

Qualified life insurance products – proposed new distribution rules under the Insurance Supervision Act

03.06.2021

Key takeaways

The revision of the Insurance Supervision Act (ISA) introduces new rules regarding the sale of insurance products with an investment character ('qualified life insurance products'). On 3 May 2021, the draft ISA, prepared by the Swiss government in October 2020 (draft ISA), took its first hurdle in Parliament. As one of the two parliamentary chambers, the National Council discussed and adopted, amongst other things, new rules concerning qualified life insurance products. These rules are similar to the provisions already implemented for financial instruments under the Financial Services Act (FinSA) and applicable to financial service providers, client advisers and producers and providers of financial instruments. This new regulation related to qualified life insurance products will create a level playing field between all actors in the financial services and insurance sectors.

In a nutshell:

- **Life insurance products involving an investment risk in the savings process for the insured, capital redemptions operations and tontines qualify as insurance products with an investment character under the proposed new legislation.**
- **Similar to FinSA, insurance companies offering qualified life insurance products must prepare a Key Information Document (KID) in advance describing all relevant aspects for the insured to compare similar qualified life insurance products.**
- **Insurance intermediaries have to fulfil additional information duties.**
- **Before recommending qualified life insurance products, insurance companies and intermediaries, respectively, must seek information from insureds to conduct an appropriateness test.**
- **Insurance undertakings and insurance intermediaries become subject to a documentation and rendering of account duty.**
- **To avoid conflicts of interests, insurance companies must disclose the compensation received in connection with qualified life insurance products for non-tied insurance intermediaries.**
- **Advertising for qualified life insurance products must be clearly recognisable as such. Anyone who provides information in the KID that is incorrect, misleading or does not comply with the legal requirements becomes liable under the proposed new legislation.**

The Council of States – as the second chamber of the Swiss Parliament – is also expected to follow the National Council in the adoption of these new rules relating to qualified insurance products. See also our [legal update](#) regarding the new rules on insurance intermediaries and the draft ISA in general as well as our [legal update](#) on new rules regarding the restructuring of insurance companies. The new law is expected to become effective in 2022 at the earliest.

Background

On 21 October 2020, the government adopted the dispatch on a partial revision of the ISA. The partial revision of the ISA takes account of insurance market developments and implements parliamentary proposals from the deliberations on FinSA, which entered into force on 1 January 2020. The overall objective of the revision is to create a nuanced regulatory and supervisory framework which improves both the competitiveness of the Swiss insurance sector and consumer protection. Regarding the sale of qualified life insurance products, the revision shall introduce specific conduct rules and a duty to provide information – in line with regulation already implemented for financial instruments under FinSA. Such new regulations will create a level playing field for financial instruments governed by FinSA and insurance investment products, which do not fall within the scope of FinSA.

Definition of ‘qualified life insurance products’

Pursuant to Art. 39a draft ISA, qualified life insurance products include (i) life insurance products involving an investment risk in the savings process for the insured, (ii) capital redemption operations, as well as (iii) tontines .

Life insurance products involving a risk of loss and therefore an investment risk in the savings process for the insured relate to any type of insurance classes with the exception of classes A6 and A7 as described below. Specifically, risk of loss shall mean that the present value of the savings portion of an insurance policy at the time of ordinary payment or conversion, respectively, may be lower than the nominal amount of all savings premiums paid. As a consequence, life insurance products with no investment components, or participations in a surplus as the only investment component, do not qualify as a life insurance product and are therefore not within the scope of Art. 39a et seq. draft ISA.

Capital redemption operations – i.e. insurance class A6 – are considered as a contractual agreement between the life insurance provider and insured party. Under such agreements the client’s assets are transferred and delegated based on a mathematical model involving no or only very limited biometric risks. Such contractual agreements can either end at a fixed point in time or upon death of the insured person. As capital redemption operations involve an investment risk per se, they fall within the scope of Art. 39a et seq. draft ISA.

Tontines – i.e. insurance class A7 – are contractual agreements under which the contributions of all insured parties are invested on a pooled basis, while the investment risk remains with the insured parties. If an investor dies, the respective share is reallocated among the surviving investors or the deceased’s heirs. The predominant relation of a tontine to capital markets justifies the treatment as a qualified life insurance product under the proposed rules introduced by Art. 39a et seq. draft ISA.

Key Information Document

Pursuant to Art. 39b para. 1 draft ISA, insurance companies offering qualified life insurance products must prepare a KID in advance describing all relevant aspects an insured person requires to compare similar qualified life insurance products. In line with Art. 60 FinSA, the KID (based on Art. 39c para. 2 draft ISA) shall include:

- the name of the qualified life insurance product and the identity of the insurance company offering the product;
- the type and characteristics of the qualified life insurance product;
- the risk/return profile of the qualified life insurance product, specifying the maximum loss that could be incurred;
- the costs of the qualified life insurance product;
- information on the authorisations and approvals associated with the qualified life insurance product.

Further, the KID must be easily understandable, separate from advertisements and kept up to date if significant changes occur related to the qualified life insurance product. Further details will be described in the revised Insurance Supervision Ordinance (ISO) (see Art. 39f draft ISA).

Information duty

Art. 45 draft ISA requires that insurance intermediaries provide certain standard information to insured parties in advance related to all insurance products. This information requirement goes beyond the scope of the existing Art. 45 ISA and Art. 3 of the Swiss Insurance Contract Act (ICA). Art. 3 ICA prescribes the general information duty of the insurer with respect to the identity of the insurer and the essential content of the insurance, namely:

- the insured risks;
- the scope of the insurance coverage;
- the premiums owed and other obligations of the insured;
- the term and termination of the insurance contract;
- the calculation bases, distribution principles and methods applicable to the determination of and participation in surplus;
- the surrender and conversion values; and
- the processing of personal data;

The proposed Art. 45 draft ISA includes the following information to be disclosed:

- the name and address of the insurance intermediary;
- whether it is a tied or non-tied intermediation;
- where information about education and ongoing training of the insurance intermediary can be obtained;
- the person liable in connection with the intermediation;
- the handling of personal data;
- the possibility of mediation proceedings before the ombudsman.

For the sake of completeness, it should also be kept in mind that the ICA is currently also subject to revision. As of 1 January 2022, Art. 3 draft ICA will provide for additional information duties of the insurer, amongst others:

- with regard to life insurance policies: the significant types of costs associated with a redeemable life insurance policy in the event of a redemption; and

- information duties regarding the right of withdrawal, the deadline for submitting a notice of claim; and the temporal validity of the insurance cover.

Appropriateness test

Before recommending qualified life insurance products, the insurance company and insurance intermediary, respectively, must conduct an appropriateness test as set out in Art. 39j draft ISA, taking into consideration the knowledge and experience of the insured person. If, based on this test, the insurance product is deemed not to be appropriate for the insured person, the insurance company or intermediary must advise against the respective product. Moreover, if the information provided by the insured person is not sufficient to enable an appropriateness test, the insured person must be informed that no appropriateness test has been performed. Please note that no appropriateness test will be required in reverse solicitation and execution-only scenarios, i.e. in situations where the insured party executed the insurance contract on their own initiative without asking for advice.

Documentation and rendering of account duty

According to the proposed Art. 39k Draft-ISA, insurance companies and insurance intermediaries, respectively, must document:

- which qualified life insurance product has been concluded;
- what knowledge and experience of the insured has been obtained;
- if no appropriateness test has been conducted;
- whether advice against the qualified life insurance product has been given.

Upon request of the insured person, insurance companies and intermediaries must provide a copy of the above information or make it available in another appropriate manner. In addition, insurance companies and insurance intermediaries, respectively, must provide information related to the valuation of the underlying financial instruments, performance and costs if requested by the insured person.

Third-party compensation

In order to avoid conflicts of interests, insurance companies are required under proposed Art. 39h para. 2 draft ISA to disclose compensation received in connection with qualified life insurance products. Interestingly, according to the government's accompanying explanatory notes to Art. 39h para. 2 draft ISA, the new rules do not apply to insurance intermediaries but refer to the new Art. 45b draft ISA which requires disclosures in respect to all intermediated products by non-tied intermediaries. Non-tied insurance intermediaries must expressly inform the policyholders of all compensation they receive from an insurance undertaking or third parties (e.g., commission, rebates or similar financial benefits) in connection with the provision of their services. For further details, also in connection with non-tied intermediaries who receive – in addition to the compensation from insurance companies or other third parties – compensation from the insured, please see our [legal update](#) on insurance intermediaries. According to the latest Supreme Court practice with respect to retrocessions when providing financial services, calculation parameters and range of compensation amounts must be disclosed if the amount cannot be determined in advance (Art. 45b para. 3 draft ISA). The new law not only follows the practice with respect to retrocessions in the financial services industry, but extends it by requiring an explicit waiver. These disclosure rules, however, do not apply to tied insurance intermediaries.

Apart from the new rules for non-tied insurance intermediaries, the proposed law is silent, however, on the type and scope of compensation-related information that must be disclosed. In analogy to the rules applicable to non-tied insurance intermediaries, we would expect the same standard to be applicable to all qualified life insurance products, including intermediated qualified insurance products.

Advertising and liability

With respect to advertising, Art. 39g draft ISA provides that advertising for qualified life insurance products must be clearly recognisable as such and indicate the KID for the qualified life insurance product in question, as well as where this can be obtained. Advertising and other information on qualified life insurance products directed at policyholders must be consistent with the information contained in the KID.

Art. 39g draft ISA regulates liability and stipulates that anyone who provides information in the KID that is incorrect, misleading or does not comply with the legal requirements, without exercising the necessary care, is liable to policyholders for the damage caused as a result.

Authors: Andrea Huber (Partner), Beat Schwarz (Partner), Daniela Fritsch (Associate), Catherine Hörr (Associate)

No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this legal update.

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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



Beat Schwarz

Partner
Attorney at law

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

