participation rights are transferred to the counterparty;
- that the risk of a reduction in the value of the financial instruments remains with the client;
- that the client may terminate the agreement on the use of financial instruments with immediate effect or, if a fixed term has been expressly agreed in the individual case, that the use only ends upon expiry; and
- that the client has the option of excluding certain financial instruments from securities lending.

**Conflicts of interest**

FINMA provides guidelines on dealing with conflicts of interest under the assumption that conflicts of interest can hardly be avoided when proprietary financial instruments are used. If the conflicts of interest cannot be completely avoided, the financial service provider should provide information about the associated risks. Such information shall include information on whether the market offering considered in the selection of financial instruments comprises only proprietary, proprietary and third-party, or only third-party financial instruments. Proprietary financial instruments shall not be favoured by specific incentives in the remuneration of the persons employed within the scope of these financial services.

**Compensation from third parties (retrocessions)**

The information on compensation in contracts must be highlighted visually and be physically available to the client, or an electronic version of this information must be easily accessible for the client. The specific amounts must be made available free of charge on the client's request. Before the financial service is provided or before the contract is concluded, the financial service provider shall at least inform the client about the range of compensation. In the case of asset management and portfolio-related investment advice, the portfolio value and the agreed investment strategy must also be taken into account.

**Omission of corporate finance and exception for mergers and acquisitions (M&A)**

In the draft circular, it was suggested that services in the context of corporate finance, mergers and acquisitions (M&A), and the underwriting and/or placement of financial instruments should be considered financial services if the clients used the service primarily for industrial, strategic or entrepreneurial purposes and not for investment or hedging purposes.

The proposal was criticized by various participants during the consultation. One particular point of criticism was that investors would often pursue several purposes and that the distinction based on the investment purpose would therefore lead to uncertainty. Hence, the proposal was not included in the final FINMA Circular 2025/2.

## Next steps

The new circular will reflect FINMA's supervisory practice and also serve as guidance in terms of the interpretation of FinSA rules of conduct. Financial institutions and financial service providers subject to FinSA should review their internal policies to ensure their processes and internal guidelines accurately reflect the expected implementation of the rules of conduct in line with the new circular.

Our team has many years of experience in implementing rules of conduct under financial market law and FINMA's practice. We will be pleased to provide you with further information.

Visit our Swiss Financial Market Regulation site to benefit from the latest guidance, tailored to your specific financial sector.

Authors: Andrea Huber (Partner), Niku Gholamalizadeh (Associate)

**No legal or tax advice**

## 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

## Andrea Huber

Partner
Attorney at law, LL.M.

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