NKF Banking, Finance & Regulatory Team

Switzerland's New Financial Market Architecture

(2nd Edition / May 2016)

Publication 20

NIEDERER KRAFT & FREY

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Switzerland's New Financial Market Architecture

(2nd revised and amended edition)

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Zurich, May 2016

NIEDERER KRAFT & FREY

In memory of our dear friend and partner Urs Pulver.

In the **NKF series** of publications an informal sequence of articles and essays is published that deal with issues related to the field of business activity of Niederer Kraft & Frey.

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Foreword

The Swiss finance industry is going through interesting times. In addition to the changing economic environment and political views on how to govern financial market activities, the regulatory framework is about to be amended in a fundamental and comprehensive way. No longer will regulation have a mere sector-focused approach. Rather, henceforth, the financial markets legal architecture will have a focus on different levels of regulation with the aim of applying the same rules to similar products and services across the industry, but certain sector specific acts will remain effective.

Niederer Kraft & Frey Ltd (NKF) is not only one of the oldest business law firms in Switzerland, but it has also a very strong and recognised banking and finance practice. Partners of our firm are counselling clients on regulatory developments and act on expert commissions for new legislative proposals. Therefore, regulatory developments and proposals prepared by the Federal Administration are closely monitored by our practice groups.

The present publication is a joint effort of NKF's Banking, Finance & Regulatory Team consisting, *inter alia*, in PD Dr. Sandro Abegglen, Dr. François M. Bianchi, Dr. Thomas A. Frick, Marco Häusermann, Dr. Adrian Kammerer and Dr. Bertrand Schott (Partners), Andrea Huber (Counsel), Luca Bianchi and Dr. Urs Hofer (Senior Associates), Thomas Hochstrasser, Christine Hohl, Dr. Martin Schaub and Yannick Wettstein (Associates), Edi Bolliger and Nina Bremi (Junior Associates). The publication does not intend to be a comprehensive discussion of the new acts, but rather aims to provide an overview with a focus on what Swiss and foreign market participants need to be aware of in view of the currently discussed proposals and developments.

The publication at hand is partly based on legislation that still is in draft form. The publication takes into account all respective drafts and proposals published until 1 May 2016. As these draft proposals yet have to be discussed in and passed by the Swiss Parliament, they might change significantly during the legislative process, so that developments will need to be monitored in the months to come.

Zurich, May 2016
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Abbreviations

ACLA	Federal Act of 22 March 1974 on Administrative Criminal Law
AEI	Automatic exchange of information
AIFMD	EU Alternative Investment Fund Managers Directive of 8 June 2011 (Directive 2011/61/EU)
AML	Anti-money laundering
AMLA	Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing in the Financial Sector
AMLO	Federal Ordinance of 11 November 2015 on Combating Money Laundering and Terrorist Financing in the Financial Sector
AMLO-FINMA	FINMA Ordinance of 3 June 2015 on Combating Money Laundering and Terrorist Financing in the Financial Sector
APA	Federal Act of 20 December 1968 on Administrative Procedure
Art. / Arts.	Article / Articles
BA	Federal Act of 8 November 1934 on Banks and Savings Banks
BIO-FINMA	Ordinance of 30 August 2012 of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers
BIB	Basic information sheet (*Basisinformationsblatt*)
BIS	Bank for International Settlement
BBl	Bundesblatt
CC	Swiss Civil Code of 10 December 1907
CCP	Central counterparty
CDB 08	SBA Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence 2008
CDB 16	SBA Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence 2016
cf.	confer / compare
CHF	Swiss francs
CIS	Collective investment schemes

CISA	Federal Act of 23 June 2006 on Collective Investment Schemes
CISO	Federal Ordinance of 22 November 2006 on Collective Investment Schemes
CISO-FINMA	Ordinance of the Swiss Financial Market Supervisory Authority of 21 December 2006 on Collective Investment Schemes
CO	Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)
CPC	Federal Code of 19 December 2009 on Civil Procedure
CRS	Standard for automatic exchange of financial account information
CSD	Central securities depository
CSDR	EU Central Securities Depository Regulation of 23 July 2014 (Regulation (EU) no 909/2014)
DEBA	Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy
EATC	Economic Affairs and Taxation Committee of the Swiss Parliament
e.g.	*exempli gratia*
EIOPA	European Insurance and Occupational Pensions Authority
EMIR	EU Regulation on OTC Derivatives, Central Counterparties and Trade Repositories of 4 July 2012 (Regulation (EU) No 648/2012)
et seq.	*et sequens / et sequentes*
EU	European Union
EUR	Euros
FAHT	Federal Act of 14 December 1990 on the Harmonization of Taxes
FAQ	Frequently asked questions
FATCA	US Foreign Account Tax Compliance Act
FATF	Financial Action Task Force on Money Laundering
FBO-FINMA	Ordinance of the Swiss Financial Market Supervisory Authority of 1 January 2009 on Foreign Banks in Switzerland
FC	Financial counterparty
FDF	Swiss Federal Department of Finance
FDTA	Federal Act of 19 December 1990 on Direct Federal Taxes

FIDLEG	Federal Financial Services Act
FIDLEV	Federal Financial Services Ordinance
FINFRAG	Federal Act of 19 June 2015 on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading
FINFRAV	Federal Ordinance of 25 November 2015 on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading
FINFRAV -FINMA	Ordinance of the Swiss Financial Market Supervisory Authority of 3 December 2015 on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading
FINIG	Federal Financial Institutions Act
FINMA	Swiss Financial Market Supervisory Authority
FINMAG	Federal Act of 22 June 2007 on Financial Market Supervision
FINRA	US Financial Industry Regulatory Authority
FISA	Federal Act of 3 October 2008 on Intermediated Securities
FMI	Financial market infrastructure
FSB	Financial Stability Board
FX	Foreign exchange
G-20	Group of Twenty
GLEIS	Global legal entity identifier system
HNWI	High-net-worth individuals
HTC	Hague Trust Convention of 1 July 1985
ICA	Federal Act of 2 April 1908 on Insurance Contracts
i.e.	*id est*
IGA	Intergovernmental agreement
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISA	Federal Act of 17 December 2004 on the Supervision of Insurance Companies
ISDA	International Swaps and Derivatives Association
KIID	Key investor information document
LEI	Legal entity identifier
LIFD	Federal Act of 14 December 1990 on the Federal Direct Tax

LHID	Federal Act of 14 December 1990 on the Harmonisation of Direct Taxation at Cantonal and Communal Levels
lit.	*litera*
MiFID I	EU Markets in Financial Instruments Directive of 21 April 2004 (Directive 2004/39/EC)
MiFID II	EU Markets in Financial Instruments Directive of 15 May 2014 (Directive 2014/65/EU)
MiFIR	EU Markets in Financial Instruments Regulation of 15 May 2014 (Regulation (EU) No 600/2014)
MROS	Money Laundering Reporting Office Switzerland
MTF	Multilateral trading facilities
N	note
NBA	Federal Act of 3 October 2003 on the Swiss National Bank
NFC	Non-financial counterparty
no. / nos.	number / numbers
ODRG	OTC Derivatives Regulators Group
OECD	Organization for Economic Co-operation and Development
OTC	over-the-counter
OTF	Organised trading facilities
p. / pp.	page / pages
para. / paras.	paragraph / paragraphs
PC	Swiss Penal Code of 21 December 1937
PEP	Politically exposed person
PFIO	Federal Ordinance of 18 November 2009 on the Professional Practice of Financial Intermediation
PFMI	Principles for financial market infrastructures
PMCA	Federal Act of 20 June 1933 on the Control of the Trade in Precious Metals and Precious Metal Articles
ROC	Regulatory Oversight Committee
SAAM	Swiss Association of Asset Managers
SAR	Suspicious activity report
SBA	Swiss Bankers Association
SESTA	Federal Act of 24 March 1995 on Stock Exchanges and Securities Trading
SESTO	Federal Ordinance of 2 December 1996 on Stock Exchanges and Securities Trading
SFAMA	Swiss Funds & Asset Management Association
SFBC	Swiss Federal Banking Commission

SICAF	Investment company with fixed capital
SICAV	Investment company with variable capital
SIX	SIX Swiss Exchange
SNB	Swiss National Bank
SOGC	Swiss Official Gazette of Commerce
SRO	Self-regulation organization
SVV	Swiss Insurance Association (*Schweizerischer Versicherungsverband*)
TR	Trade repository
UK	United Kingdom
UPI	Unique product identifier
US	United States

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I. From Old to New: An Overview

(1) It is important to note that the term "old" (Chapter I.A. below) refers to the Swiss financial market architecture as in force up until the end of the year 2015. As for the term "new" (Chapter I.B. below), we will refer to the regulatory architecture after the full implementation of the three new financial market acts (FINFRAG, FINIG, FIDLEG). With a view to the timeline, it is further important to note that the first of these new acts, the FINFRAG, has already been set into full force and effect as per 1 January 2016, while the FINIG and the FIDLEG are currently not expected to enter into force before 2018. Thus, the "current" Swiss financial market architecture is a transitional one by featuring elements of both the "new" as well as the "old" architecture.

A. The Old Swiss Financial Market Architecture

(2) It is noteworthy that the regulation of the Swiss financial market started as early as 25 June 1885 with the adoption of a supervision act on private insurance companies that was repeatedly revised and restated and finally resulted in the current Insurance Supervision Act of 17 December 2004 (ISA). In addition to this (public law) regulation of private insurance companies, the Insurance Contract Act of 2 April 1908 (ICA) regulates and will continue to regulate the (private law) relationship between such insurance companies and their clients.

(3) However, the most fundamental Swiss financial market regulation dates back to the entry into force of the Swiss Federal Banking Act (BA) on 8 November 1934, which was the first significant attempt by Swiss legislators to capture the complexity and importance of financial markets. As with many financial market acts, the enactment of the BA was linked to and driven by a crisis, in this case the Great Depression. Along with the BA came the creation of the Swiss Federal Banking Commission (SFBC) as the former supervisory body of banking institutions.

(4) As in the sector of insurance and banking, subsequent sector-oriented acts were legislated when a need for regulation in a specific sector be-

came evident. Thus, an act on investment funds was passed in 1966, ultimately leading to the current Collective Investment Schemes Act of 23 June 2006 (CISA). Similarly, by the adoption of the Stock Exchange Act (SESTA) on 24 March 1995, stock exchanges and securities dealers (other than those being or belonging to banks, whose respective activities were subject to the BA as so-called "indifferent business") – previously subject to cantonal regulation – finally became subject to Federal regulation (which was already considered as early as 1895).

(5) As a consequence, the old Swiss financial market architecture has organically grown over time and used to be product- or sector-oriented to a large extent. While some financial products, services and institutions – in particular in the areas of banking, insurance, funds, and securities dealing – were regulated by various separate acts and ordinances and were at least until 2009 sometimes even subject to supervision by different supervisory authorities, other financial products, services, and institutions – such as in the areas of asset management, advisory services, and structured products – remained entirely, or at least largely, unregulated. Such regime did not only raise issues with regard to financial conglomerates that offered products and services across different sectors, but had also led to concerns with regard to the principle of "same business, same rules".

(6) The CISA, taken as an example, did comprehensively (and will until the entry in force of the FIDLEG and FINIG continue to) regulate the following areas, however only in relation to collective investment schemes:

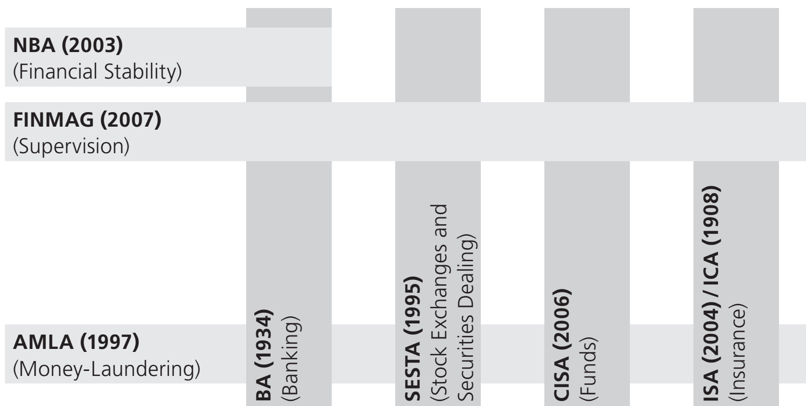
i. Mandatory licensing requirements for certain key actors as well as the licensing conditions;
ii. product rules and requirements;
iii. transparency and documentation requirements;
iv. code of conduct duties at the point of sale; and
v. cross-border inbound offerings.

All of these areas are not well harmonised with the regulation of related topics in other financial market acts. For example, while the cross-border inbound offering of collective investment schemes is subject to Swiss regulation, the same is currently not the case (at least in absence of permanent physical presence in Switzerland) in connection with cross-border inbound offerings of banking or securities dealing services.

(7) Figuratively speaking, the old architecture was based on a vertical pillar model. With the entire house being the Swiss financial market, the legislator deemed it sufficient to only build (*i.e.* regulate) certain pillars under the old architecture. Each pillar has been given its own shape and form. As such, plenty of empty spaces have remained in between those pillars.

(8) A notable exception to this conceptual model is the FINMAG, whose adoption established the Swiss Financial Market Supervisory Authority (FINMA) – a single, integrated supervisory authority across different sectors, which carries out the functions of the former SFBC, the Private Insurance Supervision Authority and the Anti-Money Laundering Control Authority. Similarly, the Anti-Money Laundering Act of 10 October 1997 (AMLA) and the National Bank Act of 3 October 2003 (NBA) regulate and will continue to regulate issues of money laundering and financial stability horizontally across different sectors.

(9) The following chart serves as illustration of the old Swiss financial market architecture:



B. The New Swiss Financial Market Architecture

(10) After roughly 130 years of more or less unsystematic organic growth, it was undoubtedly time to consider a re-design of the Swiss financial market architecture. The effective launch of such considerations was not entirely coincidental with the impact of the 2007 financial crisis, which in many respects marked a turning point in the formerly liberal Swiss financial market regulation.

(11) While a new architecture per se would not necessarily require substantially new content (*i.e.* the pillars and beams to become bigger), the now envisaged reform project will be accompanied by substantially new content in certain areas – particularly in view of harmonizing Swiss regulations with existing and upcoming EU regulations, such as the Prospectus Directive, MiFID II and MiFIR, to ensure Swiss financial institutions' access to the European market by (hopefully) fulfilling the equivalency requirements under MiFID II. However, the fear remains that the new acts – and, in particular, the way how they will be implemented – will provide for a supplementary Swiss finish in certain areas going even beyond what is required under EU-financial market regulations. While the regionally-oriented financial service providers would, of course, welcome any Swiss finish leading to a more flexible and less strict regime as compared to EU regulation, larger Swiss financial services providers may even regret such facilitations given that they will have to implement processes ensuring full compliance with EU regulations anyway and any Swiss law deviation thereto will simply add an additional layer of complexity and lead to additional compliance costs. While the most notable new content and differences to EU regulations will be discussed in the corresponding chapters, this overview will focus on the re-design of the architecture itself.

(12) In contrast to the existing pillar model, the new Swiss financial market architecture will, figuratively speaking, work with both vertical pillars and horizontal beams. The principle idea is that areas suitable for a harmonised regulation across different sectors should be carved out of the vertical product- or sector-oriented regulations and incorporated into the new horizontal financial market acts. The difference among the horizontal financial market acts is that they each address a different level of regulation: supervision, infrastructure (question of how the proper functioning of the infrastructures used in relation to financial products may be ensured), institutions (question of who may offer which financial products), point of sale (question of how financial products may be offered) and products (question of what requirements apply on the products offered). This level concept will, for example, facilitate subjecting certain financial service providers, such as client advisers, to point of sale duties, while not introducing a licensing requirement at the institution level.

(13) The following four acts will constitute the core of this new horizontal regulation:

i. The Financial Market Supervision Act (FINMAG): supervision;
ii. the Federal Financial Services Act (FIDLEG): products[1] / point of sale;
iii. the Financial Market Infrastructure Act (FINFRAG): infrastructure; and
iv. the Financial Institutions Act (FINIG): institutions.

(14) If the above concept had been followed strictly, very little would have remained within the vertical acts. In fact, it was originally indeed the intention to completely integrate both the BA as well as the SESTA into the new horizontal acts (mainly into the FINIG and the FINFRAG)[2]. Although the integration of the BA would not have – at least not as per the wording of the respective provisions – led to major material changes, many participants in the consultation process voiced a fear that abandoning the concept of a separate BA may create unnecessary legal uncertainties and potentially lead to unwanted material changes (*e.g.* by having the same wording interpreted in another systematic context). This fear combined with the fact that the BA is both of paramount importance for the Swiss financial services industry as well as up-to-date (having been subject to various major revisions recently) led the Federal Council to rescind from its original intentions. Based on similar considerations, the insurance sector will continue to be subject to its sector-specific regulations and the ISA (and ICA) will therefore remain in place[3]. As regards the funds sector, the CISA will face substantial carve-outs but will continue to exist and to provide for certain product-specific regula-

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1 Note that the products level will continue to be partly regulated by vertical acts such as the CISA. Newly, the FIDLEG will, however, also provide for certain harmonised requirements on product level (such as the prospectus obligation).

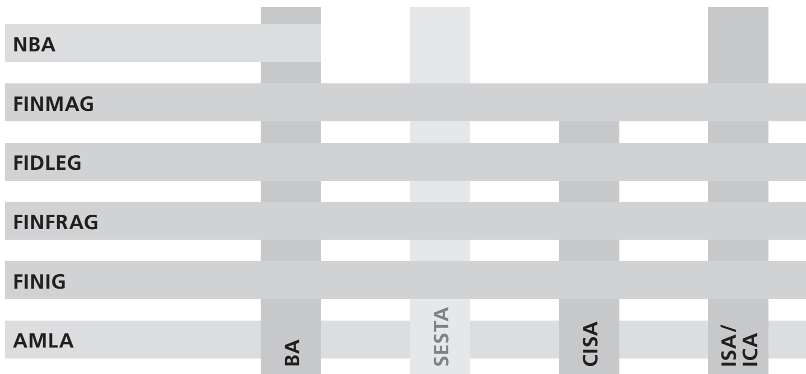
2 As regards the arguments for this initial intention, cf. Federal Department of Finance, Explanatory Report to the Consultation Draft of the FIDLEG and the FINIG dated 25 June 2014, p. 23.

3 Different to the BA, the idea of completely or at least largely integrating the ISA into the new horizontal acts was abandoned at a very early stage (well before elaborating and publishing the consultation drafts). The ICA regulating the (private law) relationship between the insurance companies and their clients would not have been much affected anyway.

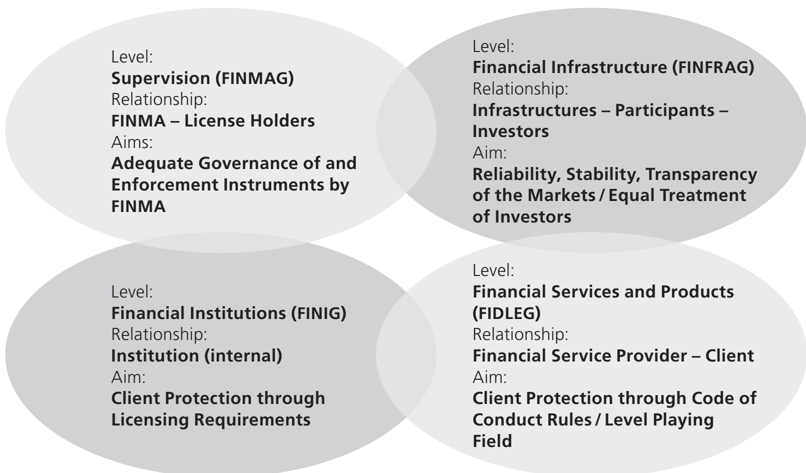
tions. Thus, the SESTA will be the only vertical act that will cease to exist with the entry in force of all new horizontal acts.

(15) In this context, it must be emphasised that there will either way be a harmonization of the rules within the BA, CISA and the ISA, on one hand, and the FIDLEG and FINIG on the other (*e.g.* as regards the licensing requirements). Moreover, both service providers of the banking as well as of the insurance sector may additionally be subject (either directly or by way of reference) to the code of conduct duties of the FIDLEG.

(16) The following chart illustrates the above described revised future "pillar & beam" model:



(17) The aims of the four horizontal acts as well as the level of regulation and relationships governed by them can be summarized as follows:



(18) From a conceptual point of view (not yet accounting for content), the main advantage of the new architecture is that it will allow for greater coherence and adherence to the principle of "same business, same rules". The fact that both the BA and the ISA will continue to stipulate separate sector-oriented rules, also in areas which could have been integrated into one of the new horizontal acts, of course, bears the risk that these advantages may not fully be achieved (even if harmonised).

(19) A disadvantage, however, might be that market participants will be required to consult various acts to ensure compliance in their day-to-day operations. For example, a company exclusively active in the fund business (*e.g.* as an asset manager and distributor of funds), which under the current regime does not need to consult many acts other than the CISA and its implementing ordinances (note, however, that this comes along with a need to consult and be aware of the corresponding FINMA and the Swiss Funds & Asset Management Association (SFAMA) circulars, public notices, fact sheets and FAQs as well), will now under the new regime have to consult the FINIG and its implementing ordinances (regarding the organizational requirements on institution level), the FIDLEG and its implementing ordinances (regarding code of conduct rules when marketing funds to potential investors), the FINMAG (when dealing with the supervisory bodies), and, finally, the CISA and its implementing ordinances (for sector-specific regulations).

II. Supervision – FINMAG

A. Overview

(20) The Federal Financial Market Supervision Act (FINMAG) entered into force on 1 January 2009 and is, therefore, not a new regulation. The FINMAG was and will, however, be partly amended through the introduction of the FINFRAG, FINIG and FIDLEG. Against this background, the publication at hand will not focus on the FINMAG in general, but rather on the afore-mentioned changes introduced to the FINMAG by way of the three new financial market acts.

1. The Content of the Current FINMAG

(21) The FINMAG established FINMA, a single, integrated supervisory authority across different sectors. FINMA carries out the functions of the former SFBC (banking supervision), the Private Insurance Supervision Authority (insurance supervision) as well as the Anti-Money Laundering Control Authority (anti-money laundering supervision of financial intermediaries). The creation of such integrated supervisory authority was in line with similar developments in other European countries. However, certain Swiss supervisory authorities remain and will continue to remain outside and independent from FINMA, such as the Federal Audit Oversight Authority (supervision of audit firms), the Swiss Takeover Board (supervision of certain areas of the SESTA, *e.g.* public takeover offers), the Swiss National Bank (SNB) (which has a joint supervision mandate together with FINMA in areas of financial stability), and the Federal Gaming Board (supervision of casinos, etc.). Moreover, self-regulatory organizations (SROs), such as the Swiss Bankers Association (SBA), the Swiss Funds & Asset Management Association (SFAMA), as well as the many SROs active in the area of anti-money laundering supervision of not directly FINMA-supervised financial intermediaries play a key role in Swiss financial market regulation. In particular, Art. 7 para. 3 FINMAG allows FINMA to publicly acknowledge a directive issued by an SRO as being a minimal standard and to declare compliance with such directive mandatory for all affected market participants regardless of whether they are members of the respective SRO. External prudential audit firms,

which are responsible for the first level of prudential supervision in many areas and which will report relevant findings to FINMA (*i.e.* by way of yearly prudential audit reports or reports on special investigations), will also continue to play a key role in the general supervision setup[4].

(22) The FINMAG governs (i) the competences and structure of FINMA (Arts. 1 *et seq.* FINMAG), including its organization (Arts. 8–23 FINMAG), its enforcement tools (Arts. 24–37 FINMAG) and its co-operation with other Swiss and foreign authorities (Arts. 38–43 FINMAG), (ii) the criminal sanctions and the corresponding procedures in case of violations of certain key requirements under Swiss financial market regulation (Arts. 44–52 FINMAG), and, finally, (iii) the applicable administrative procedures and legal recourse system (Arts. 53 and 54 FINMAG). The content of the FINMAG can be classified as formal finance law in contrast to material finance law being set forth in the BA, SESTA, CISA, etc.

2. The Amendments of the FINMAG as Part of the Introduction of the FINFRAG, FIDLEG and FINIG

a) Amendments made to FINMAG as Part of the Introduction of the FINFRAG

(23) The entry in force of the FINFRAG as per 1 January 2016 introduced a series of amendments to the FINMAG. However, these amendments are rather unrelated to the new Swiss financial market architecture or the remaining content of the FINFRAG. They mainly concern the co-operation and exchange of information between FINMA and other Swiss or foreign supervisory, regulatory, bankruptcy, and judiciary authorities and are the result of both lessons learnt during the 2007 financial crisis (namely, the inefficient cooperation among several competent authorities from different nations impeding the development of solutions to "too-big-to-fail" concerns) and the recent tax disputes between Switzerland and countries such as the US, Germany, France, etc. (specifically, the narrow and rather restrictive framework of the existing Swiss ad-

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4 Cf. for example the related IMF finding in IMF, Switzerland – Financial System Stability Assessment: Reports on Observance of Standards and Codes, April 2014, p. 51: *"FINMA has sufficient inspection and investigation powers vis-à-vis supervised entities and other persons, but has outsourced the exercise of these powers to a significant extent to audit firms and investigating agents. […] FINMA's own supervisory reviews are very limited."*

ministrative assistance procedures resulting in either FINMA acting beyond the wording of the law or foreign authorities angered by the delay and limitations of information received). Making concessions in the latter regard is also thought to increase the chances of the new Swiss financial market architecture to be granted the desired equivalency attestation by European authorities[5].

(24) The following elements of the respective provisions governing the exchange of information with foreign authorities are particularly noteworthy:

i. FINMA is newly entitled to spontaneously – thus, without a formal request – exchange information with foreign authorities (mainly but not limited to supervisory authorities); provided that such information exchange exclusively serves the purpose of enforcing financial market regulations and that the foreign authority is bound by official or professional secrecy. While this widely corresponds to prior FINMA practice, the recent amendments did relieve certain limitations on such spontaneous exchanges imposed by Swiss case law under the old regime.
ii. Regarding the administrative assistance procedure provisions (which are newly concentrated in the FINMAG instead of being spread across different regulations), the most notable change is the option granted to FINMA not to conduct a so-called "client procedure" or at least not prior to the actual exchange of information. Such "client procedure" is normally applied if the information to be exchanged concerns or may affect a client – a client being defined as any person or institution that is not itself subject to supervision (*i.e.* an account holder, but arguably also an external asset manager[6]). The affected client would normally have to be informed about FINMA's decision prior to the actual exchange of information and would have the right to appeal such decision within 10 days to the Federal Administrative Court. In addition, such clients were granted a right

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5 On the whole, cf. FEDERAL COUNCIL, Message on the FinfraG dated 3 September 2014, BBl 2014, pp. 7610 et seq. and 7614; FEDERAL DEPARTMENT OF FINANCE, Explanatory Report to the Consultation Draft of the FINFRAG dated 29 November 2013, p. 108.

6 Cf. Swiss Federal Court decision of 3 September 2001, BGE 127 II 323, c. 3b)bb). A view neither shared by FINMA nor the FEDERAL COUNCIL (cf. FEDERAL COUNCIL Message on the FinfraG dated 3 September 2014, BBl 2014, p. 7616).

to inspection with regard to the original request of the foreign authority by Swiss case law under the old regime. Thus, the old "client procedure" not only potentially delayed the exchange of information for months, but also provided the client with the necessary information to take concealment measures within the additional time bought (*i.e.* destroying evidence or transferring assets). These inadvertent consequences were not only a nuisance in view of FINMA, but have also been criticised by the International Monetary Fund (IMF)[7]. Against this background, FINMA newly has the option not to inform the client prior to the actual exchange of information if and to the extent that such information may impede or frustrate the effective accomplishment of the foreign authority's mission and generally not to grant a right of inspection with regard to the correspondence of the foreign authority. A retroactively filed appeal by a client may, in extreme cases, lead to a court ruling confirming the illegality of FINMA's action. Thus, the proposed amendments massively limit clients' rights to be heard, which is the reason why the aforementioned case law did not follow the very same arguments – then made by FINMA – that are now brought forward by the Federal Council[8].

iii. In recent years, information requests by foreign authorities directly addressed to financial services providers with Swiss domicile or headquarters (but with activities, subsidiaries or branches in the jurisdiction concerned) frequently triggered a difficult balancing act between the risk of infringing Swiss secrecy and sovereignty protec-

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7 Cf. Federal Council, Message on the FinfraG dated 3 September 2014, BBl 2014, pp. 7613 et seq. and Financial System Stability Assessment (FN 4), p. 52: "*The requirement to preserve client confidentiality consumes FINMA time and resources.*" Cf. also the corresponding recommendation on p. 63: "*The authorities should pursue the abolition of the strict client confidentiality requirements and the requirement to inform the client of foreign authorities' requests for information.*"

8 Cf. for example the arguments made by FINMA and the respective counter-arguments by the court in the ruling of the Federal Administrative Court of 22 March 2012, B-6062/2011, c. 5. Like the Federal Council does now in its message on the FinfraG (FN 7), the FINMA then used the argument of the clear violation of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information when granting a right of inspection. The Federal Administrative Court, however, deemed it highly unlikely that such would truly be the case.

tion laws and the risk of being accused of withholding information or of obstructing effective supervision and enforcement. In this regard, the new Art. 42c FINMAG provides for an explicit legal basis for an exchange of non-public information between a Swiss financial service provider and the competent foreign supervisory authorities – compliance with which would eliminate the risk of criminal sanctions under the Swiss sovereignty protection laws (Art. 271 PC – Unlawful activities on behalf of a foreign state). Similar as with information shared by FINMA, it is required that such information exchanges exclusively serve the purpose of enforcing financial market regulations and that the foreign authority is bound by official or professional secrecy. In addition, a requirement stipulates that the "rights of clients and third parties shall be preserved". Hence, any client or third party information will still need to be fully anonymised or otherwise a secrecy waiver by such client or third party will need to be obtained. FINMA always retains the right to be informed if the information to be exchanged is of material relevance as well as to veto any such exchange and to require the use of the normal judiciary and administrative assistance proceedings.

b) *Proposed Amendments of the FINMAG as Part of the Introduction of the FIDLEG*

(25) The latest draft of the FIDLEG only provides for certain minor amendments to the FINMAG, *i.e.* the introduction of a provision pursuant to which FINMA is the competent supervisory authority for ensuring compliance with the FIDLEG (the latter is, of course, also the case with regard to the FINFRAG and the FINIG).

(26) In order to ensure coherence with the new register of client advisers introduced by the FIDLEG, the separate register of insurance brokers as per Art. 42 ISA will be abolished. Instead, non-tied insurance brokers will have to register in the register of client advisers. This change in the registration concept will also address an expectation gap issue under the current concept: As the current register of insurance brokers was maintained by FINMA and as the therein registered insurance brokers were entitled to designate themselves as being supervised (although no ongoing prudential supervision was imposed by the registration), clients of such insurance brokers frequently had misled expectations as regards

the extent and content of the FINMA supervision vis-à-vis insurance brokers. For further details on the revised regime applicable to insurance brokers, see Section VIII.B.2.

c) *Proposed Amendments of the FINMAG as Part of the Introduction of the FINIG*

(27) In contrast to the latest draft of the FIDLEG, the latest draft of the FINIG provides for a series of significant amendments to the FINMAG. The following may be particularly noteworthy:

Clarifications regarding the regime applicable to non-supervised institutions

(28) Some of the amendments, and in particular the proposed new wording of Art. 3 draft FINMAG, serve as a clarification that financial services providers that are only subject to a registration requirement and, in particular, the client adviser registration requirement under the FIDLEG (*i.e.* foreign financial services providers offering their services in Switzerland on a pure cross-border basis) will not be subject to FINMA supervision and, thus, not subject to FINMA's enforcement tools. In our view, it is not entirely clear whether this also applies in relation to the possibility of FINMA to issue an occupational ban pursuant to the new Art. 33a draft FINMAG[9]. Such non-supervised financial services providers will, however, both be subject to the criminal sanctions set forth in the (old and new) Swiss financial market acts as well as the conduct duties of the FIDLEG. It derives from this that even in the absence of prudential supervision, compliance with prudential code of conduct duties by non-

[9] While the wording of Art. 3 let. a draft FINMAG would imply that this instrument is similarly limited to client advisers of supervised financial services providers, the comments in FEDERAL COUNCIL, Message on the FIDLEG and the FINIG dated 4 November 2015, BBl 2015, p. 9073, however, rather imply the contrary. Extending the application of this enforcement instrument also to non-supervised client advisers would also make sense in light of the fact that the absence of an occupational ban is also one of the registration requirements applicable to client advisers and given that client advisers of supervised financial institutions would not need to be entered into such a register this (negative) requirement would no longer serve any meaningful purpose (those client advisers that would need to be registered could never be subject to an occupational ban unless they had previously worked for a supervised financial service provider).

supervised financial services providers is thought to be achieved by the following two means:

1. The threat of civil lawsuits (non-compliance with code of conduct duties being a strong indication for a violation of the contractual duty of care or loyalty);
2. the threat of criminal sanctions.

(29) The latter was also one of the reasons why the FDF originally intended to introduce far-reaching criminal sanctions going along with the new conduct duties under the FIDLEG (even in case of mere negligence). Confronted with both the resistance by the Swiss industry (argument: inappropriate criminalization of an entire industry) as well as by the Swiss Parliament in relation to similar provisions originally intended in relation to the FINFRAG, the criminal sanction provisions were, however, substantially mitigated as compared to the original drafts.

(30) In addition, the client adviser registration requirements under the FIDLEG aim to ensure that such non-supervised financial services providers (a) know the applicable code of conduct duties before being registered (adequate training requirement) as well as (b) will not obtain respectively lose their registration in case they commit (or have committed) offences against property or against Swiss financial market acts. While FINMA will not be directly involved in this registration process, it will, however, be responsible for the licensing and supervision of the respective registration authority.

New enforcement tools

(31) FINMA will be granted the following new enforcement tools:

1. It will be empowered to demand the provision of collateral in case of violations of financial regulations;
2. in case of non-observance of a FINMA decree requiring the implementation of measures to restore the lawful state of affairs, FINMA will be entitled to take such measures itself at the defaulting party's cost and expense;
3. in addition to the already existing possibility to issue an occupational ban vis-à-vis lead managers of financial service providers, FINMA will be entitled to issue such an occupational ban vis-à-vis certain

lower level employees, such as securities dealers, traders and client advisers[10];

4. FINMA will henceforth automatically be provided by all Swiss civil courts with a copy of any decision rendered in relation to disputes between supervised institutions and their creditors, investors or clients (Art. 41a draft FINMAG).

Establishment of a new semi-public supervisory authority

(32) One of the most notable changes the introduction of the FINIG will have on the FINMAG and on the current supervisory architecture is, however, that it will provide the legal basis for both the creation as well as the governance of one or several new semi-public supervisory authorities. These semi-public supervisory authorities will be responsible for the supervision of all those individuals or institutions which will newly become subject to prudential supervision under the new Swiss financial market architecture (regular asset managers, trustees and precious metal traders[11]). The inspiration for such semi-public supervisory authorities apparently came from the US, notably from the function held by the Financial Industry Regulatory Authority[12].

(33) The design of the new supervisory architecture in the areas concerned will be two-tiered: The first tier being the new semi-public supervisory authorities which will hold the direct supervisory responsibility over the newly to be supervised individuals and institutions, while, in turn, FINMA will be responsible for the licensing and supervision of these semi-public supervisory authorities on the second tier. The choice of legal form and internal organization will, in principle, be left to the supervisory authority, but FINMA approval needs to be obtained in relation to the articles of association and the organizational regulations as well as in case of

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10 Cf. FN 9 regarding the question of whether this enforcement tool may also be applied in case of client advisers of non-supervised financial services providers.

11 The term "precious metal traders" is used herein for simplification purposes. More precisely, only trade examiners pursuant to Art. 42bis of the Federal Act of 20 June 1933 on the Control of the Trade in Precious Metals and Precious Metal Articles (as amended by the entry in force of the FINIG) will newly be subject to supervision if and to the extent that they, in addition to their examination activities, also engage in precious metal trades on a commercial basis.

12 On the whole, cf. also the chart in Section IV.B.2 which illustrates the new supervisory architecture.

elections of members of the governing bodies. The oversight by FINMA is, however, limited to ensuring the adequate organization and financing of the new supervisory authorities as well as to monitoring whether such an authority lives up to the public mandate vested. FINMA's oversight does, however, not include the right to interfere with the day-to-day first level supervision process and activity. In this regard, the semi-public supervisory authorities will be independent.

(34) In the same context, it is for example noteworthy that these semi-public supervisory authorities will also be entitled to issue and publish circulars on the implementation of Swiss financial market acts. While FINMA will have to approve all such circulars, Art. 43b para. 2 draft FINMAG explicitly states that approval may only be denied if the circular will result in a potentially contradicting supervisory practice. A potential follow-up question that may arise could, thus, be if institutions directly supervised by FINMA that likewise offer asset management services (*e.g.* banks) may (or even have to) apply and rely on circulars issued by the new semi-public authorities *mutatis mutandis* and vice versa (*e.g.* because they are confronted with a question only explicitly addressed in a circular by the non-competent supervisory authority). Put differently, we will have two different supervisors which will in certain areas be responsible for the supervision of the same business and the question will be, how their regulation in form of circulars as well as their supervisory practice will interdepend.

(35) Further, the semi-public supervisory authorities will be authorised to increase the minimally required prudential audit frequency based upon risk considerations and grant the institutions supervised by them a prudential audit frequency of up to maximally four years – which would result in reduced regulatory costs as compared to the institutions directly supervised by FINMA (at least one annual prudential audit required). Finally, the semi-public supervisory authorities will be empowered with the same supervisory and enforcement instruments as FINMA with the exception of the occupational ban pursuant to Art. 33 FINMAG and the instalment of an independent examiner pursuant to Art. 36 FINMAG.

(36) Given that such semi-public supervisory authorities will also assume the supervisory responsibility in matters of anti-money laundering, they will replace and take over the responsibility of the current SROs in this area.

(37) The reasons why FINMA was not mandated with direct supervisory responsibilities in this area were, *inter alia*, (i) the large number of the newly to be supervised individuals and institutions (staffing and resourcing problem of FINMA) – roughly between 2,000 and 3,000 licensing applications are currently expected[13] –, and (ii) the fact that a semi-public supervisory authority may provide for a more flexible and industry-oriented and, thus, a more risk-adequate supervision process. However, if and to the extent that no such new semi-public supervisory authority will be available – because no organization has applied for or been granted a respective license or because an existing authority had to be wound up – Art. 57 para. 3 FINIG, nevertheless, assigns the regular asset managers' and the trustees' supervision to FINMA.

Supervision of asset managers of Swiss occupational benefits schemes

(38) Newly, FINMA will also be responsible for the supervision of asset managers of Swiss occupational benefits schemes given that they will be re-classified as "managers of collective assets" as per the FINIG. FINMA's supervisory responsibility will, however, be limited to their asset management activity and their compliance with Swiss financial market laws, while compliance with occupational pension regulations will continue to be monitored by the respective sector-specific supervisory authorities on both cantonal and Federal level.

B. Key Differences to EU Regulations

(39) The FINMAG provides the basis for a modern supervisory authority (FINMA) endowed with similar competences, enforcement tools, and responsibilities as compared to other EU supervisory authorities that are constituted as a single, integrated supervisory body. That being said there are some notable differences. For example, the Swiss supervisory model is different from the twin-peaks approach applied in the UK where supervisory and regulatory responsibilities are shared between the Financial Conduct Authority and the Prudential Regulation Authority. In con-

13 Cf. also Schleiffer Patrick/Schärli Patrick, Supervision of Portfolio Managers and Trustees, CapLaw 2016/1, p. 42 which estimate the amount to be approximately 2300.

trast to certain EU supervisory authorities, FINMA does not have the power to impose pecuniary administrative fines, such as those imposed in the Adoboli case where the former UK Financial Service Authority fined UBS, whereas FINMA did and could not impose any fine. The additional creation of one or several new semi-public supervisory authorities endowed with the supervision responsibility vis-à-vis regular asset managers, trustees and precious metal traders will be similar to the US concept in relation to the Financial Industry Regulatory Authority but may differ from certain regimes in EU countries, where such financial services providers are supervised by (fully) public authorities.

C. What Swiss and Foreign Market Participants Need to be Aware of

(40) All Swiss and foreign market participants, as well as their clients, need to be aware of the increased cross-border exchange of information among authorities as a consequence of the abolishment of certain limitations in the current Swiss administrative assistance procedure in the area of financial market regulation. This approach is consistent with the same increase in exchange of information in the areas of anti-money laundering or judicial assistance in criminal matters, most notably in relation to tax offenses.

(41) Swiss financial service providers may newly profit from Art. 42c FINMAG which provides a justification under Art. 271 PC to provide information to foreign authorities, even if proceedings are pending, as long as no third party data is affected.

(42) All Swiss and foreign financial services providers should be aware that – even in case their activity would not be subject to a licensing requirement and therefore not subject to FINMA supervision under the new Swiss financial market acts – non-compliance with the new code of conduct duties may lead to criminal sanctions and provide grounds for civil claims.

(43) The Swiss industry of regular asset managers should closely observe the further process in the creation and setup of one or several new semi-public supervisory authorities, the rules issued through such authorities and should, if deemed necessary, participate in this process.

III. Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading – FINFRAG

A. Overview

(44) The Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FINFRAG), the Federal Financial Market Infrastructure Ordinance (FINFRAV) and the FINMA Financial Market Infrastructure Ordinance (FINFRAV-FINMA), which all entered into force on 1 January 2016, provide, *inter alia*, for a consolidated and comprehensive set of rules for the supervision of financial market infrastructures (FMIs), the duties of financial market participants in derivatives trading, the disclosure of shareholdings, public takeover offers and market conduct rules. The following section will focus on the new regulation of FMIs and the regulation of the derivatives trading market. The other areas of law have been transferred into the FINFRAG and its ordinances from the SESTA and hence are largely existing law.

(45) The new rules on the regulation of FMIs will, to some extent, replace the current fragmented regime for FMIs consisting of provisions that can be found in a variety of different acts (*e.g.* SESTA and NBA) and ordinances.

(46) The core reason for the new FINFRAG is to align the Swiss regime of regulating FMIs and derivatives trading with international standards, in particular with EU regulations such as MiFID II, MiFIR, EMIR and CSDR, in order to preserve Switzerland's global competitiveness.

1. The New Regime for Financial Market Infrastructures: Consolidated – Revised – Internationally Aligned

(47) Under the FINFRAG, the following categories are considered FMIs (Art. 2 FINFRAG):

i. Trading venues (stock exchanges and multilateral trading facilities (MTFs) but not organised trading facilities (OTFs, see below));

ii. central counterparties (CCPs);
iii. central securities depositories (CSDs);
iv. trade repositories (TRs); and
v. payment systems.

(48) Organised trading facilities (OTFs) are not defined as FMIs but are nevertheless regulated under the FINFRAG and its ordinances, however, primarily through its operators.

a) *Which Swiss-based FMIs must be licensed by FINMA?*

(49) The following *Swiss-based* FMIs will need to obtain a license from FINMA (Art. 4 FINFRAG):

i. *Trading venues* (*i.e.* stock exchanges and MTFs).
ii. For *CCPs and CSDs*, currently supervised under a bank license, the FINFRAG will introduce *tailor-made* licenses. A license will be needed irrespective of whether or not the relevant *institution* is deemed systemically important.
iii. *TRs* (however, as of today, there are no TRs domiciled in Switzerland).
iv. *Payment systems* will be required to obtain a license only if this "is necessary for the proper functioning of the financial market or the protection of financial market participants and if the payment system is not operated by a bank".

(50) An institution that meets all pertaining requirements as set forth in the FINFRAG/FINFRAV will be *entitled* to receive the relevant license (Art. 5 FINFRAG).

(51) Anyone who operates an OTF in Switzerland must be a Swiss bank, Swiss securities dealer or Swiss trading venue (*i.e.* a Swiss stock exchange or MTF) or be recognised by FINMA as a foreign trading venue (*i.e.* a foreign stock exchange or MTF). No authorization is required for the operation of an OTF in Switzerland within a financial group if the OTF is operated by a legal entity that (a) is controlled directly by a FMI and (b) is subject to consolidated supervision by FINMA (Art. 43 FINFRAG).

(52) *Supervisory authorities:* The regime will remain unchanged, *i.e.* FINMA is the competent authority for the ongoing supervision of FMIs and operators of Swiss OTFs and, in case of systemically important FMIs, also the SNB.

b) *What are the Recognition Requirements for Foreign Trading Venues, CCPs and Trade Repositories?*

(53) *Preliminary remark:* Foreign payments systems and CSDs are not subject to recognition by FINMA.

(54) *Trading venues* domiciled abroad must obtain recognition from FINMA before granting Swiss participants supervised by FINMA direct access to their facilities (Art. 41 FINFRAG).

(55) A *CCP* registered abroad must obtain FINMA recognition before it (a) grants supervised Swiss participants direct access to its facilities; (b) provides services for a Swiss FMI or (c) enters into an interoperability agreement with a Swiss CCP (Art. 60 FINFRAG).

(56) FINMA shall grant recognition to a *foreign trading venue or CCP* (a) if the foreign trading venue or CCP is subject to appropriate regulation and supervision, (b) if the competent foreign supervisory authorities (1) do not have any objections to the cross-border activity of the foreign trading venue or CCP, (2) guarantee that they will inform FINMA if they detect violations of the law or other irregularities on the part of Swiss participants and (3) provide FINMA with administrative assistance.

(57) In addition, certain foreign trading venues can benefit from a "deemed" recognition process if FINMA finds that (1) the state in which the trading venue has its registered office regulates and supervises its trading venues adequately and (2) if the competent foreign supervisory authorities guarantee that they will inform FINMA if they detect violations of the law or other irregularities by Swiss participants

(58) Also, certain foreign CCPs may be exempt from the recognition requirement if this does not adversely affect the protective purpose of the FINFRAG.

(59) A *Trade Repository* registered abroad must obtain recognition from FINMA before accepting reports in accordance with the FINFRAG for derivatives transactions (Art. 80 FINFRAG). FINMA shall grant recognition (a) if the foreign trade repository is subject to appropriate regulation and supervision, (b) if the competent foreign supervisory authorities (1) do not have any objections to the cross-border activity of the foreign trade repository, (2) guarantee that they will inform FINMA if

they detect violations of the law or other irregularities by Swiss participants, (3) confirm to the competent Swiss financial market supervisory authority that (i) forwarding of the data by it to other foreign authorities is permitted only if, on transfer to a criminal authority, mutual assistance in accordance with the Mutual Assistance Act of 20 March 1981 is possible and (ii) FINMA, the SNB, other Swiss financial market supervisory authorities and the Federal Electricity Commission have immediate access to the foreign trade repository.

(60) *Mutuality reservation:* FINMA may, even if the above criteria are met, refuse recognition to trading venues, CCPs or TRs if their home state does not grant Swiss trading venues, CCPs or TRs actual access to its markets or does not offer them the same competitive opportunities.

(61) The licensing and recognition requirements may be summarised as follows:

Organization / Lic. / Rec.	Trading Venues (exchanges, MTFs)	OTFs	CCPs	CSDs	Trade Repositories	Payment Systems
License required?	yes	no, *but…*[a]	yes	yes	yes	no, *but…*[b]
Recognition of foreign FMIs / OTFs required?	yes	no[c]	yes	no[d]	yes	no

Systemically important FMIs are subject to special regulation/supervision.

[a] The operator of an OTF operated in Switzerland must be a Swiss bank, securities dealer or trading venue or a foreign trading venue recognised by FINMA pursuant to the FINFRAG.

[b] The Swiss Federal Council has been authorised and has made use of such authorization in the FINFRAV to define specific duties for payment systems, namely as regards operational aspects, security, own capitalization, risk diversification and liquidity.

[c] Foreign OTFs may voluntarily apply for a recognition in Switzerland pursuant to Art. 110 FINFRAV-FINMA in connection with Art. 41 FINFRAG for the purpose of becoming an eligible foreign OTF for purposes of the platform trading obligation for derivatives transactions.

[d] Note: interoperability links (*Interoperabilitätsverbindungen*) and access links (*Zugangsverbindungen*) arrangements between CSDs (see n. (74)) need FINMA approval.

c) *What are the Recognition Requirements for Foreign Trading Participants? (Art. 40 FINFRAG)*

(62) *Foreign trading participants (remote-member license):* The licensing requirements for foreign participants, which currently only apply to securities dealers seeking membership on a Swiss Stock Exchange, will be extended to *any participants of any trading venues*. In contrast to the current regulation, foreign trading participants with a branch in Switzerland may also be able to obtain a remote-member license. The licensing regime introduced by the FINFRAG is slightly stricter as the requirements are now as follows:

i. The participant (1) is subject to an "appropriate" regulation and supervision, (2) is subject to *"equivalent"* conduct rules, recording and reporting duties and (3) ensures that any such activities are separated from activities of its Swiss licensed entities (if any); and
ii. the foreign supervisory authority (1) has no objection to the participant's activity in Switzerland and (2) provides administrative assistance to FINMA.

Further, FINMA may refuse to grant a license in case the home state of the foreign participants does not grant reciprocal rights.

d) *What are the General Requirements/Duties? (Arts. 8–21 FINFRAG)*

(63) The FINFRAG provides for a variety of general requirements and duties FMIs will be subject to, including the following:

i. FMIs will be required to maintain an *adequate organization* and meet the "fit-and-proper-test".
ii. They will need sufficient *regulatory capital and liquidity*, both on a stand-alone and on a consolidated basis; the Federal Council will determine the minimum requirements.
iii. A legal entity will be allowed to operate only one FMI at a time, except for (1) stock exchanges who may operate also an MTF and (2) for CSDs, which may run both a securities settlement system and a central securities depository. Ancillary business activities may trigger both license/approval and capital/liquidity requirements.
iv. The outsourcing of substantial tasks, such as the risk management, will require prior approval by FINMA.

v. The FINFRAG further provides for duties relating to the business continuity (strategy, technical systems).
vi. FMIs will be required to provide non-discriminatory and open access to their services and will be subject to documentation and disclosure duties.

e) *What Additional Rules Apply to Systemically Important FMIs? (Arts. 22–24 FINFRAG)*

(64) The previous regime applicable to systemically important FMIs has been transferred into the FINFRAG, and the authority to establish the details will remain with the SNB. The scope of information FMIs will be required to provide to the SNB will be extended.

(65) *Recovery and resolution planning:* The FINFRAG provides for a duty of systemically important FMIs to prepare a recovery plan (*Stabilisierungsplan*) that describes the measures to be taken in case of a crisis for ensuring a continuation of systemically important business processes. FINMA will, on the basis of the recovery plan, prepare a resolution plan (*Abwicklungsplan*) describing how an ordered restructuring or winding-up of a systemically important financial market infrastructure may be carried out.

f) *Trading Venues (Stock Exchanges and MTFs) and OTFs (Arts. 26–41 FINFRAG)*

(66) *Stock Exchanges* are defined as facilities for the *multilateral securities trading where securities are listed, whose purpose is the simultaneous exchange of bids between several participants and the conclusion of contracts based on non-discretionary rules.*

(67) *MTFs have the same purpose as Stock Exchanges but do not offer the service of listing securities* ("listing" means the admission of securities to trading on a stock exchange in accordance with a standardised procedure whereby the stock exchange's requirements regarding issuers and securities are being verified).

(68) *OTFs* are establishments for the (a) multilateral trading in securities or other financial instruments whose purpose is the exchange of bids and the conclusion of contracts based on discretionary rules, (b) multilateral trading in financial instruments other than securities whose purpose is

the exchange of bids and the conclusion of contracts based on non-discretionary rules or (c) bilateral trading in securities or other financial instruments whose purpose is the exchange of bids, but which do not qualify as stock exchanges or MTFs. OTFs are defined to, for example, also cover internal multilateral trading facilities of banks. Operators of an OTF will be permitted to trade on their platform securities for their own account (*Eigengeschäfte*) but they have to ensure that client interests are comprehensively protected when conducting proprietary transactions on the OTF operated by them.

Feature / Tr. Venue	Trading	Exchange of bids	Rules	Listing
Stock Exchange	multilateral (bilateral possible)	simultaneously	non-discretionary	yes
MTF	multilateral only	simultaneously	non-discretionary	no
OTF	multilateral/ bilateral	simultaneously	non-discretionary/ discretionary	no

(69) *Duties of trading venues and trading participants:* Among various other duties, the FINFRAG will require stock exchanges, MTFs and operators of OTFs to provide *pre-trading and post-trading transparency*. The current duty of stock exchange participants to *record* transactions and *report* them to the trading platform will be extended to stock exchanges and MTFs.

g) Central Counterparties (CCPs) (Arts. 48–55 FINFRAG)

(70) As counterparty risks are not eliminated by interposing a CCP, but rather concentrated, and the failure of a CCP is deemed to pose a greater risk for the stability of the financial system than a system of bilateral trading, the *FINFRAG will subject CCPs to a comprehensive regulatory regime*. The main requirements CCPs will be required to meet under the FINFRAG are as follows:

i. *Obtaining collateral and determination of a "default waterfall":* In order to mitigate credit and liquidity risks, CCPs will be required to obtain adequate collateral from the participants, in particular in the form of initial margin, variation margin and participation in a default fund. The CCP will need to determine the "waterfall" of collateral

proceeds and its equity in case of a defaulting participant (pursuant to the requirements as set forth in the FINFRAG).

ii. *Limited means of payment:* CCPs and its participants will be required to settle payments by transferring sight deposits at a central bank or, if not possible or practicable, use a mean of payment with minor credit and liquidity risks.

iii. *Maintaining of liquidity buffer:* The liquidity buffer, as further determined by the FINFRAG, will need to consist of cash or liquid financial instruments bearing only minor market or credit risks.

iv. *Adopting measures to mitigate risks arising from defaulting participants* and s*egregation of accounts* (as set out in the FINFRAG).

v. *Segregation:* CCPs must segregate their own assets from assets of participants and segregate assets from different participants as well as to offer participants to further segregate assets of indirect participants.

vi. *Portability*: Finally, an important but complex requirement is that a CCP must ensure that, in the event of a participant's default, the collateral and positions held by the participant on behalf of an indirect participant can be transferred to another participant indicated by the indirect participant.

(71) *Interoperability arrangements* between CCPs will be subject to approval by FINMA. In order to avoid restraints of competition, the FINFRAG requires a CCP to accept the request of another CCP to enter into an interoperability arrangement, except if it would jeopardise a secure and efficient clearing.

h) Central Securities Depositories (CSDs) (Arts. 61–73 FINFRAG)

(72) A CSD is a facility *that operates a central custodian and/or a securities settlement system*. A central custodian is an entity for the central custody of securities and other financial instruments based on uniform rules and procedures. A securities settlement system is described as a facility that is based on uniform rules and procedures and that serves the purpose of clearing and settling transactions in financial instruments, in particular securities.

(73) The primary task of a CSD is to ensure a proper and lawful custody, recording and transfer of securities. For such purposes it must set the deadlines for participants to settle their securities transactions in their system

in line with international practices and its participants' needs. The CSD must also monitor whether transactions are settled within the allocated deadlines and must impose contractually agreed sanctions in the event of late settlement. Also it has to cover risks relating to the granting of credit (in particular by obtaining collateral) and needs to maintain sufficient liquidity, adopt measures mitigating a participant default and segregate accounts.

(74) A central element for cooperation between CSDs are so called link arrangements (*Verbindungen*). They can be entered into between CSDs as *agreements relating to (a) the execution of payment and transfer orders (interoperability links) or (b) the direct or indirect participation of a CSD in another CSD (access links)*. Interoperability links and certain types of access links between CSDs are subject to approval by FINMA.

(75) A participant of a CSD must *separate* the securities, receivables and liabilities of its indirect participants from its own assets, receivables and liabilities with the CSD and those held in its own accounts. Indirect participants must be given the option to keep and record securities, receivables and liabilities together with those of other indirect participants (omnibus customer accounts) or separately (individual customer accounts) with the respective consequences for the participant with respect to margin requirements, costs and the level of protection granted by the respective custody arrangement.

i) Trade Repositories (TRs) (Arts. 74–80 FINFRAG)

(76) Similar to the description in EMIR, TRs under the FINFRAG are described as *institutions that centrally collect, manage and retain data relating to derivative transactions*.

(77) TRs will be required to regularly disclose relevant transaction data. SIX Securities Services AG intends to establish a FINMA registered TR domiciled in Switzerland using the reporting technology of the London Stock Exchange Group's (LSEG) UnaVista platform. The SIX TR is expected to go live sometimes in 2016[14].

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14 Cf. <http://www.six-securities-services.com/en/home/trade-repository/project.html>, last visited on 3 March 2016.

(78) Data access for Swiss and foreign authorities and private individuals is a central piece of the regulation of TRs and the new legislation imposes various obligations on how to deal with such data access and data transmissions, also in view of existing and potentially conflicting data protection and banking secrecy issues.

j) *Payment Systems (Arts. 81 and 82 FINFRAG)*

(79) The FINFRAG describes payment systems as *entities that clear and settle payment obligations based on uniform rules and procedures*.

(80) The FINFRAG does not provide any specific duties relating to payment systems, but authorises the Federal Council to do so if and to the extent necessary to implement generally accepted international standards Accordingly, the FINFRAV provides for the following:

i. Clearing and settlement principles, *for example*: The payment system shall specify the time after which a payment order is irrevocable and may no longer be changed (finality) as well as when a payment is settled. It shall settle payments in real time if possible, but at the latest at the end of the value day.
ii. Collateral, *for example*: The payment system is required to use appropriate measures to cover risks arising from the granting of credit and it shall accept only liquid collateral with low credit and market risks.
iii. Fulfilment of payment obligations, *for example*: The payment system shall enable the settlement of payments by transferring sight deposits held with a central bank. If this is impossible or impractical, it shall use a mean of payment which carries no or only low credit and liquidity risks.
iv. Liquidity requirements.
v. Capital adequacy requirements for systemically important payment systems.

(81) The SNB may determine specific requirements for systemically important payment systems.

k) *Transitional Periods (Arts. 159–161 FINFRAG)*

(82) FMIs that are licensed or recognised already at the time the FINFRAG entered into force (1 January 2016) must submit a new request for authorisation or recognition within one year. The authorisation or recog-

nition procedure is limited to an assessment of the new requirements. The FMIs may continue their activity until the decision on their request is issued.

(83) FMIs that need a license or recognition under the FINFRAG (but did not need one under the current regime) shall report to FINMA within six months since the FINFRAG entered into force. Within one year they must satisfy the FINFRAG requirements and submit an authorisation or recognition request to FINMA. They may continue their activity until the authorisation or recognition decision is issued.

(84) In special cases, FINMA may extend the deadlines set out above.

(85) Special transitional periods apply for foreign participants of Trading Venues (Art. 160 FINFRAG) and interoperability agreements between CCPs (Art. 161 FINFRAG).

2. New Regulation of Derivatives Trading (Arts. 93–119 FINFRAG)

(86) The financial crisis revealed that the lack of transparency in the markets for derivatives traded over-the-counter (OTC) can threaten the stability of the entire financial system. Since then, international efforts have been set in motion, in particular by the Group of Twenty (G-20) and the Financial Stability Board (FSB), to improve transparency and stability in the OTC derivatives market.

(87) In order to safeguard the competitiveness of the Swiss financial centre, strengthen financial stability, maintain the ability of Swiss market participants to access foreign markets and to enable Swiss counterparties to take advantage of certain exemptions granted under foreign regulations (in particular under EMIR/MiFIR and the US-Dodd-Frank Act), it is necessary for Switzerland to implement equivalent standards on derivatives trading as fully as possible in parallel with other financial centres.

a) Definition of Derivatives and Derivative Transactions

(88) OTC-derivatives were the trigger for the new regulations. OTC-derivatives are (i) traded bilaterally between counterparties (*i.e.* not over a trading facility), (ii) rarely standardised (and hence generally more complex), (iii) often not cleared over a CCP and (iv) usually less collateralised. It is important to note that the FINFRAG also partially subjects non-OTC de-

rivatives (*i.e.* derivatives that are traded over a trading facility) to its regulations.

(89) The FINFRAG defines derivatives as *financial contracts whose value depends on one or several underlying assets* (*Basiswerte*) and which are not cash transactions (*Kassageschäfte*) (Art. 2 lit. c FINFRAG, Art. 2 paras. 2–4 and Art. 80 FINFRAV).

(90) *Exemptions (Art. 94 para. 3 FINFRAG)*: (a) *Structured products* (such as capital-protected products, capped return, products and certificates), (b) *securities lending transactions,* (c) *derivatives* transactions relating to goods that (1) must be *physically delivered*, (2) *cannot be settled in cash* at a party's discretion and (3) are not traded on a trading venue or an organised trading facility, (d) derivatives that are issued in certificated form (*Wertpapier*) or as an uncertificated right (*Wertrecht*) and (e) derivatives which are accepted in the form of a deposit (*Einlage*). As *repo transactions* are generally not considered as derivative transactions, they are not explicitly mentioned under the derivatives exemptions.

(91) The FINFRAG delegates to FINMA the authority to specify in the FINFRAV the derivatives that are subject to a clearing obligation (*Abrechnungspflicht*) or trading obligation (*Plattformhandelspflicht*). FINMA has not yet determined the relevant derivatives classes but it is expected that they will largely follow those of the EU.

(92) All derivatives transactions must be reported to a TR (*Meldepflicht*). For OTC derivative transactions that are not cleared over a CCP authorised or recognised by FINMA, certain risk mitigation obligations (*Risikominderungspflichten*) apply.

(93) *Currency swaps* or *currency forward transactions* are not subject to the clearing obligation (Art. 100 para. 3 FINFRAG), the risk mitigation obligations (Art. 107 para. 3 FINFRAG) or the platform trading obligation (Art. 113 para. 3 FINFRAG). For such purpose, currency swaps or currency forward transactions are deemed transactions for the exchange of currencies, irrespective of the settlement method, as long as an actual delivery is possible (Art. 84 FINFRAV).

b) *Counterparties Subject to the New Rules*

(94) Subject to certain exceptions (see further below re extraterritorial effects), the derivatives trading rules are generally applicable only to transactions between parties domiciled in Switzerland (Art. 93 para. 1 FINFRAG). Foreign branches of Swiss counterparties will be treated as a Swiss domiciled counterparty while Swiss branches of foreign counterparties (unless specifically subjected to the FINFRAG by the Federal Council due to a lack of equivalent regulation abroad) will generally not be subject to the FINFRAG.

(95) *Financial counterparties (FCs)* are defined as counterparties professionally involved in financial markets such as banks, securities dealers, (re-)insurance companies, parent companies of a financial or insurance group or conglomerate, fund management companies, SICAVs, limited partnerships for collective investment schemes, SICAFs, asset managers of collective investment schemes, pension funds (*Vorsorgeeinrichtungen*) and investment foundations (*Anlagestiftungen*) (Art. 93 para. 2 FINFRAG).

(96) *Non-financial counterparties (NFCs)* are all legal entities that do not qualify as an FC which, for example, includes regular asset managers and investment advisers (other than under EMIR) (Art. 93 para. 3 FINFRAG).

(97) The FINFRAG introduces two sub-categories, *i.e.* small NFCs (Art. 98 FINFRAG) and small FCs (Art. 99 FINFRAG).

(98) *Small NFCs* are NFCs that, for a period of 30 consecutive working days, have a rolling average gross position (*Durchschnittsbruttoposition*) in all relevant categories of OTC derivatives that is below:

i. CHF 1.1 billion for credit derivatives (*Kreditderivate)*;
ii. CHF 1.1 billion for equity derivatives (*Aktienderivate*);
iii. CHF 3.3 billion for interest derivatives (*Zinsderivate*);
iv. CHF 3.3 billion for currency derivatives (*Währungsderivate*); and
v. CHF 3.3 billion for commodity derivatives (*Rohwarenderivate*).

(99) Positions for the reduction of risks (hedging) directly relating to the NFC's business or the liquidity or financial management of the NFC or its group companies are disregarded for the calculation of the average gross positions.

(100) These thresholds are very similar to the ones set by EMIR, whereby the EU has set the thresholds at EUR 1 billion for OTC credit derivative contracts and OTC equity derivative contracts and at EUR 3 billion for OTC interest rate derivative contracts, OTC currency derivative contracts and OTC commodity derivative contracts as well as other OTC derivative contracts.

(101) *Small FCs* are FCs that have a rolling average gross position (*Durchschnittsbruttoposition*) of all relevant outstanding OTC-derivatives for the past 30 days period below CHF 8 billion.

(102) *Relevance of other group companies*: If the counterparty is part of a fully consolidated group, all of the intra-group OTC derivatives transactions concluded by the counterparty or by other counterparties shall also be factored into the calculation of the average gross positions.

(103) *Calculatory conditions:* The following rules apply when calculating the average gross positions of the outstanding OTC-derivative contracts:

i. The *actual exchange rates* shall be used;
ii. OTC derivative positions have to be taken into account also when they are *cleared on a voluntary basis*;
iii. positions of *Swiss and foreign fully consolidated group companies* have to be taken into account, irrespective of the domicile of the holding company, if such group companies would qualify as FCs or NFCs in Switzerland;
iv. *changes to the nominal amount* during the term have to be taken into account if they have been pre-agreed at the beginning of the transaction;
v. *subsequent transactions* linked to a hedging transaction of a NFC are also considered as hedging transactions;
vi. a *set-off* is permitted for derivative positions that have the same underlying asset, are denominated in the same currency and have the same term – thereby reference interest rates of positions with variable interest as well as the fix interest rates and the interest fixing dates are identical as well;
vii. *currency swaps and forward transactions*, provided they are settled on a payment versus payment basis, must not be taken into account.

(104) A change of status from a FC/NFC to a small FC/NFC will become effective after a four months waiting period commencing with the exceeding

of a relevant threshold unless it again meets the 30 working days threshold test within these four months.

(105) The classification of a party is its own obligation and counterparties may – absent clear indications to the contrary – rely on confirmations of a counterparty with regard to its status. Such declaration is valid with respect to all obligations imposed under the new Swiss derivatives trading rules. Counterparties changing their status must inform their counterparties in due time (*fristgerecht*) about such change (Art. 83 para. 2 FINFRAV).

(106) The Swiss Confederation, cantons, communes, the SNB and the Bank for International Settlement (BIS) *will not be subject to the new rules* on derivatives trading (Art. 94 para. 1 FINFRAG).

(107) *The following* counterparties *will also not be subject to the new rules (except for the reporting duty if a derivatives transaction is entered into with such counterparts) (Art. 79 FINFRAV)*: (i) multilateral development banks (*e.g.* the World Bank and the European Investment Bank), (ii) organizations, including social security institutions, belonging to the Swiss Confederation, cantons or communes or for which the Swiss Confederation, canton or commune in question is liable and provided that they are not an FC, (iii) foreign central banks, (iv) the European Central Bank (ECB), (v) the European Financial Stability Facility (EFSF), (vi) the European Stability Mechanism (ESM), (vii) units of foreign states that are responsible for or participate in the governmental debt management and (viii) financial institutions that have been established by a central government or a local government to grant promotional funds (*Förderdarlehen*) based on a governmental order and on a non-competitive and non-profit oriented basis.

(108) Derivative transactions between central banks and units of foreign states that are responsible for or participate in the governmental debt management can be *exempt from the reporting duties* by the Swiss Federal Council if they grant a reciprocal exemption to Swiss institutions.

(109) The following chart indicates the duties allocated under the FINFRAG to the various regulated market participants[15]:

Obligations \ Participants	Financial Counter-party (FC)	Small Financial Counterparty (small FC)	Non-Financial Counterparty (NFC)	Small Non-Financial Counterparty (small NFC)
Clearing	yes	no	yes	no
Reporting	yes	yes	yes	yes
Risk mitigation – operational risk	yes	yes	yes	yes
Risk mitigation – valuation	yes	no	yes	no
Risk mitigation – collateral	yes	yes	yes	no
Platform trading	yes	no	yes	no

c) *Cross-border Transactions*

(110) Like the corresponding US and EU regulations, also the Swiss derivatives trading legislation in some points is addressed to foreign counterparties. For example, the clearing or platform trading obligations will also apply in case of a transaction between a Swiss and a foreign counterparty if the foreign counterparty would be subject to the clearing and platform obligation if it were domiciled in Switzerland ("what if-test") (Arts. 102 and 114 FINFRAG).

d) *What are the Key Obligations under the New Derivative Trading Rules?*

(111) With the new rules, the risks associated to derivatives trading will be mitigated – the main risk being that counterparties cannot fulfil their obligations. The FINFRAG implements four areas of regulation:

i. A clearing obligation;
ii. a reporting obligation;

15 Federal Department of Finance, Explanatory Report to the Consultation Draft of the FINFRAG dated 29 November 2013, p. 134.

iii. risk mitigation measures for uncleared derivative transactions; and
iv. a platform trading obligation.

Clearing Obligation (Arts. 97–103 FINFRAG)

(112) The primary risk mitigating measure will be the obligation that derivative transactions must be cleared through a FINMA authorised or recognised CCP. FINMA may allow clearing through a foreign non-recognised CCP in certain cases. If a CCP has only one or very few Swiss related transactions, the recognition process may be disproportionate for such CCP.

(113) The types of derivatives subject to the clearing obligation will be determined and published by FINMA, but will nevertheless be based on the basic principles set out in the FINFRAG (*i.e.* legal and operational standardization, liquidity, trading volumes, availability of pricing information and associated counterparty risks).

(114) Transactions involving small FCs/NFCs or counterparties will be generally exempt from the new rules. Likewise the Swiss Federation, cantons, communes, SNB, BIS, multilateral development banks, social insurance carriers are exempt from the clearing obligation. Furthermore, transactions between parties that are (i) fully consolidated group members, (ii) subject to appropriate centralized risk evaluation, measurement and control procedures and (iii) not entered into to circumvent the clearing obligations, are also exempt from the clearing obligation.

(115) Clearing in connection with derivatives is a process whereby the positions of the counterparties are established through the calculation of the net positions by netting and the posting of collateral (margins) to secure the net obligations. A CCP is an organization which enters in between the two counterparties, on the one side as a buyer and on the other side as a seller. A CCP must be able to model, measure and control the risks of a derivative transaction, which is only feasible with standardised derivatives. In other words, only standardised derivatives are suitable for a clearing obligation through a CCP while non-standardised derivatives will continue to be bilaterally cleared. Since a significant portion of derivative transactions do not meet the criteria for a standardization, the clearing obligation will not apply to them.

(116) The requirements for becoming a direct member of a CCP (a clearing member) are high. Therefore, smaller FCs and most of the NFCs will clear their transactions indirectly through a clearing member (indirect participation).

(117) At the moment there is only one CCP domiciled in Switzerland, the SIX x-clear AG. However, the SIX x-clear AG is not primarily involved in the clearing of derivative transactions; rather such market is dominated by foreign CCPs such as LCH Clearnet Ltd or the Eurex Clearing AG, which are classified as systemically important by the SNB[16].

(118) For cross-border transactions, the clearing obligation will also apply in case the foreign counterparty would be subject to a clearing obligation if domiciled in Switzerland ("what if-test").

(119) Clearing can also be effected pursuant to the rules of another jurisdiction if FINMA has recognised these foreign rules as being equivalent in order to harmonise the various regulations. The EU and US regulations have similar concepts in place (*i.e.* "equivalence" and "substituted compliance").

Risk Mitigation Measures for Uncleared Derivative Transactions (Arts. 107–111 FINFRAG)

(120) Derivative transactions not cleared through a FINMA authorised or recognised CCP will be subject to risk mitigating obligations consisting of (i) operational and counterparty risk mitigation measures (*i.e.* timely confirmation of terms of derivatives transaction, portfolio reconciliation procedures, dispute resolving procedures and regular portfolio compression), (ii) the daily valuation of the derivative at market prices and (iii) the exchange of appropriate collateral to mitigate the counterparty risk.

(121) Transactions with counterparties generally exempt from the derivative trading rules (*i.e.* the Swiss Federation, cantons, municipalities, SNB, BIS, multilateral development banks, social insurance carriers) will also not be subject to the risk mitigating measures because they do not create risks that need to be specifically mitigated.

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16 Swiss National Bank, Annual Report 2013, p. 84.

(122) Except for transactions with small NFCs, the counterparties to non-cleared derivatives transactions are required to *exchange adequate collateral (margins)* and such collateral must be segregated from other assets in order to allow for a swift and uncomplicated realization of the collateral prior to the official liquidation of the counterparty. The collateral consists of an "*initial margin*" (covering the counterparty default risk and market fluctuations thereafter for the period until the replacement transaction is entered into) and a "*variation margin*" that shall protect the respective counterparties from market price fluctuations in the underlying assets after the trade has been entered into.

(123) The requirement to post an *initial margin* applies only to counterparties that have, at the level of a financial, insurance or other group, an average gross position (*Durchschnittsbruttoposition*) of non-cleared OTC derivatives (including currency swaps and currency forwards) as per the end of March, April and May of each year in excess of CHF 8 billion. The collateral posting obligation then applies to such counterparties as from 1 September of such year until the end of August of the next year.

(124) The posting of an *initial or variation margin* can be waived if the collateral to be exchanged is less than CHF 500,000.–. Similarly, the posting of an *initial margin* can be waived if such initial margin would be less than CHF 50 million (for financial and insurance groups the CHF 50 million threshold is calculated taking into account all group companies).

(125) If certain criteria are met, *group internal transactions* will be exempt from the obligation to post collateral. Although *foreign counterparties* cannot be directly obliged to post collateral to a Swiss counterparty, it is the Swiss counterparty that will need to ensure that it receives adequate collateral, otherwise it is not allowed to conclude the transaction.

(126) *Operational risk mitigating measures* are, for example, the *timely confirmation of terms and conditions* of the derivative transaction or the implementation of appropriate procedures for the *reconciliation of portfolios* as well as the timely *detection and settlement of potential disagreements* between the parties.

(127) Derivative transactions must further be *valued* daily on the basis of actual prices. If market conditions do not permit a valuation at market, a valuation based on appropriate models recognised in practice will be

permitted. Beside the generally exempt counterparties, transactions with small FCs and small NFCs are also exempted from the daily valuation obligation.

Reporting Obligation (Arts. 104–106 FINFRAG)

(128) The key terms of all derivative transactions (except for transactions between small NFCs) must be reported by a counterparty and, if cleared, by the CCP to a FINMA approved or recognised TR.

(129) The reporting obligation is being allocated among the market participants as follows:

i. In the case of transactions between a FC and a NFC: the FC;
ii. in the case of transactions between two FCs: (a) the FC which is not small or (b) the selling counterparty in the case of a transaction between two non-small FCs or between two small FCs whereby it shall be determined in accordance with market practice and recognised international standards who the selling party is;
iii. the counterparty which has its registered office in Switzerland if the foreign counterparty does not report.

In the event of a transaction between NFCs, paragraph (ii) and (iii) above apply by analogy.

If transactions are entered into with counterparties that are exempt from the derivative trading regulations, the non-exempt counterparty must report.

If the transaction is cleared centrally, the report has to be submitted by the CCP. If a recognised foreign CCP does not submit reports, the reporting duty shall remain with the counterparties; the counterparty closer to the CCP in the CCP-participants chain shall be obliged to make the reporting.

The reporting obligation can be delegated to third parties and if there is no TR, the Federal Council shall indicate the body to which the report is to be submitted.

(130) Counterparties and CCPs will need to ensure that the details of any derivative transaction they have concluded and any amendment or termination of the transaction are reported to a TR. The details will need to

be reported no later than the working day following the conclusion, amendment or termination of the transaction.

(131) The FINFRAG sets out the minimum content of the report while annex 2 to the FINFRAV sets out the content of the report in more detail. Given the aim to achieve better transparency, efficiency, integrity and the recognition of risks by implementing the reporting obligation, it is absolutely essential that the data delivered to the TRs globally can be effectively and efficiently shared, assembled and evaluated. This requires that the involved parties to the transaction and the type of the transaction are clearly identifiable and that the format is globally agreed upon and used by all TRs.

(132) The Regulatory Oversight Committee (ROC), a stand-alone committee established following the recommendations of the FSB and subsequent endorsement by the G-20, oversees the Global Legal Entity Identifier System (GLEIS) pursuant to which a standardised identification system is being globally implemented by means of the so-called *legal entity identifier* (LEI), a 20-digit, alpha-numeric code that connects to key reference information and enables the clear and unique identification of companies participating in global financial markets.

(133) As part of the ongoing effort to improve the OTC derivatives infrastructure, the International Swaps and Derivatives Association (ISDA) has also developed a plan to define a *standardised taxonomy* (classification) for OTC derivatives and develop *unique product identifiers* (UPIs) with the aim of supporting regulatory mandates to increase transparency through public and regulatory reporting. If no UPI is available, the *ISIN* number or, if no ISIN number is available, the *alternative instrument identifier* (AII) provided by ESMA. Finally if no AII is available, the *exchange product code* allocated by the trading venue shall be used for the identification of the product.

(134) The reporting of information about derivatives transactions by Swiss parties to foreign TRs raises data confidentiality and professional secrecy issues. The FINFRAG states that the reporting of such data to foreign TRs is generally permitted so that no permission pursuant to Art. 271 of the Swiss Penal Code (PC) (regarding unlawful activities on behalf of a foreign state) will be necessary in each case. However, a consent/waiver must be obtained if the data delivered abroad contains personal data.

Platform Trading Obligation (Arts. 112–115 FINFRAG)

(135) Once enacted, standardised derivatives may need to be traded over a FINMA authorised or recognised platform in order to enhance pre- and post-trade transparency. Transactions with or among small FCs/NFCs and, if certain criteria are met, group internal transactions will be exempt from such obligation. FINMA will determine the scope of derivatives subject to such obligation and take into account international standards, both of which will ensure some flexibility with regard to timing and allow for the adaptation to international standards. The platform trading obligation is not intended to become effective until such obligation has been imposed internationally (in particular in the EU).

e) Who Monitors Compliance with the Rules and what are the Sanctions?

(136) Compliance with the derivative trading rules will be examined by the auditor of the respective counterparty and, in case of regulated financial institutions, in accordance with the applicable financial laws (Art. 116 FINFRAG).

(137) Violations of the rules on derivatives trading can be sanctioned by a penalty of up to CHF 100,000 (in case of an intentional breach) (Art. 158 FINFRAG). Negligent violations are not sanctioned.

f) Transitional Periods (Art. 159 FINFRAG, Arts. 129–133 FINFRAV)

(138) *Clearing obligation*: The obligation to clear derivatives trades through an authorised or recognised CCP starts, counted from the date when FINMA publishes the relevant derivative category:

i. After 6 months for derivative transactions that are newly concluded between parties that are participants of an authorised or recognised CCP;
ii. after 12 months for derivative transactions that:
    1. are newly concluded between a participant of an authorised or recognised CCP and other FCs that are not small, or
    2. are newly concluded between other FCs that are not small;
iii. after 18 months for all other derivative transactions that are newly concluded.

(139) *Reporting obligations*: The derivatives transactions reporting obligation towards a TR authorised or recognised by FINMA will become effective

only after FINMA authorised/recognised the first TR. Thereafter, the following transitional periods apply to the trade reporting obligations:

i. Within 6 months for open derivatives transactions where the party obliged to report is not a small FC or a CCP;
ii. within 9 months for open derivatives transactions where the party obliged to report is a small FC or a NFC which is not small;
iii. within 12 months for open derivatives transactions in all other cases.

For transactions concluded over a trading venue or an OTF, the above deadlines are extended by an additional period of 6 months.
To date, no TRs have been authorised/recognised by FINMA. SIX Swiss Exchange intends to establish a FINMA registered TR domiciled in Switzerland. According to the SIX website it is expected that the system will be available by July 2016[17].

(140) *Risk Mitigation Obligations*: For the *operational and counterparty risk mitigation measures* (*i.e.* timely confirmation of terms of derivatives transaction, portfolio reconciliation procedures, dispute resolving procedures and regular portfolio compression), the following effective date mechanism apply after the FINFRAV having become effective (*i.e.* 1 January 2016):

i. After 12 months for outstanding derivatives transactions among counterparties that are not small as well as for outstanding derivatives transactions with a small FC;
ii. after 18 months for all other then outstanding derivatives transactions.

(141) The obligation to make a *daily valuation of the derivative at market prices* will become effective, for all then outstanding derivatives transactions, 12 months after the FINFRAV having become effective (*i.e.* 1 January 2017).

(142) The obligation to *exchange appropriate collateral* to mitigate the counterparty risk will only apply to transactions with counterparties once and if such counterparties have become subject to the following obligations:

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17 Cf. <http://www.six-securities-services.com/en/home/trade-repository/project.html>, last visited on 3 March 2016.

i. The obligation to exchange *variation margins* (*Nachschusszahlungen*) will become effective:
   (A) As from 1 September 2016: for counterparties whose aggregate month-end average gross position (*aggregierte Monatsend-Durchschnittsbrutto-position*) of non-cleared OTC derivatives at the level of a finance or insurance group or another group (*Konzern*) for March, April and Mai 2016 is greater than CHF 3,000 billion;
   (B) as from 1 September 2017 for all other counterparties,
ii. the obligation to exchange *initial margin* (*Ersteinschusszahlungen*) applies to all counterparties whose aggregate month-end average gross position (*aggregierte Monatsend-Durchschnittsbruttoposition*) of non-cleared OTC derivatives at the level of a finance or insurance group or another group (*Konzern*):
   (A) For March, April and May 2016 is greater than CHF 3,000 billion: as from 1 September 2016 until 31 August 2017;
   (B) for March, April and May 2017 is greater than CHF 2,250 billion: as from 1 September 2017 until 31 August 2018;
   (C) for March, April and May 2018 is greater than CHF 1,500 billion: as from 1 September 2018 until 31 August 2019;
   (D) for March, April and May 2019 is greater than CHF 750 billion: as from 1 September 2019 until 31 August 2020.

3. Insolvency Measures/System Protection (Arts. 88–92 FINFRAG)

(143) The FINFRAG subjects not only regulated FMIs to the *FINFRAG insolvency regime* but also *group parent companies* of a financial group which have their registered office in Switzerland or group companies which have their registered office in Switzerland and perform significant functions for activities which require authorization (*significant group companies*). Group companies are considered to provide significant functions for activities which require authorization if they are necessary for the continuation of important business processes, namely in the area of liquidity management, treasury, risk management, core data administration and accounting, personnel, information technology, trade and settlement as well as legal and compliance. FINMA will identify significant group companies and keep a publicly accessible list of said companies. Similar concepts had been introduced in the Swiss banking and insurance laws.

(144) The FINFRAG insolvency regime consists of the following:

i. The *insolvency rules of the Swiss Banking Act* relating to the insolvency measures (*Massnahmen bei Insolvenzgefahr*) (*i.e.* securing measures, segregation of assets into good and bad bank, bail-in of debt, protection of netting provisions, postponement of termination of contracts) and the bankruptcy liquidation proceedings (other than the rules on privileged deposits) are declared to apply by analogy for financial market infrastructures unless the FINFRAG contains provisions to the contrary;
ii. *rules regarding the protection of the financial system* whereby, *inter alia*, (1) FINMA is given powers to inform central counterparties, central securities depositories and payment systems in Switzerland and abroad of the insolvency measures it intends to take against a participant and which limit the participant's power of disposal, (2) rules are determined as to when orders given to a central counterparty, central securities depository or payment system by a participant shall be legally enforceable and binding despite any insolvency measures against such FMIs;
iii. rules on the *impact of insolvency measures* that are ordered against a central counterparty's participant with respect to previously concluded agreements between the central counterparty and the participant regarding (1) the offsetting of receivables, including the agreed method and valuation; (2) the direct realization of collateral in the form of securities or other financial instruments whose value can be determined objectively and (3) the transfer of receivables and liabilities, and collateral in the form of securities, or other financial instruments whose value can be determined objectively;
iv. rules on the *impact of insolvency measures* that are ordered against a central counterparty's indirect participant or an indirect participant of another indirect participant which shall also have no effect (as set out in (iii)) on previously concluded agreements between the participant and the indirect participant;
v. rules on FINMA's right to *postpone the termination of contracts* and the exercise of rights to terminate them; in this context it should be noted that financial market infrastructures are required to ensure that new agreements or amendments to existing agreements which are subject to foreign law or envisage a foreign jurisdiction contain

a clause whereby the counterparty contractually recognises such right of FINMA.

4. Further Provisions

(145) The current regime relating to the *disclosure of shareholdings*, *public takeovers* as well as *insider trading* and *market manipulation* has been transferred into the FINFRAG.

(146) Among various other amendments of Federal laws, the FINFRAG will also introduce new rules on *administrative assistance (Amtshilfe)*[18].

B. Key Differences to EU Regulations

1. Financial Market Infrastructures

(147) While in the EU there is a trend to limit self-regulation of trading venues, the Swiss rules adhere to the concept of self-regulation. This different approach results in a number of deviations from the MiFID II/MiFIR regulation. For example, under the FINFRAG the compliance with listing requirements regarding securities is determined by the trading venue, whereas in the EU the relevant supervisory authority is the relevant competent authority.

(148) Under MiFID II, the operator of an OTF is not allowed to trade on its platform for its own account, whereas there is no such prohibition in the FINFRAG. However, the operator of a Swiss OTF must ensure that client interests are comprehensively protected when conducting proprietary transactions on the Swiss OTF operated by him.

(149) As opposed to the CSDR, the FINFRAG does not require the immobilization or dematerialization of securities. A Swiss CSD, however, will be required to enable participants to hold their securities in form of book-entry securities within the meaning of the FISA.

(150) Unlike the CSDR, which requires CSDs to implement a period of two days for the settlement of transactions in securities, the FINFRAG will

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18 Cf. note (24).

provide that the CSD itself determines the settlement period for its system (however, the FINFRAG requires CSDs to take into consideration international practices and the needs of its participants).

(151) Unlike the CSDR, the FINFRAG also regulates link arrangements between CSDs in the context of which a CSD has an account with a depository that does not qualify as a CSD.

2. Derivatives Trading

(152) In order to ensure access of Swiss participants to the EU market and in order for Swiss participants to be eligible for EU/US exemptions, the FINFRAG has been drafted with a particular focus on ensuring compliance with the EU/US regulations. However, there are deviations.

(153) Under EMIR, the clearing and platform trading obligation also applies (i) to contracts between non-EU entities having a "direct, substantial and foreseeable effect" within the EU or (ii) where necessary to prevent evasion of EMIR. The Swiss regulations do not contain analogous rules.

(154) The FINFRAG establishes the concept of "small FCs". While this concept is not included under EMIR, it is reflected under the Dodd-Frank Act in the US. In addition, under the FINFRAG, regular asset managers and investment advisers will qualify as NFCs, whereas under EMIR they qualify as FCs.

(155) The intragroup exemption for the clearing obligation under the FINFRAG will also apply in cross-border situations, whereas under EMIR the exemption is available only in case the relevant jurisdiction of the other group member has an equivalent derivatives regulation and the competent EU regulator has approved the exemption. In Switzerland, compliance with such exemptions will not be controlled by the regulator, but rather by the auditor of the Swiss participant.

(156) The Swiss reporting obligations will not require the disclosure of the beneficial owner, whereas such disclosure is required under EMIR.

(157) Discrepancies exist also between the US (Dodd-Frank Act) and the EU (EMIR) regulations and the US and the EU are currently engaging in a dialogue to overcome these discrepancies. International harmonization efforts (involving Switzerland) are also under way and were, *inter alia*,

published by the OTC Derivatives Regulators Group (ODRG) on a continuing basis, for example in the latest report prepared in November 2015 under the title "Report of the OTC Derivatives Regulators Group (ODRG) to G20 Leaders on Cross-Border Implementation Issues".

C. What Swiss and Foreign Market Participants Need to be Aware of

1. Financial Market Infrastructures

(158) Under the previous regime, Swiss trading venues were divided into "stock exchanges" and the rather vague category of "facilities similar to stock exchanges" (*i.e.* exchange-like facilities). Institutions qualifying as exchange-like facilities were only required to obtain a license if FINMA determined so. The FINFRAG, in accordance with the EU regulation, introduced a new concept consisting of three categories (Stock Exchanges, MTFs and OTFs), replacing the catch-all category of exchange-like facilities by MTFs and OTFs. Swiss trading venues, especially exchange-like facilities, therefore, should closely examine the scope of the new licensing requirements.

(159) While Swiss exchanges, MTFs and OTFs are always subject to regulation, foreign exchanges and MTFs are only subject to a FINMA recognition requirement if they grant Swiss participants direct access to their facilities. OTFs operated outside Switzerland (and their operator) are not subject to any Swiss licensing or recognition requirements.

(160) The FINFRAG provides for tailor-made licenses for CCPs, CSDs, trading repositories and payment systems for which new requirements apply.

(161) Participants admitted to a trading venue are subject to record-keeping and reporting duties and foreign participants must obtain a FINMA license before they are allowed to become a participant in a Swiss trading venue.

2. Derivatives Trading

(162) Both financial and non-financial counterparties are subject to the new rules.

(163) The new rules to some extent also apply also to foreign counterparties. In addition, Swiss counterparties have to ensure that foreign counterparties meet certain criteria.

(164) The trading in derivatives will become more complex and expensive.

(165) Compliance with the derivatives trading obligations will require (significant) administrative and operational adjustments and their implementation will take time.

(166) Together with the Swiss regulations, corresponding EU and US regulations must be analysed given their extraterritorial effect and applicability in Switzerland. There are numerous transitional periods to be taken into account before the respective obligations must be complied with. These transitional periods depend on FINMA publishing the relevant derivative categories, a TR being authorised or recognised by FINMA, the qualification of the counterparty as a (small) FC or NFC or even the requirement for the Federal Council to formally enact certain provisions.

IV. Institutions – FINIG

(167) The Financial Institutions Act (FINIG) is one of the proposed new pieces of legislation that has emerged as a result of the authorities' endeavours towards achieving cross-sectoral regulation. It is intended to regulate in a uniform act all Financial Institutions (as defined in N (173)) providing asset management services. While the provisions concerning asset managers of collective investment schemes, fund management companies and securities dealers will, in principle, be transferred from the relevant existing laws to the FINIG in a substantially unchanged form, the FINIG will, as one of its main innovations, also subject asset managers of occupational benefits schemes, (independent) asset managers and trustees to a prudential supervision.

(168) On 4 November 2015, the Federal Council submitted the Message (*Botschaft*) on the new FINIG to the Swiss Parliament. It is currently in draft form and subject to Parliamentary review as well as to an optional referendum. The reactions among representatives of the financial industry, economists and lawyers were controversial when the preliminary draft (*Vorentwurf*) of the proposed new law was presented to the public in 2014. While a general need for enhancement of investor protection was, and still is, generally acknowledged, the methods suitable for its achievement were widely disputed. The large scope of initial criticism led to substantial changes in the course of the Federal Council's consultation process. The new draft of the FINIG published on 4 November 2015 (and discussed herein) may be subject to further alterations during the Parliamentary review.

A. Overview

1. Aim and Scope of the New Proposed Law (Art. 1 FINIG)

(169) The draft legislation introduces a differentiated supervisory and regulatory regime for Financial Institutions who provide asset management services to third parties. It is envisaged to become a framework law that will govern the licensing requirements and further organizational conditions for Financial Institutions. The aim of the FINIG is to (i) enhance the

protection of investors and clients of Financial Institutions and (ii) ensure the functionality of the financial market (Art. 1 para. 2 FINIG). The new proposed regulation is further intended to improve market conditions, reduce conflicts of interest and increase the attractiveness of the Swiss market for asset management services. The proposed FINIG shall provide for harmonised, cross-sectoral regulation in order to "create a *level playing field* for the supervised institutions"[19]. The following aspects relevant to Financial Institutions are intended to be regulated under the FINIG:

i. Organization of Financial Institutions;
ii. licensing requirements;
iii. supervision of Financial Institutions;
iv. foreign Financial Institutions operating in Switzerland;
v. insolvency measures; and
vi. criminal provisions.

(170) Under current law, not all Financial Institutions are regulated or subjected to prudential supervision. As a result of the most recent revision of the CISA, the mandatory licensing obligation has already been expanded to the formerly unregulated asset managers of foreign collective investment schemes. Under the FINIG it is now envisaged for all asset managers to be placed under licensing obligations and prudential supervision (Arts. 4 and 57 FINIG). This expansion of the scope directly and mostly affects regular asset managers, who are currently only subjected to provisions of the AMLA, asset managers of occupational benefits schemes, trustees and precious metal traders[20].

(171) The term "regular asset manager" used herein serves to provide for a clear distinction to the very next higher type of licensed status, namely the status as manager of collective assets (the FINIG itself simply uses the term "asset manager"). Under the current regime, these newly to be regulated regular asset managers are frequently labelled as "independent" or "external" asset managers – labels indicating their independency from the (regulated) banks where the respective client assets

[19] FEDERAL COUNCIL, Message on the Financial Services Act (FIDLEG) and on the Financial Institutions Act (FINIG) dated 4 November 2015, BBl 2015, p. 8926.

[20] Cf. FN 11 for a more precise definition of the term "precious metal traders".

they manage are deposited. The term, however, also encompasses managers of collective investment schemes that fall under the *de minimis* exemption (cf. N (196)).

(172) Precious metal traders will not be deemed Financial Institutions in the sense of the FINIG, but they will – like regular asset managers – newly become subject to a licensing requirement and prudential supervision by a semi-public supervisory authority and the licensing requirements of the FINIG will apply *mutatis mutandis* by way of a reference contained in Art. 42bis para. 3 of the PMCA (as amended by the FINIG).

2. Financial Institutions (Art. 2 FINIG)

(173) The new FINIG will apply to the following financial services providers (collectively, the Financial Institutions), irrespective of their legal form:

i. *Regular asset managers*;
ii. *trustees*;
iii. *managers of collective assets* (asset managers of collective investment schemes and asset managers of Swiss occupational benefits schemes);
iv. *fund management companies*; and
v. *securities houses* (currently classified as securities dealers).

(174) Art. 2 para. 2 FINIG contains a list of exemptions. The FINIG shall not apply to persons providing services to family offices (lit. a), persons managing assets in the framework of employee participation plans (lit. b), lawyers, notaries and their assistants (lit. c), persons managing assets in the framework of a mandate regulated by law (lit. d), the Swiss National Bank (SNB) and the Bank for International Settlement (BIS) (lit. e), occupational benefits institutions (lit. f), social security institutions and compensation funds (lit. g), insurance companies in the sense of the ISA (lit. h) and banks in the sense of the BA (lit. i).

3. Adaption of Current Laws

(175) Provisions concerning Financial Institutions that are already subject to prudential supervision under current law will basically remain unchanged and will be incorporated into the FINIG (except for the relevant provisions of the BA). However, such provisions will be revised in order to remedy existing deficiencies due to the age of the provisions.

(176) This adaption will require the review of the existing regulations concerning asset managers of collective investment schemes (to be re-classified as managers of collective assets), fund management companies, securities dealers (to be re-classified as securities houses), currently regulated under the CISA and the SESTA, as applicable.

(177) The proposed transfer of regulations regarding fund management companies into the FINIG has been justified on the basis that such institutions practice a qualified form of asset management. Despite the proposed transfer of certain regulations into the FINIG, the product specific regulations of the CISA will continue to be applicable.

(178) The majority of the SESTA will be transferred into the FINIG, in particular the provisions concerning securities dealers. The term "securities dealer" used under the SESTA will be replaced by the term "securities house".

(179) The SESTA is intended to be repealed in its entirety once provisions contained therein are adopted by the FINIG (Art. 69 FINIG in connection with Section I of the Appendix to the FINIG).

(180) While the preliminary draft envisaged the application of the FINIG to banks, such proposal was abandoned during the consultation period. Banks therefore continue to be subject to the provisions of the BA. The latter will, however, be revised in order to ensure the consistency of the FINIG and the BA.

(181) Since the rules governing asset managers of collective investment schemes and fund management companies are transferred from the CISA to the FINIG, the scope of the CISA will be limited to the regulation of collective investment schemes on a product level.

B. Selected Features of the New Proposed Law

1. Harmonised Supervision of All Providers of Asset Management Services (Art. 57 FINIG)

(182) According to current law, not all Financial Institutions are prudentially supervised. In particular, regular asset managers, except for asset managers of collective investment schemes, may operate without a license

from or registration with the authorities[21]. This means that their operations are not subject to any prudential supervision and rules of conduct can neither be imposed nor controlled. An integrated supervisory regime is the core aspect to be established by the FINIG, which will subject all providers of asset management services for third parties to comparable regulation and supervision.

2. Licensing Provisions (Arts. 4–6 FINIG)

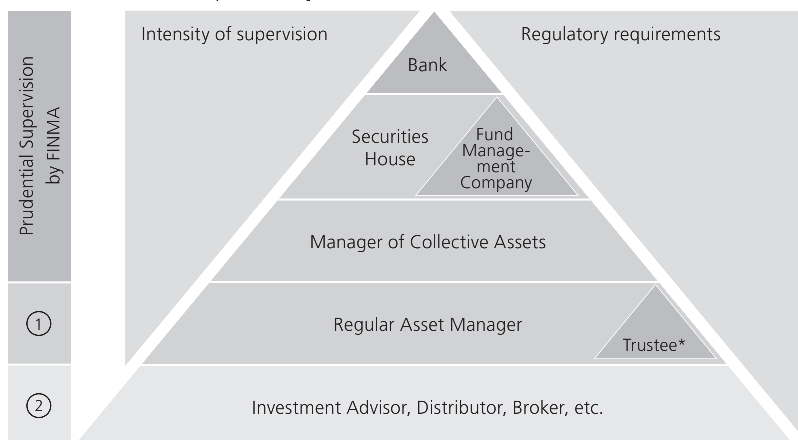
(183) Financial Institutions will require a license from the competent supervisory authority (*i.e.* FINMA or, in case of regular asset managers and trustees, the supervisory organization according to Art. 43a para. 1 FINMAG) and may not be registered in the commercial register until such license has been granted (Art. 4 paras. 1 and 2 FINIG). Financial Institutions already in possession of a license according to Art. 1 para. 1 FINMAG at the time the FINIG enters into force will not require a new license; however, they must comply with the requirements of the new legislation within one year after its entry into force (Art. 70 para. 1 FINIG).

(184) The FINIG further provides for a licensing cascade regime (with a similar pattern as currently set out in Art. 12 para. 3 of the CISA and Art. 8 of the Collective Investment Schemes Ordinance (CISO), *i.e.* the higher license types will also encompass lower license types so that institutions will not necessarily need multiple licenses). A license to operate as a bank as per BA will also include authorization to operate as a securities house, manager of collective assets, regular asset manager and trustee (Art. 5 para. 1 FINIG). Hence, a license to operate as a securities house will include authorization to operate as a manager of collective assets, regular asset manager and trustee (Art. 5 para. 2 FINIG). A license to operate as a fund management company also encompasses the ability to operate as a manager of collective assets and regular asset manager (Art. 5 para. 3 FINIG). Finally, a license to operate as a manager of collective

[21] However, such regular asset managers are subject to licensing under the AMLA or must become a member of a recognized anti-money laundering SRO. FINMA's supervision of regular asset managers is limited solely to ensuring compliance with the due diligence requirements set out in the AMLA.

assets includes the authorization to operate as a regular asset manager (Art. 5 para. 4 FINIG).

(185) The following chart illustrates the above described cascade regime as well as the new supervisory architecture[22]:



① Prudential supervision by semi-public supervisory authority
② Code of conduct rules enforced by civil and criminal courts

*While a license to operate as a Securities House also includes the authorization to operate as a Trustee, the same does not apply to a license to operate as a Manager of Collective Assets or the ability to operate as a Regular Asset Manager.

(186) It is to be noted that trustees have been included to a limited extent into the licensing cascade regime of Art. 5 FINIG: Only a license to operate as a bank or as a securities house will also encompass authorization to operate as a trustee. This special regime is justified by the fact that a trustee's functions require, along with the qualifications necessary for regular asset management, additional skills specified by the applicable foreign law and that such requirements are only covered by the compre-

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22 The chart is inspired by and a free translation of a similar chart contained in: FEDERAL COUNCIL, Raw Material to the Message on the Financial Services Act and on the Financial Institutions Act dated 4 November 2011, p. 7, available on <http://www.news.admin.ch/NSBSubscriber/message/attachments/41563.pdf >, last visited on 3 March 2016.

hensive licensing requirements that need to be met by banks and securities houses due to their extensive business operations[23].

(187) The FINIG will provide the conditions for the granting of licenses (Art. 6 FINIG). In general, Financial Institutions will be required to meet the licensing requirements throughout the duration of their business operations. Licensing requirements that can – for practical reasons – only be fulfilled upon performance of the business activity must at least be achievable by the Financial Institution.

3. Assurance of Proper Business Conduct (Art. 10 FINIG)

(188) In order to ensure client protection and business professionalism, a particular business conduct will be expected and explicitly required from all Financial Institutions (Art. 10 FINIG). A distinct set of obligations applicable to all Financial Institutions is envisaged in the draft act. The assurance of proper business conduct requirements in the new act will correspond to those currently set out in the BA, SESTA and CISA and the licensing practice of FINMA. The professional qualifications required depend upon the individual person's function and responsibility. Furthermore, the provisions of the FINIG will ensure that the assurance of proper business conduct cannot be endangered by the influence of qualified shareholders.

4. Delegation of Duties (Art. 13 FINIG) and Ombudsman's Office (Art. 15 FINIG)

(189) Financial Institutions may delegate tasks only to third parties who have the necessary knowledge, skills and experience as well as the required licenses (Art. 13 para. 1 FINIG). Moreover, Financial Institutions must join an ombudsman's office before taking up their duties (Art. 15 para. 1 FINIG).

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23 Federal Council, Message on the Financial Services Act (FIDLEG) and on the Financial Institutions Act (FINIG) dated 4 November 2015, BBl 2015, pp. 9020 et seq.

5. Regular Asset Managers and Trustees (Arts. 16–19 FINIG)

(190) In contrast to a financial adviser, a regular asset manager has the power to manage the investment of client assets independently (Art. 16 para. 1 FINIG). The central characteristic of a regular asset manager is the professional exercise of such investment activity in the name and for the account of its clients and typically on the basis of an individual mandate.

(191) In the course of the Federal Council's consultation process, the definition of Financial Institutions has been expanded to include trustees. Trustees are defined in Art. 16 para. 2 FINIG as natural or legal persons that have been given, by means of a Deed of a Trust in the sense of the Hague Trust Convention (HTC), control over assets for the benefit of a beneficiary or for a specified purpose. One of the main features of such trust is that while being a legally autonomous unit of assets, it does not possess own legal personality and can thus neither sue nor be sued. Rather, it is the trustee, being the owner of the trust assets, who has standing to sue and to be sued in civil bankruptcy matters. However, although ownership of the trust assets is conferred upon the trustee, it is important to bear in mind that the trust assets do not constitute part of, and, thus, have to be segregated from, the trustee's own patrimony (Art. 2 HTC).

(192) It is to be noted, in this context, that the institution of a trust is a foreign legal concept which does not have an exact equivalent in the Swiss legal system. Nevertheless, trusts are an important economic and legal reality in Switzerland, since trusts are frequently managed by Swiss banks, lawyers and asset management companies, thereby acting as trustees. Given the specific duties of these trustees, which also include the management of assets, trustees are encompassed in the list of Financial Institutions being governed by the FINIG[24].

(193) Regular asset managers and trustees will be required to choose amongst legal forms that are suitable for the exercise of their asset management business (Art. 17 para. 1 FINIG). Unlike in certain Anglo-Saxon countries, natural persons may also act as regular asset managers or trustees. However, they will always have to be registered in the commercial reg-

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24 FEDERAL COUNCIL, Message on the Financial Services Act (FIDLEG) and on the Financial Institutions Act (FINIG) dated 4 November 2015, BBl 2015, p. 8928.

ister (Art. 17 para. 2 FINIG). Like all other Financial Institutions, regular asset managers and trustees must possess adequate collateral or provide for adequate professional liability insurance coverage (Art. 19 FINIG). Regular asset managers and trustees who buy or sell securities for clients through their own account or deposit will fall within the scope of provisions regarding securities houses and, thus, require a corresponding license (Art. 37 lit. a FINIG).

(194) Regular asset managers and trustees will newly be subjected to a licensing requirement and prudential supervision (Art. 4 para. 1 and Art. 57 para. 1 FINIG). While some, such as the Swiss Bankers Association (SBA), have supported the new supervision of regular asset managers[25], others have rejected it. Applying the same supervisory methods for major banks to small- and medium-sized enterprises has, in particular, been heavily criticised as being inappropriate by the Swiss Association of Asset Managers (SAAM)[26], mainly due to the financial burden it will place on small asset managers. It is estimated that initial license costs may lie between CHF 70,000 and CHF 128,000 depending on the business size, with additional costs between CHF 19,000 and CHF 56,000 recurring annually[27]. Such costs may financially cripple smaller institutions to the extent that they will no longer be able to continue operating their business.

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25 SWISS BANKING ASSOCIATION, Statement zur Veröffentlichung der Botschaft zu FIDLEG und FINIG, Basel 4 November 2015, available on <www.swissbanking.org/stellungnahme-20151104>, last visited on 3 March 2016.

26 SWISS ASSOCIATION OF ASSET MANAGERS, FIDLEG/FINIG: Unnötige Aufblähung des Kontrollapparats ohne Nutzen für die Anleger und ohne Verbesserung beim Marktzugang («SAAM Media release»), Zurich 4 November 2015, available on <www.vsv-asg.ch/uploads/file/news/2015/20151104_-fidleg-de.pdf>, last visited on 3 March 2016. See also UMBRELLA ORGANIZATION OF SWISS SME, FIDLEG/FINIG: sgv gegen Diskriminierungsvorlage («sgv Media release»), Bern 4 November 2015, available on <http://www.sgv-usam.ch/fileadmin/user_upload/deutsch/2015/medienmitteilungen/20151104_mm_fidleg-finig_de.pdf>, last visited on 3 March 2016, and RABIAN ALEXANDER, Hohe Kosten und kein besserer Schutz, Neue Zürcher Zeitung, 22 January 2016, p. 11.

27 ZÜRCHER HOCHSCHULE FÜR ANGEWANDTE WISSENSCHAFTEN (SCHOOL OF MANAGEMENT AND LAW), Analysis of FINIG Regulatory Costs *(Regulierungskostenanalyse zum Finanzinstitutsgesetz (FINIG)),* status 6 May 2014, p. 47.

6. Managers of Collective Assets (Arts. 20–27 FINIG)

(195) Asset managers of collective investment schemes and asset managers of occupational benefits schemes will be re-classified as "managers of collective assets" (Art. 20 para. 1 FINIG). In relation to compliance with Swiss financial market laws, they will be supervised by FINMA (Art. 57 para. 2 FINIG) and will need to comply with stricter requirements than those of regular asset managers. This largely corresponds to the current regime in relation to asset managers of collective investment schemes (immaterial re-labelling) but not in relation to asset managers of occupational benefits schemes (material re-classification). The more stringent requirements placed on asset managers of occupational benefits schemes can be justified on the basis that they manage savings that secure the retirement provisions for the respective investors[28]. Compliance with occupational benefits regulations will continue to be monitored by the respective sector-specific supervisory authorities. It is to be noted that managers of collective assets who are already subject to prudential supervision in Switzerland do not require an additional license under the FINIG, provided that such supervision is equivalent to the one of FINIG (Art. 4 para. 3 FINIG).

(196) Art. 20 para. 2 FINIG provides for *de minimis* rules according to which the following are deemed regular asset managers rather than managers of collective assets:

i. Asset managers of collective investment schemes whose investors are qualified investors within the meaning of Art. 10 para. 3 or 3ter CISA and who fulfil one of the following conditions:
   (A) the assets of collective investment schemes under their management, including the assets acquired through the use of leveraged finance, amount to no more than CHF 100 million;
   (B) the assets of collective investment schemes under their management do not exceed CHF 500 million in total and do not include leveraged financial instruments, if such collective investment schemes give no right to redemption in the first five years after making the first investment.

28 Federal Council, Message on the Financial Sercives Act (FIDLEG) and on the Financial Institutions Act (FINIG) dated 4 November 2015, BBl 2015, p. 8927.

ii. Asset managers of Swiss occupational benefits schemes who manage the assets of occupational benefits schemes totalling no more than CHF 100 million and manage no more than 20% of the assets of an individual pension scheme.

Such asset managers may request authorization as managers of collective assets provided this is required by the jurisdiction where the collective investment scheme is established or offered or where the occupational benefits scheme is managed (Art. 20 para. 3 FINIG).

7. Fund Management Companies (Arts. 28–36 FINIG)

(197) Fund management companies (*Fondsleitungen*) frequently carry out a qualified form of asset management (in addition to their sector-specific fund administration responsibilities such as the handling of subscriptions and redemptions etc.). In particular, they manage collective assets in their own name and for the account of collective investment schemes. They may, however, also act as asset managers in the name of a third party. For this reason, it is considered appropriate to transfer the regulation of fund management companies to the FINIG. In principle, the current provisions regulating fund management companies in the CISA are adopted in the FINIG substantially unaltered.

(198) Fund management companies are defined as institutions that manage investment funds in their own name and for the account of investors (Art. 28 FINIG). Just like currently under the CISA, fund management companies will need to be organised as companies limited by shares with their registered office and main administrative office in Switzerland (Art. 29 para. 1 FINIG). For this reason, as well as the fact that the primary object of the fund management company is statutorily limited to the conduct of fund business, a license to operate as a bank does not encompass the ability to operate as a fund management company[29].

(199) With regard to the delegation of duties, the FINIG also adopts the respective CISA provisions: Fund management companies may delegate

29 Federal Council, Message on the Financial Services Act (FIDLEG) and on the Financial Institutions Act (FINIG) dated 4 November 2015, BBl 2015, p. 9030.

investment decisions as well as specific tasks, provided this is in the interest of efficient management (Art. 31 para. 1 FINIG). In addition, Art. 31 para. 1 FINIG now explicitly states the principle that the executive managerial function of the fund management company may not be delegated to third parties. Moreover, it is to be noted that (as already under the CISA), for collective investment schemes subject to simplified distribution in the European Union under a specific treaty, investment decisions may not be delegated to the custodian bank or to other companies whose interests may conflict with those of the fund management company or the investors (Art. 31 para. 2 FINIG).

8. Securities Houses (Arts. 37–47 FINIG)

(200) Like fund management companies, client dealers as the main category of securities dealers in the sense of the SESTA practice a qualified form of asset management by acting in their own name for the client's account. Consequently, they will, along with the remaining categories of securities dealers, newly be regulated by the FINIG.

(201) The definition of a securities house according to Art. 37 FINIG encompasses (i) those who engage in commercial securities trading for the account of clients but in their own name (client dealers), (ii) those who engage in short term commercial securities trading for their own account and are active mainly in the financial market, provided that they could potentially endanger the functionality of the financial market or that they are active as a member of a trading venue (proprietary dealers), as well as (iii) those who engage in short term commercial securities trading for their own account and who publicly, either permanently or on request, quote prices for individual securities (market makers). These categories largely correspond to the current categories of securities dealers under the SESTA. Issuing houses (*Emissionshäuser*) and derivatives companies (*Derivathäuser*) pursuant to Art. 3 para. 2 and 3 SESTO, however, have in the past never played an independent role; such activities have typically been performed by banks and client dealers. Therefore, it is proposed that the latter will not be subject to a separate license, given that their activities may, according to the FINIG, only be conducted by banks or securities houses (Art. 11 FINIG).

(202) Due to reasons of legal certainty, the FINIG now explicitly states that securities houses domiciled in Switzerland must have the legal form of a commercial company (Art. 38 FINIG). In particular, a cooperative is not regarded as a suitable legal form for a securities house.

9. Foreign Financial Institutions (Arts. 48–56 FINIG)

(203) The FINIG, as proposed, harmonises the licensing obligation for *branches* of foreign Financial Institutions. A foreign Financial Institution will need to obtain a license from the supervisory authority if it employs persons who perform any of the following activities on a continuous and commercial basis on the institution's behalf in Switzerland (Art. 48 para. 1 FINIG):

i. *Regular asset management*;
ii. *asset management for collective investment schemes or occupational benefits schemes*;
iii. *securities dealing*;
iv. *conclusion of business transactions; or*
v. *client account management*.

As an exception, foreign fund management companies will not be allowed to establish branch offices in Switzerland (Art. 48 para. 2 FINIG).

(204) With regard to the license requirements, the FINIG, as proposed, will basically incorporate the respective regulations concerning branches in the securities and collective investments area (Art. 49 FINIG). Namely, authorization to establish a branch is granted if:

i. The foreign Financial Institution is sufficiently organised and has adequate collateral and qualified personnel to operate a branch in Switzerland, is subject to appropriate supervision that includes the branch, and proves that the business name of the branch can be entered in the commercial register;
ii. the competent foreign supervisory authorities do not raise any objections to the establishment of a branch, undertake to notify the competent supervisory authority immediately if any circumstances arise that could seriously prejudice the interests of the investors or clients and provide FINMA with administrative assistance; and
iii. the branch fulfils the conditions set out in Arts. 8–10 FINIG and has a set of regulations that accurately describes the scope of business

and defines an administrative or operational organization corresponding to its business activity, and fulfils the additional authorization conditions under Arts. 50–53 FINIG.

FINMA may make the granting of the license for a foreign Financial Institution to open a branch in Switzerland subject to reciprocity from the country in which the foreign Financial Institution or qualified shareholders have their domicile (Art. 50 FINIG). Furthermore, the supervisory authority will be permitted to condition the creation of a branch of a foreign regular asset manager, trustee or manager of collective assets in Switzerland upon the lodging of adequate collateral, if such measure is warranted for the protection of investors or clients (Art. 52 FINIG).

(205) Similar provisions for branches will apply to *representative offices* of foreign Financial Institutions. Foreign Financial Institutions will need to obtain a license from the competent supervisory authority if they employ people in Switzerland who operate a representative office for such Foreign Financial Institution on a continuous and professional basis in Switzerland (Art. 54 para. 1 FINIG). Foreign fund management companies, however, will not be permitted to establish a representative office in Switzerland (Art. 54 para. 2 FINIG).

(206) The provisions regulating branches and representative offices, as described above, need to be contrasted with the rules applicable to the mere offering of financial services on a *pure cross-border basis* (thus, without the establishment of a permanent physical presence in Switzerland by way of a branch or a representative office): Currently, such pure cross-border activity is, in principle, not subject to Swiss regulation (except for the distribution of foreign collective investment schemes into Switzerland which is subject to the CISA). Under the proposed new regulatory regime, namely under the FIDLEG, foreign financial services providers seeking to provide cross-border financial services into Switzerland will need to be registered in the client adviser register and need to comply with the code of conduct duties stipulated in the FIDLEG. However, despite this registration requirement, they will continue not to be subject to a license requirement or to prudential supervision by FINMA (or any other Swiss supervisory authority).

10. Supervision (Arts. 57–63 FINIG)

(207) While the supervision of managers of collective assets, fund management companies and securities houses will remain with FINMA (Art. 57 para. 2 FINIG), one or several new semi-public supervisory authorities may be established for the authorization and supervision of regular asset managers, trustees and precious metal traders (Art. 57 para. 1 FINIG). Please refer to Section II "Supervision – FINMAG" for further details.

11. Insolvency Provisions (Art. 63 FINIG)

(208) While initially, the FINIG envisaged an independent regulation of insolvency measures for banks, fund management companies and securities houses (Arts. 87–93 of the preliminary draft), such proposal has been dropped in the course of the Federal Council's consultation and has, instead, been replaced by a general reference to the insolvency provisions of the BA (Art. 63 FINIG). By making these provisions not only applicable to banks and securities houses, but also to fund management companies – which are, under current law, subject to the special regulatory provisions of the CISA concerning liquidation proceedings (Art. 137 *et seq.* CISA) – the new draft substantially leads to the same result as the preliminary draft. Along with the general insolvency provisions, the initially planned provisions concerning safeguards and restructuring proceedings (Arts. 92 and 93 of the preliminary draft) have also been abandoned in the course of the consultation process. The new draft does, however, include a provision that makes the BA provisions on deposit protection and dormant assets applicable to fund management companies (Art. 63 para. 2 FINIG).

(209) The insolvency measures of the BA do, however, not apply to regular asset managers, trustees and managers of collective assets, since they act in the name and for the account of third parties and, thus, assets of the clients are always separated from the assets of the asset manager and, consequently, not affected by insolvency or restructuring proceedings in relation to the latter.

12. Criminal Provisions (Arts. 65–67 FINIG)

(210) The proposed FINIG provision relating to professional confidentiality (Art. 65 FINIG) corresponds to current Art. 43 SESTA, Art. 148 para. 1 lit. k, para. 2 and para. 3 CISA as well as to Art. 47 BA. Imprisonment of

up to 3 years or a monetary penalty shall be imposed on any person who willfully (a) discloses a secret entrusted to them in their capacity as a director or officer, employee, agent or liquidator of a Financial Institution or of which they have become aware in said capacity, or (b) attempts to induce a violation of professional secrecy, or (c) discloses a secret that was entrusted to them in violation of (a) above or exploits such a secret for their own benefit or for the benefit of others (Art. 65 para. 1 FINIG). Imprisonment of up to 5 years or a monetary penalty shall be imposed on any person who obtains a pecuniary advantage for themselves or another person through an action as set out in (a) or (c) above (Art. 65 para. 2 FINIG). Persons who commit an offence under the proposed FINIG through negligence shall be penalised with a fine of up to CHF 250,000 (Art. 65 para. 3 FINIG).

13. Transitional Provisions (Arts. 68–71 FINIG)

(211) Financial Institutions newly subjected to a licensing requirement will need to report to the supervisory authority within six months, and must meet the regulatory requirements and request a license to operate within two years of the FINIG's entry into force (Art. 70 para. 2 FINIG). However, they may continue their operations until a decision regarding the license is rendered. Managers of collective assets, fund management companies and securities houses that are already in possession of a license for the relevant activity upon the legislation's entry into force will not be required to apply for a new license, but must comply with the new law within a year of its entry into force (Art. 70 para. 1 FINIG).

(212) The formerly unregulated "independent" or "external" asset managers who have performed their operations for at least 15 years and who do not fall within the scope of Art. 20 para. 2 FINIG will benefit from a *grandfathering clause*. They will not need to apply for a license, as long as they solely maintain their current client relationships and do not take on any new clients (Art. 70 para. 3 FINIG). This exemption acknowledges the business experience of long term asset managers who already enjoy the trust of their clients and, thus, should not be required to apply for a license just in order to continue their business activities until retirement[30].

[30] Federal Council, Message on the Financial Sercives Act (FIDLEG) and on the Financial Institutions Act (FINIG) dated 4 November 2015, BBl 2015, p. 9044.

(213) In special cases, the supervisory authority will have the power to extend such deadlines (Art. 125 para. 4 FINIG).

C. Key Differences to EU Regulations

(214) A major difference between the proposed FINIG and current EU regulations relates to their structure. The proposed FINIG produces a harmonised and comprehensive regulation structure, whereas in EU jurisdictions strong fragmentation of the relevant legal sources still remains. Furthermore, financial institutions in the EU are not subject to supervision by two specific bodies, as envisaged in the proposed FINIG. They are instead supervised by European supervisory bodies according to their functions, e.g., in the case of banks by the European Banking Authority and the competent authorities in the home member state of the institution.

(215) According to national laws of EU member states, financial institutions are generally subjected to prudential supervision and licensing requirements in a manner similar to that foreseen by the proposed FINIG. However, apart from the proposed registration duties for client advisers under the FIDLEG, pure advisory services are not subject to an obligation to obtain a license by a supervisory authority.

(216) In the context of the prudential supervision of trustees, it is to be noted that, unlike in certain Anglo-Saxon countries, the prudential supervision set forth in the FINIG will not only apply to legal persons, but also to individuals acting as trustees.

D. What Swiss and Foreign Market Participants Need to be Aware of

(217) Due to the envisaged scope of the FINIG, the majority of Financial Institutions will become subjected to the proposed regulation. In order to comply with the new law within the time frame provided it is important for Financial Institutions to be aware of their obligations thereunder in advance.

1. Swiss Market Participants

i. All Financial Institutions will need to be in possession of a license from the competent supervisory authority and comply with the assurance for proper business conduct requirements. Notably, the definition of Financial Institutions will also encompass regular asset managers (including both "independent" asset managers as well as those asset managers of collective investment schemes that currently profit from the *de minimis* exemption) and trustees, which are currently not subject to prudential supervision.
ii. Existing regular asset managers will benefit from a grandfathering clause and will not be subjected to prudential supervision if they have been exercising their activities for at least 15 years, do not fall within the scope of Art. 20 para. 2 FINIG and limit themselves to continuing existing client relationships.
iii. Asset managers of collective investment schemes and asset managers of Swiss occupational benefits schemes will be newly classified as "managers of collective assets" and subject to stricter requirements.
iv. Fund management companies will be subject to stricter insolvency regulations.
v. Transitory provisions and deadlines will need to be observed.

2. Foreign Market Participants

i. As under current law, continuous physical presence of foreign Financial Institutions in Switzerland will lead to a requirement to obtain a license for the respective branch or representative office in Switzerland.
ii. Irrespective of the licensing requirement, foreign Financial Institutions will need to comply with the same rules of conduct as Swiss Financial Institutions.

V. Services and Products – FIDLEG

A. Overview

1. General Provisions (Arts. 1–5 FIDLEG): Purposes and Definitions

(218) The purpose of the new Financial Services Act (FIDLEG) is client protection and the creation of a sufficiently level playing field in terms of regulatory conditions for the rendering of financial services (Art. 1 para. 1 FIDLEG). Key content of the new proposed law is the determination of requirements for the loyal, diligent, and to a certain degree transparent provision of financial services and of rules on the easement of asserting of civil claims by clients of financial services providers (Art. 1 para. 2 FIDLEG). In addition to this point of sale focus, the FIDLEG governs the offering of financial instruments (Art. 1 para. 2 FIDLEG).

(219) Subject to the scope of FIDLEG are financial services providers, client advisers, as well as producers and providers of financial instruments (all as defined in Art. 2 lit. a–c FIDLEG)[31].

(220) The FIDLEG defines, *inter alia*, the following important basic terms, knowledge of which definitions is key for the understanding of the new law:

i. *Financial instruments* pursuant to Art. 3 lit. b nos. 1–8 FIDLEG are shares, non-voting equity securities, participation certificates, securities that can be converted (e.g. convertible bonds) or exercised (e.g. options) into shares, debt securities (including bonds), shares or units of collective investment schemes, structured products (in particular, but not limited to, capital protected notes, maximum return products, and certificates[32]). Furthermore, derivatives are also con-

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31 Cf. Bianchi Luca, Proposed Regulatory Framework for Financial Products in Switzerland, CapLaw 2014/1, pp. 18 et seq.

32 In our view financial instruments include, but are not limited to, all structured products that are set out in the Swiss Derivative Map of the Swiss Structured Products Association, available on < http://www.svsp-verband.ch/en/structured-products-pro/>, last visited on 3 March 2016.

sidered financial instruments according to Art. 2 lit. c FINFRAG[33] as well as deposits with redemption value or interest that depends on risk or market prices. In addition, certain life insurances qualify as financial instruments to the extent set out in the next paragraph (Art. 3 lit. b no. 6 FIDLEG).

The offering of insurance products, in principle, will not be subject to the FIDLEG. However, the following exceptions will apply:

- insurance brokers will need to comply with the rules of the ISA and some of the provisions in the ISA will be brought in line with the FIDLEG;
- life insurance contracts that can be repurchased with price-related pay-outs and settlement values as well as capitalization operations and tontines will be deemed to be financial instruments and their distribution, therefore, will be regulated directly by the FIDLEG (Art. 3 lit. b no. 6 FIDLEG)[34].

ii. *Financial services* are the following activities provided for clients: purchase and sale of financial instruments, acceptance and transmission of orders regarding financial instruments, asset management, providing of personal recommendations in respect of financial instruments (*i.e.* investment advisory), and granting of loans in connection with transactions in financial instruments (Art. 3 lit. d nos. 1–5 FIDLEG).

iii. *Financial services providers* are all persons that provide financial services on a professional basis in Switzerland or for clients in Switzerland (Art. 3 lit. e FIDLEG).

iv. *Client advisers* are natural persons that provide financial services in the name of a financial services provider or in their own name (Art. 3 lit. f FIDLEG). In particular, the sales force of a bank, investment advisers, relationship managers, and natural persons that are *acting* as

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33 In the past, from a strictly legal perspective, some products (e.g. plain vanilla warrants) were not to be qualified as structured products in terms of Art. 5 para. 1 CISA and, therefore, not subject to the legal obligation to publish a simplified prospectus. Under the FIDLEG, as proposed, a BIB will have to be published also for these products (if an offer to private investors is intended), because all products set out in the Swiss Derivative Map qualify at least as derivatives according to Art. 3 lit. b no. 5 FIDLEG in connection with Art. 2 lit. c FINFRAG.

34 From an economic perspective, these insurance products show characteristics that are similar to other financial instruments due to their investment component.

external distributors of financial instruments, could qualify as client advisers in terms of Art. 3 lit. f FIDLEG. Employees of financial services providers that do not have contact to clients or only have a subordinated support function will not qualify as client advisers.

v. An *offer* is defined as any invitation to the purchase of a financial instrument which includes sufficient information on the terms and conditions of the offer and the financial instrument (Art. 3 lit. h FIDLEG).
vi. A *public offer* is defined as an offer which is addressed to the public (Art. 3 lit. i FIDLEG).
vii. The *producers* of a financial instrument are persons that structure a new or amend an existing financial instrument, including amendments of its risk and return profile or its costs (Art. 3 lit. j FIDLEG).

(221) The proposed FIDLEG will introduce a MiFID-oriented concept of client segmentation. Clients are categorised as private clients, professional clients, and institutional clients (Art. 4 para. 1 lit. a–c FIDLEG). The basis for the differentiated investor protection are the following definitions:

i. *Private clients* are clients that do not qualify as professional clients (Art. 4 para. 2 FIDLEG);
ii. *professional clients* are: (i) regulated financial intermediaries, (ii) regulated insurance companies, (iii) foreign clients that are under equivalent prudential supervision as the persons in (i) and (ii), (iv) central banks, (v) public bodies with professional treasury operations, (vi) retirement benefits institutions and institutions established for the purpose of providing occupational pension plan with professional treasury operations, and (vii) enterprises with professional treasury operations (Art. 4 para. 3 lit. a–g FIDLEG). The Federal Council can declare that further client categories qualify as professional clients (Art. 4 para. 5 FIDLEG);
iii. the term *institutional clients* comprises professional clients according to Art. 4 para. 3 lit. a–d FIDLEG and *supranational and national* public bodies with professional treasury operations (Art. 4 para. 4 FIDLEG).

Group companies that receive financial services provided by other group companies of the same group are not considered to be clients (Art. 4 para. 6 FIDLEG). In addition, it is noteworthy that a financial services

provider may abstain from implementing the client segmentation if it treats all clients as private clients (Art. 4 para. 7 FIDLEG).

(222) Pursuant to the draft FIDLEG, high-net-worth individuals (HNWI) will be able to declare that they wish to be deemed professional investors (*opting-out*; Art. 5 para. 1 FIDLEG). The Federal Council may make such persons' freedom to opt-out dependent on certain conditions, in particular, expertise qualifications (Art. 5 para. 1 FIDLEG). Institutional clients may demand to be treated as professional clients (Art. 5 para. 3 FIDLEG). Further, professional and even institutional clients may require to be treated as private clients (*opting-in*[35]; Art. 5 para. 2 FIDLEG). Financial services providers will have to inform their clients if they do not have the status as private client on the possibility of opting-in. The declarations according to Art. 5 paras. 1–3 FIDLEG must be in writing or another form which allows for text verification (Art. 5 para. 5 FIDLEG).

2. Requirements for Providing of Financial Services (Arts. 6–36 FIDLEG)

a) *Education and Training*

(223) Client advisers will need to possess sufficient knowledge on the code of conduct set out in the FIDLEG and have the technical expertise which is required for their professional activities (Art. 6 para. 1 FIDLEG). Financial services providers shall themselves define industry-specific minimum standards for the initial and ongoing education/training (Art. 6 para. 2 FIDLEG). The Federal Council will define the requirements for the education and training of client advisers that are not subject to adequate minimum standards (Art. 6 para. 3 FIDLEG). Only client advisers that are either (i) employed by a financial institution which is supervised in Switz-

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35 In connection with the CISA an opting-out describes the decision of a high-net-worth individual to switch out of his qualified investor status and into a non-qualified investor status (and, thereby, to benefit from more investor protection) (cf. Abegglen Sandro, Die unabhängigen Vermögensverwalter vor grossen Veränderungen – Elemente der KAG-Teilrevision, in: Isler Peter R./Cerruti Romeo, EIZ-Vermögensverwaltung V, Zurich 2012, p. 86). Vice versa, under the terminology proposed by the FIDLEG an opting-out means that an investor waives his private investor status (and loses investor protection), and elects to be treated as professional investor. This inconsistency of the terminology is likely to cause confusion.

erland or (ii) registered in the client adviser register will be permitted to work as client advisers (Art. 30 FIDLEG). It is important to note that this provision also applies to foreign regulated financial institutions. Thus, unless amended in the legislation process, employees of such foreign regulated financial institutions will need to be registered in the Swiss client adviser register.

(224) Financial services providers are responsible for their client advisers having the required education and training with respect to the services which have to be provided (Art. 7 para. 1 FIDLEG). They must ensure that clients can inform themselves on the education and training of the client adviser (Art. 7 para. 2 FIDLEG).

b) Code of Conduct

General Principle

(225) The FIDLEG defines the conduct duties of financial services providers vis-à-vis their clients (Art. 8 para. 1 FIDLEG). As a general principle, financial services providers will be obliged to act in the best interest of their clients and apply the required knowhow, due diligence and care (Art. 8 para. 2 FIDLEG and Art. 398 para. 2 CO). The core aspects of these provisions are the point of sale focused information and enquiry duties described below. In addition, special provisions may be applicable (Art. 8 para. 3 FIDLEG)[36].

Specific Duties

Information Duties

(226) Financial services providers will be subject to a general information duty vis-à-vis their clients, in particular, regarding the following: (i) their name, address, area of practice, regulatory status, possibility to obtain information on the training and education of the client adviser and the possibility to initiate a mediation proceeding before an ombudsman (Art. 9 para. 1 FIDLEG). In addition, they have to inform on (ii) the offered financial services and the connected risks and costs, (iii) their economic ties to third parties that are connected with the offered financial services, (iv) the offered financial instruments and the connected risks and costs,

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36 On the code of conduct rules under the proposed FILDEG, cf. also ABEGGLEN SANDRO/ BIANCHI LUCA, Regulation of the Point of Sale – An Update on the Rules of Conduct of Financial Services Providers under the proposed FIDLEG, CapLaw 2016/1, pp. 17 *et seq.*

(v) the market offering considered for the selection of the financial instruments and (vi) the type of custody of the financial instruments and the connected risks and costs (Art. 9 para. 2 FIDLEG).

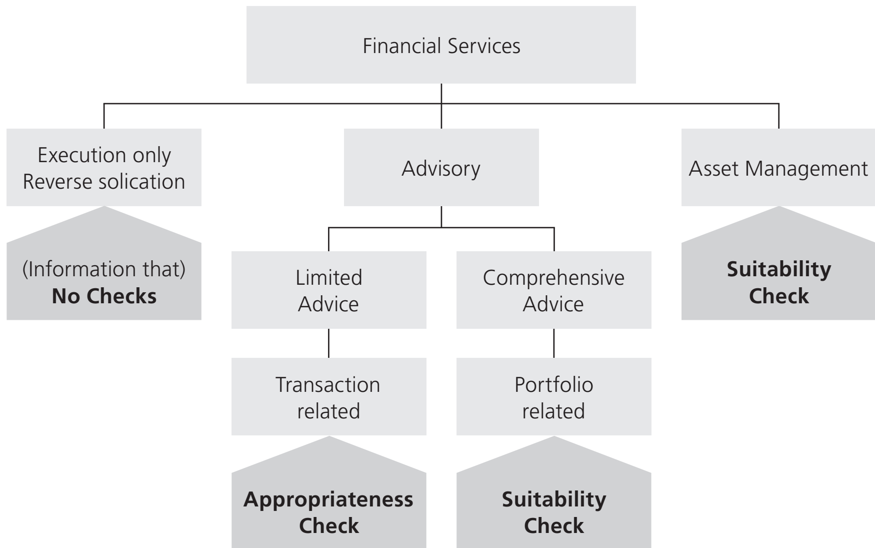
(227) The information set out above must be comprehensible and may be provided to the clients in standardised form and electronically (Art. 9 para. 3 FIDLEG). Advertisings must be marked as such (Art. 9 para. 4 FIDLEG).

(228) With respect of the prescribed point in time of the information the following applies. Financial services providers inform their clients before conclusion of the agreement or rendering of the services (Art. 10 para. 1 FIDLEG). With respect to the offering of financial instruments which require a BIB, financial services providers are obliged to provide such BIB to their private clients before subscription or conclusion of the agreement free of charge (Art. 10 para. 2 FIDLEG). If the value of a financial instrument is calculated based on the development of one or a number of other financial instruments and a BIB exists for these instruments, a duty to provide the BIBs of the underlying instruments arises analogously to Art. 10 para. 2 FIDLEG (Art. 10 para. 3 FIDLEG). With respect to the offer of financial instruments that require a prospectus, financial services providers make such prospectus available to their private clients free of charge upon request (Art. 10 para. 4 FIDLEG).

(229) Material changes of the information must be communicated to the client either (i) at the point in time of the next client contact (in case of information according to Art. 9 para. 1 FIDLEG) or (ii) immediately (in case of information according to Art. 9 para. 2 FIDLEG) (Art. 10 para. 5 FIDLEG).

Assessment of Appropriateness and Suitability

(230) Financial services providers that render investment advisory or asset management services will be obliged to perform appropriateness or suitability assessments (Art. 11 FIDLEG).



(Source: Message, free translation[37])

(231) A financial services provider that renders investment advice (*i.e.* issues a personal recommendation) for a transaction without considering the complete portfolio must examine the *appropriateness* of financial instruments for the client before the investment recommendation is made (Art. 12 FIDLEG). To that end, he must request *information on the expertise (knowledge) and experience* of his clients *with respect to the specific type of transaction* that is intended and educate the client in case knowledge and experience are not given.

(232) The financial services provider that renders investment advice under consideration of the client portfolio, or asset management services, must make a *suitability* check, *i.e.* inquire about the *financial situation and investment objectives*, and – same as in the appropriateness test – also the *expertise and experience* of the clients, prior to making a recommendation with respect to appropriate financial instruments or making respective investments in its function as an asset manager (Art. 13 FIDLEG). An adviser or asset manager will only be able to recommend financial

37 Federal Council, Message on the Financial Services Act (FIDLEG) and the Financial Institutions Act (FINIG), p. 52.

instruments or make investment decisions, respectively, if the recommendation or transaction, as applicable, is appropriate or suitable, respectively, for the client. In case of portfolio-related advice, the only reasonable interpretation of the draft must be to the effect that here, the assessment of expertise and experience (appropriateness) should not relate to the very instrument, but rather to understanding the impact on the portfolio as a whole. In case of discretionary asset management services, appropriateness must be pertinent only in respect of the service and the chosen strategy.

(233) In case the gathered *information is not sufficient* to perform a appropriateness or suitability check, the financial services provider will need to warn the client about the fact that an assessment as to whether the financial instruments or the financial services are suitable or appropriate for the client is not possible (Art. 16 para. 1 FIDLEG). If the financial services provider is of the opinion that a financial instrument is not appropriate, or suitable, respectively, for his clients he must advise them against it before rendering his services (Art. 16 para. 2 FIDLEG).

(234) Unless contrary indications exist, *professional clients* may be deemed to possess the required expertise (knowledge) and experience and may be considered able to bear the risk of financial services at all times (Art. 15 FIDLEG); that is, must only be enquired on the investment objectives. Finally, vis-à-vis *institutional clients* neither appropriateness nor suitability checks are required (Art. 22 FIDLEG).

(235) With respect to mere *execution only transactions*, the financial services provider will not be obliged to perform an appropriateness or suitability check (Art. 14 para. 1 FIDLEG) – in contrast to MiFID II regardless of whether the financial instrument in question is complex or non-complex. However, the financial services provider will be required to inform the client that these checks will not be made before executing the services (Art. 14 para. 2 FIDLEG). According to the text of the draft, the same regime applies in case of services provided at the request of the client; however, there may be an editorial mistake as, quite obviously, the checks will be required for advisory or discretionary services independently of whether it was the client who sought to be provided with these services.

Documentation and Reporting Duties (Arts. 17–18 FIDLEG)

(236) Pursuant to the bill, financial services providers will be obliged to document the following in an adequate manner: (i) the financial services that have been agreed with clients and the information that has been given to them, (ii) the information of the clients according to Art. 14 para. 2 FIDLEG, respectively, the fact that he has advised against the financial instrument in line with Art. 16 FIDLEG and (iii) the services that have been provided to the clients (Art. 17 para. 1 lit. a–c FIDLEG). Moreover, with respect to asset management and investment advisory services, financial services providers will be required to record the client's needs and the reasons for a recommendation that leads to the purchase, holding or sale of a financial instrument (Art. 17 para. 2 FIDLEG).

(237) In addition, financial services providers will be obliged to deliver a copy of the documentation required by Art. 17 FIDLEG to their clients (Art. 18 para. 1 FIDLEG). They must notify their clients about the services provided and, in particular, (i) give account on agreed and executed orders, (ii) the composition, valuation and development of the portfolio and (iii) the costs linked to the financial services (Art. 18 para. 2 lit. a–c FIDLEG). The Federal Council will regulate the time and minimum content of such information (Art. 18 para. 3 FIDLEG).

Best Execution Principles / Securities Lending (Arts. 19–21 FIDLEG)

(238) Financial services providers will be obliged to comply with the principles of *bona fide* and equal treatment while processing client orders (Art. 19 para. 1 FIDLEG). The Federal Council will specify these principles, in particular, with respect to procedures and systems to settle client orders (Art. 19 para. 2 FIDLEG). Financial services providers will be bound to the duty of best execution in respect of financial, temporal and qualitative aspects (Art. 20 para. 1 FIDLEG). In particular, not only the price of the financial instrument but also the costs linked to the execution of the order and the compensations according to Art. 28 para. 3 FIDLEG must be taken into consideration (Art. 20 para. 2 FIDLEG). The implementation of internal guidelines regarding the execution of client orders will be mandatory (Art. 20 para. 3 FIDLEG).

(239) It is intended that the following rules will apply with respect to the use of financial instruments of clients: Financial services providers may only borrow financial instruments from client holdings as counterparty or

lend them to third parties if the clients have agreed to these transactions in a separate agreement in writing or another form that allows for text verification, which must not be part of the general terms and conditions of the financial services provider (Art. 21 para. 1 FIDLEG). The approval of the clients is only valid if the clients (i) have been informed on the risks linked to such transactions, (ii) have a compensation claim on the due proceeds of the securities that have been lent and (iii) receive a compensation for the securities lending (Art. 21 para. 2 lit. a–c FIDLEG). Uncovered securities lending transactions with financial instruments of private clients will be prohibited (Art. 21 para. 3 FIDLEG).

Lower Requirements regarding Institutional Clients (Art. 22 FIDLEG)

(240) With respect to transactions with institutional clients only the code of conduct according to Arts. 8, 9, 10 paras. 1 and 5, 18 para. 2 and 19–21 FIDLEG will be applicable (Art. 22 FIDLEG). For institutional clients no basic information sheet (BIB; *Basisinformationsblatt*) will need to be provided. Furthermore, the obligations to perform suitability or appropriateness checks, as well as some of the regulatory documentation and accountability duties will not be compulsory vis-à-vis institutional clients (in particular, those set out in Art. 17 and Art. 18 paras. 1 and 3 FIDLEG). Of course, accountability duties deriving from the civil law may still be applicable (cf. Art. 400 para. 1 CO).

c) Organization / Conflicts of Interest (Arts. 23–29)

(241) Financial services providers will be obliged to ensure the fulfilment of their duties according to the proposed FIDLEG with internal guidelines and an adequate organization (Art. 23 FIDLEG). They will need to ensure that their employees possess the skills that are required for their tasks (Art. 24 para. 1 FIDLEG). Financial services providers which are not subject to supervision according to Art. 3 FINMAG will further have to ensure that only registered client advisers are acting as client advisers (Art. 24 para. 2 FIDLEG).

(242) Employee transactions should be subject to measures that can exclude inappropriate behaviour (Art. 29 para. 1 FIDLEG). In particular, appropriate and suitable measures will need to be implemented in an internal guideline (Art. 29 para. 2 FIDLEG).

(243) Financial services providers will be obliged to take appropriate measures to avoid actual or potential conflicts of interest or respective disadvantages of clients (Art. 27 para. 1 FIDLEG). If a disadvantage for clients cannot be excluded it must be disclosed to the respective client (Art. 27 para. 2 FIDLEG).

(244) Financial services providers will only be permitted to accept compensations in connection with the performance of financial services from third parties, if (a) clients have explicitly been informed on such compensations, or (b) the compensations are forwarded to the clients completely (Art. 28 para. 1 lit. a and b FIDLEG). The information of the clients must include the type and amount of the compensations and must take place before the financial services have been provided. If the amount of the benefit cannot be determined in advance, the financial services provider will need to inform its clients on the calculation parameters *and* the range of the compensations (Art. 28 para. 2 FIDLEG). Compensations in terms of Art. 28 para. 1 FIDLEG will consist of payments, such as brokerage fees, kickbacks, commissions, rebates, distribution remunerations, retrocessions and similar payments, including other financial advantages (*e.g.* soft dollars) that are made to the financial services providers (Art. 28 para. 3 FIDLEG). These proposed provisions are stricter than the current case law of the Swiss Federal Court concerning retrocessions[38], in particular because the proposed provisions would seem to be applicable to all financial services and not only to services that are subject to Art. 400 para. 1 CO. The requirements for a valid waiver with respect to compensations are not regulated in the FIDLEG; they remain subject to Art. 400 para. 1 CO (and the respective case law)[39].

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38 Cf. decisions of the Swiss Federal Court 4A_127/2012 of 30 October 2012, c. 5.6 and 4A_266/2010 of 29 August 2011, c. 2.6 *et seq.*; Abegglen Sandro, «Retrozession» ist nicht gleich «Retrozession»: Zur Anwendbarkeit von Art. 400 Abs. 1 OR auf Entschädigungen, die an Banken geleistet werden, insbesondere im Fondsvertrieb, SZW 2007, pp. 122 *et seq.*; Abegglen Sandro, Der Verzicht auf Ablieferung von Retrozessionen – Einordnung und Anforderungen, recht 2007, pp. 190 *et seq.*; Bianchi Luca / Bianchi François M., RdF-Länderreport Schweiz: Aktuelle Entwicklungen im Aufsichts-, Zivil-, Bilanz und Steuerrecht für den Kapitalmarkt, RdF 2014/1, p. 73.

39 Cf. Abegglen (FN 38), 190 *et seq.*

d) *Register of Advisers / Cross-border Activities into Switzerland (Arts. 30–36 FIDLEG)*

(245) Client advisers of Swiss and non-Swiss financial services providers (that are not already subject to financial market supervision in Switzerland according to Art. 3 FINMAG) may only conduct their activities in Switzerland if they are registered in the register of advisers (Art. 30 FIDLEG). It is important to note that client advisers that are employed by financial services providers which are subject to such supervision in Switzerland are not obliged to register in the register of advisers. Consequently, the registration duty targets primarily Swiss "external" financial advisers, and non-Swiss "internal" and "external" client advisers and their employers (independently of whether they are regulated or not), which are conducting financial services into Switzerland.

(246) Conditions for the registration are that the client advisers (i) have concluded the education and training according to Art. 6 FIDLEG, (ii) have obtained professional liability insurance or possess equivalent collateral, and (iii) are connected to an ombudsman's institution according to Art. 77 FIDLEG (Art. 31 para. 1 lit. a–c FIDLEG). In addition, client advisers will have to provide evidence that they (i) do not have a criminal record regarding violations of Arts. 92–94 FIDLEG (i.e. violations of the rules for prospectuses or BIBs, illegal offering of financial instruments, or violations of the code of conduct of the FIDLEG), Arts. 86–86a ISA, or 137–172ter PC (offences against property), and (ii) have not become subject to a professional ban as contemplated by Arts. 33–33a FINMAG (i.e. regulatory ban of activity or prohibition to exercise his profession) (Art. 31 para. 2 FIDLEG). The proceeding before the registration office will be governed by the APA (Art. 36 FIDLEG).

(247) In the beginning of the legislative process it had been foreseen that foreign financial services providers performing a cross-border activity requiring a license in Switzerland (if carried out by Swiss financial services providers) will need to be registered in a separate register of foreign financial services providers (which will be conducted by a FINMA approved registration office). Now, upon completion of the consultation process, this requirement has been abandoned, respectively, merged with the registration duty for client advisers (cf. Arts. 30 and 34 paras. 1 and 2 FIDLEG): Also client advisers of non-Swiss financial services providers must be registered in the register of client advisers according

to Art. 30 FIDLEG. Further, Swiss clients shall receive the same protection they benefit from when facing Swiss financial services providers. Therefore, the code of conduct according to Arts. 8 *et seq.* FIDLEG will also apply to cross-border activities of foreign financial services providers (Art. 8 para. 1 FIDLEG). It may, however, well be that during the course of the upcoming Parliamentary debate certain additional facilitations will be granted in relation to inbound cross-border offerings of financial services (*e.g.* an exemption in case of cross-border services provided to exclusively institutional clients and even certain other professional clients in Switzerland).

(248) It is quite remarkable and a substantial deviation from many foreign laws that, in principle, there exists no general duty to establish a Swiss branch under the proposed FIDLEG in case of services to be provided to private clients. However, in case of the establishment of a branch or representative office (that employ persons) in Switzerland the FINIG will require the obtainment of a regulatory license[40]. In addition, under the CISO, if the distribution of structured products to non-qualified investors is intended and the products are not listed with SIX Swiss Exchange (SIX), a Swiss branch (with the regulatory status that is required for the relevant business activities) is mandatory for the issuer or the guarantor[41]. Presumably, this rule will be transferred to the Federal Financial Services Ordinance (FIDLEV).

3. Offering of Financial Instruments (Arts. 37–74 FIDLEG)

a) Prospectus (Arts. 37–59 FIDLEG)

Prospectus Duty (Art. 37 FIDLEG)

(249) Whoever offers financial instruments for sale or subscription in a *public* offering into, in or from Switzerland or requests admission of financial instruments on a regulated market according to Art. 26 FINFRAG will be required to publish a prospectus beforehand (Art. 37 para. 1 FIDLEG). The prospectus duty will be subject to certain exceptions as described

40 Art. 48 *et seq.* FINIG; cf. also Section IV.B.9.

41 Cf. Bianchi François M./Bianchi Luca/Wettstein Yannick *et al.*, Debt Capital Markets 2015, in: Lopez David/Fleisher Adam E./Kim Daseul, Getting the Deal Through – Debt Capital Markets in 19 Jurisdictions Worldwide (2015), p. 99; Bianchi/Bianchi (FN 38), p. 71.

below (*safe harbour rules*). Further exceptions may be set forth by the Federal Council (cf. Art. 49 FIDLEG).

Exceptions regarding the Type of the Offering (Art. 38 para. 1 lit. a–e FIDLEG)

(250) According to the proposed new rules, no prospectus will have to be published in case of public offers that satisfy any of the following:

i. Address only professional clients (lit. a);
ii. address less than 150 investors that qualify as private clients (lit. b);
iii. address only investors that purchase financial instruments in the amount of at least CHF 100,000 (lit. c);
iv. have a minimum denomination of CHF 100,000 (lit. d); or
v. have a total volume of not more than CHF 100,000 in a period of time of 12 months (lit. e).

Exceptions regarding the Type of the Financial Instrument (Art. 39 FIDLEG)

(251) Furthermore, no prospectus will have to be published in case of public offerings regarding any of the following:

i. Shares which are issued outside of a capital increase in exchange for existing shares of the same kind (lit. a);
ii. shares which are issued or delivered in case of a conversion or exchange of financial instruments of the same issuer or the same group (lit. b);
iii. shares which are issued or delivered as a result of the exercise of a right which is linked to a financial instrument of the same issuer or the same group (lit. c);
iv. financial instruments that are offered for exchange due to a takeover if information exists that has a content which is equivalent to an issuance prospectus (lit. d);
v. financial instruments that are offered or allocated due to a merger, split, conversion, or transfer of assets if information exists that has a content which is equivalent to an issuance prospectus (lit. e);
vi. shares that are redeemed to the holders of shares of the same kind if information on the amount and the type of the shares as well as the reasons and details of the offer exists (lit. f);
vii. securities that are offered or allocated to members of the board or the management or employees if information on the amount and

the type of the shares as well as the reasons and details of the offer exists (lit. g);

viii. securities that are unconditionally and irrevocably guaranteed by the Swiss Federation and its cantons, by an international or supranational public entity, by the Swiss National Bank or a foreign central bank (lit. h);
ix. securities that are issued by establishments with ideal purpose (lit. i);
x. certificates of deposits (*Kassenobligationen*) (lit. j);
xi. money market instruments (lit. k); or
xii. derivatives that are not offered by way of an issuance (lit. l).

Exceptions regarding the Approval for Trading (Art. 40 FIDLEG)

(252) In addition to the exceptions set out above, no prospectus will have to be published in case any of the following types of securities are approved for trading:

i. Shares that represent less than 10% of the number of shares of the same kind that are already admitted for trading on the same trading venues within a period of 12 months (lit. a);
ii. shares which are issued or delivered in case of a conversion or exchange of financial instruments of the same issuer or the same group, provided that they are shares of the same kind as the ones that are already admitted for trading on the same trading venues within a period of 12 months (lit. b);
iii. securities which are admitted to trading on a foreign trading venue whose regulation, supervision and transparency are (i) recognised as adequate by the Swiss trading venue or (ii) ensured in another manner (lit. c); or
iv. securities for which the admission for a trading segment is requested, provided that such trading segment is only open for professional clients that trade exclusively for their own account or for the account of exclusively professional clients (lit. d).

Content (Art. 42 FIDLEG)

(253) The content of the prospectus will be regulated in Art. 42 FIDLEG. The prospectus will need to comprise the information which is relevant for the decision of the investor (Art. 42 para. 1 FIDLEG), such as information on:

i. The issuer/guarantor/collateral provider (as applicable) (*i.e.* (a) the board of directors, management, auditor, and other bodies, (b) the

last semi-annual or annual report, (c) the business situation and (d) the material perspectives, risks, and litigation proceedings);

ii. the securities, in particular the terms and conditions, risk factors, and final terms (where applicable); and

iii. the offer, in particular the type of placement and the estimated net revenue of the issuance.

(254) The prospectus will need to be provided either in German, French, Italian, or English (Art. 42 para. 2 FIDLEG). Information may be incorporated to the prospectus by way of reference to the extent specified by the Federal Council (Art. 44 FIDLEG). Furthermore, the prospectus will have to contain a summary of the essential information set out in comprehensible form (Art. 42 para. 3 FIDLEG). The summary shall facilitate the comparison of similar securities (Art. 45 para. 1 FIDLEG). With respect to debt securities, the prospectus may be in the form of an issuance program, whereas the final terms of a specific product under the base prospectus may be issued in separate final terms (Art. 47 para. 1 and 3 FIDLEG).

Approval Proceeding (Art. 53 FIDLEG)

(255) A major change is being proposed with respect to the approval of prospectuses. Under the proposed FIDLEG, any prospectus for a *public* offering (and not only a stock exchange listing prospectus like under the current regime[42]) will need to be submitted to and examined by an authority for completeness, coherence, and comprehensibility (Art. 51 para. 1 FIDLEG in connection with Art. 54 para. 1 FIDLEG). An approval of the prospectus only after the issuance of the respective financial instruments could be implemented for certain securities by the Federal Council (Art. 53 para. 2 FIDLEG). Furthermore, the responsible approval body may approve a prospectus that is published under foreign law for a public offer (or approval for trading on a regulated market) into, in, and from Switzerland, if (i) it is drafted according to international standards and (ii) the applicable information duties are equivalent to those of the FIDLEG (Art. 56 para.1 lit. a and b FIDLEG). It should still be pos-

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42 Cf. Weber Philippe / Kronauer Markus / Huber Andrea, Die Börsenzulassung in der Schweiz in ihrem rechtlichen und steuerlichen Umfeld, in: Habersack Mathias / Mülbert Peter O. / Schlitt Michael, Unternehmensfinanzierung am Kapitalmarkt, 3rd ed., Cologne 2013, p. 1512.

sible to submit missing information by way of a Swiss wrapper[43]. Furthermore, Swiss selling restrictions and a Swiss tax wording will have to be implemented[44]. The prospectus will be valid for public offers or trading on a regulated market for a period of 12 months after its approval (Art. 57 para. 1 FIDLEG). It will be possible to register supplements to the prospectus with the competent authority (Art. 58 para. 1 FIDLEG). The approval body may provide for a passporting of prospectuses of certain jurisdictions into Switzerland and publishes a list of the respective countries (Art. 56 para. 2 and 3 FIDLEG).

b) Special Provisions for the Offering of Collective Investment Schemes (Arts. 50–52 FIDLEG)

(256) The management companies of open investment funds, respectively, SICAV, according to the CISA will be obliged to publish a fund contract in the form of a prospectus (Art. 50 para. 1 FIDLEG). The prospectus will need to either include the fund regulations or make reference to the place where they can be obtained (Art. 50 para. 2 FIDLEG). The Federal Council will specify further information which will have to be set out in the prospectus (Art. 50 para. 3 FIDLEG). The prospectus and its updates will need to be filed with FINMA immediately (Art. 50 para. 4 FIDLEG). The same rules will apply to the SICAF by analogy (Art. 51 para. 3 FIDLEG).

(257) Furthermore, the Swiss Limited Partnership for Collective Investments (*Kommanditgesellschaft für kollektive Kapitalanlagen*) as defined in Art. 98 CISA will need to publish a prospectus (Art. 51 para. 1 FIDLEG). It must contain the information that is included in the partnership agreement according to Art. 102 para. 1 lit. h CISA (Art. 51 para. 2 FIDLEG).

(258) Due to the FINMA approval requirement as set out in the CISA, prospectuses of collective investment schemes will not be subject to the approval by the approval body according to Art. 54 para. 1 FIDLEG (Art. 53 para. 3 FIDLEG).

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43 Cf. Bianchi/Bianchi/Wettstein et. al (FN 41), p. 97.

44 Cf. Bianchi/Bianchi/Wettstein et. al (FN 41), pp. 97 *et seq.*; Weber Philippe, The Offering of Foreign Securities in Switzerland, in: Reutter Thomas/Werlen Thomas, EIZ-Kapitalmarkttransaktionen III, Zurich 2008, pp. 11 *et seq.*

c) *Basic Information Sheet (Arts. 60–66 FIDLEG)*

(259) Pursuant to the draft, in order to offer a financial instrument to private clients (independently of whether the offering is public or not), a standardised, basic information sheet (BIB; *Basisinformationsblatt*) will have to be created (and delivered to the clients at the point of sale). If the offer is made on a preliminary basis an indicative version of the BIB will need to be provided (Art. 60 para. 3 FIDLEG). An exception from the duty to provide a BIB will apply to shares and securities similar to shares that grant membership rights (Art. 61 para. 1 FIDLEG). BIBs must include the information that is material for a reasonable person in order to make an informed investment decision and to compare different financial instruments (Art. 63 para. 1 FIDLEG). In particular, the BIB will need to comprise the following information (Art. 63 paras. 1–2 FIDLEG):

i. The name of the financial instrument and the identity of the issuer;
ii. the type and characteristics of the financial instruments;
iii. the risk- and return profile of the financial instrument, in particular, the maximal capital loss that may occur to the investors;
iv. the costs of the financial instrument;
v. the minimal holding period and the tradability of the financial instrument; and
vi. information on the licenses and approvals that are connected with the financial instruments.

Documents ruled by foreign law that are equivalent to the BIB may be used instead of the BIB (Art. 61 para. 2 FIDLEG).

(260) The BIB will need to be a separate document that is clearly distinguishable from marketing material and easy to understand for a private investor (Art. 64 paras. 1 and 2 FIDLEG). The producer will need to assess regularly whether the information included in the BIB is still accurate and *update* the document where required (Art. 65 para. 1 FIDLEG). Whereas such updating obligation is already standard in the fund industry, it is new in the area of structured products that are distributed to private investors (and will increase the running costs for these products). The Federal Council will regulate the details on the following topics: (i) content, (ii) volume, language, and design of the BIB, (iii) the modalities of providing it to private clients, as well as (iv) the equivalence of foreign documents with the BIB (Art. 66 lit. a–d FIDLEG).

d) *Publication (Arts. 67–70 FIDLEG)*

(261) The financial instruments provider or the person requesting admission for trading will need to (i) deposit the approved prospectus with the approval body and (ii) publish it before the beginning of the public offer at the latest (Art. 67 para. 1 lit. a and b FIDLEG). The publication requirement can be satisfied either through (i) publishing the prospectus in a newspaper or the Swiss Official Gazette of Commerce (SOGC), (ii) making hard copies of the prospectus available free of charge at the domicile of the issuer, the lead managers, the guarantor or collateral provider, (iii) publishing the prospectus electronically on the website of the issuer, the regulated market, or the lead manager, or (iv) publishing the prospectus in electronic form on the website of the approval body (Art. 67 para. 3 lit. a–d FIDLEG in connection with Art. 69 FIDLEG). However, even if the prospectus is published electronically, additional hardcopies will need to be made available free of charge upon request (Art. 67 para. 4 FIDLEG).

(262) The rules regarding the publication of the prospectus according to Art. 67 para. 3 and 4 FIDLEG apply to the BIB analogously (Art. 68 para. 2 FIDLEG). In principle, this means that with respect to a public offering the BIB must be published. However, it should be noted that in case of a tailor made product that addresses only an individual client (and, consequently, does not qualify as a public offer), as an exception, the BIB must only be created and delivered to the client (but not be "published" in terms of Art. 67 para. 3 and 4 FIDLEG).

e) *Advertisings (Art. 71 FIDLEG)*

(263) Advertisings in terms of Art. 71 FIDLEG comprise any activities that have the purpose of selling a financial instrument, irrespective of their type or form[45]. Advertisings will need to be clearly recognizable and labelled as such (Art. 71 para 1 in connection with Art. 9 para. 4 FIDLEG). If a prospectus or a BIB is published for a financial instrument this fact must be stated in advertisings (Art. 71 para. 2 FIDLEG). Advertisings and any other information on financial instruments will need to be consistent with the prospectus and the BIB (Art. 71 para. 3 FIDLEG).

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45 Cf. FINMA Circular 2013/9 "Distribution of Collective Investment Schemes", p. 3.

f) *Liability (Art. 72 FIDLEG)*

(264) A new cross-sector legal foundation for prospectus liability is proposed by Art. 72 FIDLEG. Specifically, where information that is inaccurate, misleading or in breach of regulatory requirements is provided or disseminated in prospectuses, BIBs, advertisings, or similar statements relating to the issue of financial instruments, any person involved may be liable for the resulting losses to the acquirers of the financial instruments (Art. 72 FIDLEG). The main proposed conditions for a prospectus liability are the following: (i) active legitimation, (ii) passive legitimation, (iii) damage, (iv) violation of a duty of care/information, (v) causation and (vi) fault. Any damage that has been caused by inaccurate, misleading or insufficient (*e.g.* not in line with the legal minimum requirements) information in a prospectus, BIB, or similar notifications (potentially including advertisings) must presumably be compensated. The Swiss Federal Court currently requires an overwhelming likelihood of the causation between the violation of a duty and the damage. Any natural or legal person that was involved in the production of these documents will be liable to the purchaser of a financial instrument, unless he can prove that he is not at fault (*due diligence defence*). The liability will not be limited to the prospectus itself, but will include documents included by reference according to Art. 44 FIDLEG. Before this background, the prospectus liability provision is rather atypical for the FIDLEG when considering that the Message states that the FIDLEG does not contain *double rules* (*i.e.* provisions that have a regulatory *and* a civil law nature). The prospectus liability rule, however, may be such a double rule (if not a norm that belongs entirely to the civil law) and will replace the currently applicable provisions in Art. 752 and 1156 CO.

g) *Special Provisions for the Offering of Structured Products (Art. 73 FIDLEG)*

(265) Under the proposed new legislation, structured products may only be offered to private clients (without an asset management agreement) into, in or from Switzerland, if they are issued, guaranteed or secured in an equivalent manner by a Swiss bank, securities house or insurance company or a pertinent foreign institution subject to equivalent standards of supervision (Art. 73 para. 1 lit. a–d FIDLEG). The existing rule in the CISO will most likely be integrated in the FIDLEV, thereby, requiring that the

foreign issuer or the guarantor have a regulated Swiss branch[46]. A Swiss branch of a foreign institution in the context of the issuance of structured products can be a representative office, a branch office, a subsidiary, a sister company or a group company (provided that it comes under consolidated supervision at the group level and has the regulatory status that is necessary to render its activities)[47].

4. Restitution of Documents (Arts. 75–76 FIDLEG)

(266) Clients will have a right to request the release of a copy of their file and any other documents relating to them that where produced by the financial services provider under their business relationship at any time and free of charge (Art. 75 para. 1 FIDLEG). A possible refusal of the financial services provider with respect to the restitution of documents can be taken into consideration by the competent court with respect to the decision concerning the litigation costs (Art. 76 para. 4 FIDLEG).

5. Ombudsman's Office (Arts. 77–89 FIDLEG)

(267) A claiming client will benefit from the proposed institution of an ombudsman's office which will deal with disputes concerning claims between the client and the financial services provider in a mediation proceeding (Art. 77 *et seq.* FIDLEG). The proceeding must be non-bureaucratic, fair, quick, unbiased and free of charge for the client (Art. 78 para. 1 FIDLEG). The filing of a mediation request before an ombudsman's office does not exclude or prevent a civil claim (Art. 79 para. 1 FIDLEG). After the proceeding before the ombudsman's office the claimant may waive the court conciliation proceeding (*Schlichtungsverfahren*) according to the CPC (Art. 79 para. 2 FIDLEG). Financial services providers have the obligation to join an ombudsman's office (Art. 80 FIDLEG).

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46 Cf. Art. 4 para. 1 lit. b CISO.

47 Cf. Bianchi / Bianchi / Wettstein *et al.* (FN 41), p. 100; FINMA FAQ-Structured Products of 10 September 2014, p. 1, available on <https://www.finma.ch/de/faq/#Order=1>, last visited on 3 March 2016.

6. Supervision and Exchange of Information (Arts. 90–91 FIDLEG)

(268) FINMA will monitor and enforce compliance with the requirements for the provision of financial services and the offering of financial instruments among the supervised financial services providers (Art. 90 para. 1 FIDLEG).

(269) FINMA, the new semi-public supervisory authority, the register of client advisers, the prospectus approval body, the ombudsman, and the FDF will be entitled to exchange information (Art. 91 FIDLEG).

7. Criminal Provisions (Arts. 92–94 FIDLEG)

(270) *Wilful* non-compliance with the code of conduct of the FIDLEG may result in a fine of up to CHF 100,000 (Art. 92 FIDLEG). In particular, it is punishable to wilfully (i) make wrong statements or omit material information concerning the information duties of Art. 9 FIDLEG, (ii) violate the duties to perform appropriateness and suitability checks according to Art. 11–16 FIDLEG substantially, or (iii) violate the rules on forwarding compensations of third parties according to Art. 28 FIDLEG (Art. 92 para. 1 lit. a–c FIDLEG). Negligent breaches of these provisions are not considered to be criminal offences.

(271) Furthermore, *wilful* breaches of the provisions regarding prospectuses and BIBs may be sanctioned with a fine of up to CHF 500,000 (Art. 93 para. 1 lit. a and b FIDLEG). Such violations will comprise (i) wrong or missing facts and information in the prospectus or BIB and (ii) violations of the prospectus duty (including proper drafting and the actual creation of the prospectus/BIB before the beginning of the public offer). A fine of up to CHF 100,000 may arise if the BIB is intentionally not made available before the subscription or conclusion of the contract (Art. 93 para. 2 FIDLEG). Negligent breaches of these provisions do not qualify as criminal offences.

(272) In addition, the illegal offering of structured products (*e.g.* a distribution to private clients without a BIB) will be sanctioned with a fine of up to CHF 500,000 (Art. 94 lit. a–b FIDLEG). Again, negligence is not punishable.

8. Final Provisions (Arts. 95–98 FIDLEG)

(273) In principle, the FIDLEG will become effective upon its entering into force. However, the following transitory provisions may apply (Art. 97 para. 1–4 FIDLEG):

i. The Federal Council can implement a transitional period for obtaining the education and training according to Art. 6 FIDLEG;
ii. client advisers which are subject to the registration duty according to Art. 30 FIDLEG must request registration within a transitional period of six months after the entering into force of the FIDLEG;
iii. financial services providers must join an ombudsman's office according to Art. 77 FIDLEG within a transitional period of six months after the entering into force of the FIDLEG;
iv. the provisions on the offering of financial instruments are subject to a transitional period of two years in case of (i) securities for which a public offer or an application for admission to trading on a trading venue has been made before the entering into force of the FIDLEG; or (ii) financial instruments that have been offered to private clients prior to the FIDLEG's entry into force.

The Federal Council may extend the deadline for securities according to Art. 97 para. 4 FIDLEG if this should be advisable due to a late entry into service of the approval body (Art. 97 para. 5 FIDLEG).

B. Key Differences to EU Regulations

(274) The new alignment of the European financial markets regulation after the financial crisis has led to a revision of MiFID, which resulted in MiFID II. MiFID II enhances the legal prerequisites for asset management and advisory services. It also specifies the minimal duties in case of execution only transactions. Finally, it restrains the possibilities to accept distribution fees, retrocessions, and similar benefits from third parties. Besides, the duties of the producers of financial instruments are largely harmonised in Europe. The European Prospectus Directive regulates that securities may only be offered publicly or admitted to a regulated market if a respective prospectus has been previously published.

(275) MiFID II differs from the FIDLEG amongst others in the following key points:

i. prospectuses are approved by the national supervisory authorities and not by a separate approval body;
ii. it requires an *ex ante* prospectus approval, whereas the proposed FIDLEG provides the possibility of an *ex post* approval for some financial instruments (*e.g.* bonds);
iii. it requires pure investment advisers to obtain a regulatory approval, whereas the proposed FINIG and FIDLEG require only compliance with the code of conduct (and a registration by Swiss domiciled "external" and non-Swiss "internal" and "external" client advisers);
iv. it restricts execution only orders of retail clients to non-complex financial instruments, whereas the proposed FIDLEG allows private clients execution only orders for any financial instruments, regardless of their qualification as complex or non-complex;
v. it allows member states to introduce the requirement to establish a branch (for third-country cross-border providers), whereas the proposed FIDLEG, in principle, does not;
vi. it does not subject all types of financial services but only asset management and investment advisory to the regime on inducements. However, the regime applicable to inducements is stricter than in the FIDLEG; *e.g.* under MiFID II, inducements are absolutely prohibited in the context of discretionary mandates;
vii. it provides for a distinction between dependent and independent financial services; whereas this concept has been deleted in the FIDLEG in sequence to the consultation process; and
viii. it stipulates product governance rules; the FIDLEG does not require a regulatory product governance process.

(276) In particular, strong opposition can be expected where the proposed FIDLEG rules exceed the MiFID II standards and in particular on the regime for enforcement of civil claims which proves to be very client/plaintiff-friendly. Furthermore, it remains to be seen to what extent Swiss politicians will support the government's intention to achieve full equivalency and whether the goal of full equivalency will mean equivalent in principle or on a rule-by-rule basis.

C. What Swiss and Foreign Market Participants Need to be Aware of

1. Swiss Market Participants

(277) *Services*: Swiss financial services providers will have to consider the following key points:

i. All types of asset managers (including regular asset managers[48]; but not investment advisers) will become subject to prudential supervision;
ii. Swiss domiciled "external" investment advisers will be subject to a registration duty;
iii. the new laws' conduct rules will be applicable to all financial services providers including investment advisers;
iv. the distributor license for distributors of collective investment schemes will be abolished and replaced by the registration duty for individual client advisers or license as regular asset manager or higher license;
v. how to implement the appropriateness and suitability rules;
vi. how to handle the client segmentation;
vii. elaborating a strategy in connection with extended rules on inducements;
viii. preparation for ensuring the new, more extensive client information and disclosure duties; and
ix. ensuring effective dispatch of the offering documentation (*e.g.* BIBs) to private clients.

(278) *Products:* Swiss financial instruments providers should be aware of the following issues:

i. New rules concerning the prospectus for financial instruments;
ii. preparation of BIB templates;
iii. preparation of marketing material templates;
iv. implementation of solutions for the efficient production and update of product documentation and marketing material; and

48 Abegglen Sandro/Huber Andrea, A Changing Landscape – A Guide to Regulatory Developments in the Distribution of Retail Investment Products, Herbert Smith Freehills, November 2012, p. 38; Abegglen Sandro/Bianchi François M./Bianchi Luca, Neue Finanzmarktarchitektur: Auswirkungen auf das Fonds- und Asset Management-Geschäft, B2B 2015/53, p. 13.

v. in the institutional market space, the certain trend to less regulated and less costly products (such as investment foundations or actively managed certificates (AMCs)) will continue[49].

2. Foreign Market Participants

(279) *Services*: Foreign financial services providers will have to consider the following key points:

i. Registration duties for client advisers of foreign financial services providers;
ii. key points for Swiss financial services providers (see above) , including compliance with the Swiss conduct rules; and
iii. in connection with the preceding point, elaborating a gap analysis regarding the divergences of the (familiar) code of conduct rules under EU regulations from those under Swiss regulation.

(280) *Products*: Foreign financial instruments providers should be aware of the following issues:

i. New rules on the prospectus for financial instruments that are offered in Switzerland;
ii. preparation of BIB templates for Switzerland; and
iii. key points for Swiss financial instruments providers (see above).

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49 Abegglen/Bianchi/Bianchi (FN 48), p. 13; Bianchi Luca, The Rise of Actively Managed Certificates, CapLaw 2015/2, p. 23; Abegglen Sandro/Bianchi Luca/Hochstrasser Thomas, The Launch of the Real Estate Investment Foundation, CapLaw 2015/4, pp. 5 *et seq.*

VI. Anti-Money Laundering – AMLA

A. Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendations of 2012

(282) In February 2012, the FATF published its revised international standards concerning the combating of money laundering and terrorist financing (FATF Recommendations).

(283) Namely as a consequence of the FATF Recommendations and in view of the forthcoming mutual evaluation of Switzerland to be conducted by the FATF in spring 2016, over the past 18 months, Switzerland has implemented, amended and enacted far-reaching laws, regulations and additional measures to further increase its combat and prevention of money laundering and terrorist financing. The implemented laws, regulations and additional measures further enhance the already strict Swiss regulatory framework on the prevention of money laundering and include preventive measures under administrative law (amended AMLA, newly implemented AMLO, revised AMLO-FINMA), repressive measures under criminal law (Art. 305ter para. 2 PC) and law enforcement, international cooperation measures (Art. 42 FINMAG) as well as important, so-called minimum standard soft law regulations (CDB 16). Notably, not only financial institutions but also service providers outside the financial services industry such as, *e.g.*, dealers (*Händler*), are affected by the new, respectively, amended regulation.

(284) Switzerland has been a (founding) member of the intergovernmental organization FATF since the latter's creation in 1989. As a consequence of the FATF Recommendations, on 12 December 2014, the Swiss Parliament approved the Federal Act for Implementing the Revised FATF Recommendations which subsequently entered into force in two stages on 1 July 2015 and 1 January 2016, respectively. The amended provisions that were enacted per 1 July 2015 are contained in the CO, the CISA and the FISA, while on 1 January 2016 amendments to the AMLA, the CC, the PC, the ACLA and the DEBA as well as the CDB 16 (replacing the CDB 08) entered into force. Hence, the aforementioned implementing Federal act modifies a variety of legal and regulatory areas; the most important of which are being discussed in more detail below.

B. AMLA-Related Regulatory Amendments of Swiss Anti-Money Laundering Framework

1. Overview

(285) In a nutshell, the most considerable amendments to the Swiss anti-money laundering regulatory framework that entered into force on 1 July 2015, respectively, 1 January 2016, affect the following areas:

i. inclusion of "serious tax crimes" as predicate offence to money laundering;
ii. improved transparency of not stock exchange listed legal entities having issued bearer shares;
iii. stricter rules on the identification of the beneficial owner of (not stock exchange listed) legal entities (so-called "controlling person");
iv. extended qualification of politically exposed persons (PEP);
v. implementation of due diligence obligations relating to cash payments to dealers (*Händler*); and
vi. modifications of regulation on SARs.

(286) Together with the AMLA, its implementing ordinances AMLO (replacing the former PFIO) and AMLO-FINMA were revised as well. Also, the CDB 08 was brought in line with the revised AMLA regulation and newly put into force per 1 January 2016 as CDB 16. Details on the CDB 16 can be found further below under Section VI.D.

2. Improved Transparency of not Stock Exchange listed Legal Entities having issued Bearer Shares

(287) Based on the FATF Recommendations, countries are requested to implement measures to identify the beneficial owners of legal entities and enhance the transparency of unlisted companies that have issued bearer shares (in Switzerland, some 50,000 respective legal entities still exist). According to the new rules which entered into force on 1 July 2015, an acquirer of bearer shares in a privately held Swiss stock corporation must report the share purchase to the respective stock corporation (or, if so provided, to an instructed financial intermediary) within one month following the purchase. Failure to comply with such reporting obligations leads to the suspension of the respective shareholder's membership rights (including financial rights). This reporting obligation is not linked to any specific threshold and companies listed on a stock ex-

change (also a stock exchange abroad) as well as subsidiaries of listed companies are excluded from such regulation. Also, bearer shares having been issued as book-entry securities according to the FISA are not subject to the aforementioned reporting obligation.

(288) The stock corporation (as well as the limited liability company), in turn, must register the holders of its bearer shares in the company's bearer share register, which must be accessible within Switzerland at any time. Further, the bearer share register and all related records are subject to a mandatory retention period of ten years. Thus, although legally still in existence, bearer shares of Swiss stock corporations are treated similarly to registered shares. Therefore, we believe it is fair to say that Swiss bearer shares have, factually, disappeared.

(289) Notably, together with the above revision the former concept allowing an operating company to be considered the beneficial owner of its (or third party) assets was dropped. Since 1 January 2016, only natural persons may be considered (and recorded in the AML files, *e.g.* Form A) as beneficial owners (see also Art. 27 para. 2 CDB 16).

3. Implementation of Stricter Rules on the Identification of Beneficial Owners

(290) The FATF identified some unresolved deficiencies under Swiss law during its last mutual review in 2005. Among these deficiencies, the establishment of the identity of beneficial owners was criticised. As a consequence thereof, the law now expressly stipulates in its key provision on the identification of the beneficial owner (Art. 4 para. 1 AMLA) that the financial intermediary has to identify the beneficial owner with the due diligence required by the circumstances. The financial intermediary must obtain a written declaration indicating the natural person who is the beneficial owner, particularly in cases where the contracting party is not the beneficial owner or where there is doubt in this respect, and always when the contracting party is a domiciliary company or a legal entity that is operationally active (Art. 4 para. 2 AMLA). Hence, notably, the obligation to establish the beneficial owner's identity newly extends to operating legal entities as well in that the so-called "controlling person"*(Kontrollinhaber)* must be identified. According to Art. 2a para. 3 AMLA are considered controlling person(s) of an operationally active

legal entity natural persons who are in control of the legal entity in that they, directly or indirectly, alone or in bilateral arrangement with third parties, are participating in the legal entity with at least 25 per cent of its capital or its voting rights or control it in another way. If these cannot be determined, the identity of the top member of the governing body of the legal entity must be identified (see also Section VI.D.2 below). As mentioned above, to establish the identity of their beneficial owners, unlisted legal entities having issued bearer shares were required to implement a shareholders register stating the beneficial owners, *i.e.* his/her first name, surname and address (Art. 697i CO), see Section VI.B.2 for details.

(291) The exception regarding the identification of beneficial owners applies to cases where the contracting party is a stock exchange listed company or an affiliate in which such a company has a majority stake (Art. 4 para. 1 in fine AMLA).

4. Qualified Tax Offences as Predicate Offence to Money Laundering

(292) As of 1 January 2016, the scope of Art. 305bis PC has been extended to qualified tax offences, so-called "aggravated tax misdemeanour" (Art. 305bis para. 1bis PC). An "aggravated tax misdemeanour", often also labelled as "qualified tax crime" or "serious tax offence" is considered tax fraud pursuant to the FDTA and the FAHT against the Swiss Confederation or a Swiss canton or municipality. Tax fraud as defined under the relevant tax regulation is committed by tax evasion in use of false, falsified or substantially incorrect documents bearing an increased evidentiary relevance. In order to qualify as qualified tax offence as per the revised PC, the amount of evaded taxes in a given taxation period must exceed CHF 300,000 (Art. 305bis para. 1bis PC). Such offences include offences in the areas of individual income tax and wealth tax and in case of legal entities profit and capital tax. Furthermore, real property gains tax is subject to such offences while cantonal inheritance and gift taxes are excluded from the regulation.

(293) Aggravated tax misdemeanour as predicate offence for money laundering can also be committed with respect to taxes payable outside Switzerland; provided that (i) the relevant conduct constitutes an offence in the

relevant country, (ii) represents a tax fraud from a Swiss law perspective and (iii) the evaded tax amount exceeds the equivalent of CHF 300,000. Hence, tax offences committed to the detriment of a tax authority abroad may also qualify as predicate offences to money laundering in Switzerland if the respective act represents an offence in the foreign jurisdiction the tax authorities of which are affected by the offender. The amount of evaded taxes is calculated in accordance with the laws of the jurisdiction where the tax fraud occurred.

(294) Regarding the enhanced due diligence duties of financial intermediaries in connection with qualified tax offences, we would expect that, based upon risk considerations, no enhanced due diligence will be required in relation to assets that are subject to an automatic exchange of information (AIE). In the context of a comparable constellation, namely in the context of the enhanced due diligence duties under the (non-implemented) white money strategy, the Federal Council for example noted that such enhanced duties "should be effective in relation to clients from countries where the future agreements on the Automatic Exchange of Financial Account Information (MCAA) do not apply. This means that they will not be applicable to clients whose country of origin has an MCAA with Switzerland. This also includes US clients, as FATCA effectively has an MCAA. The due diligence requirements are not applicable to clients who are resident in Switzerland for tax purposes"[50].

(295) The newly implemented predicate offence of aggravated tax misdemeanour does not apply retroactively. Thus, only aggravated tax misdemeanours committed as of 1 January 2016 are considered predicate offences for money laundering. Qualified tax offenses with respect to assets that came under the control of a financial intermediary prior to that date may be relevant for anti-money laundering purposes if committed after 1 January 2016.

(296) The extension of the scope of predicate offences for money laundering further entailed an amendment to the scope of Art. 305ter para. 2 PC to enable financial intermediaries to file an SAR with MROS in case of observations indicating a qualified tax offence (see Section VI.B.6 below).

50 Cf. <https://www.estv.admin.ch/estv/en/home/allgemein/aktuell/nsb-news_list.msg-id-57552.html?>, last visited 21 April 2016.

5. Inclusion of Domestic PEPs and International Organizations' PEPs

(297) Pursuant to the FATF Recommendations, for due diligence purposes, there should be an obligation to identify domestic PEPs, foreign PEPs, and persons exercising or having exercised an important function at or on behalf of international organizations' PEPs.

(298) Pursuant to revised Art. 2*a* AMLA, a formal definition of national PEPs has been included on the level of the Federal law. All financial intermediaries shall equally apply the PEPs regulations in terms of risk assessment. Relatives of PEPs are in a similar way concerned by such rules. Since 1 January 2016, the following categories of persons shall be considered as PEPs: (i) persons who are or have been entrusted with governing public functions abroad; (ii) persons who are or have been entrusted with governing public functions in Switzerland; (iii) persons exercising an important function within an international sports federation. In case of Swiss PEPs, the status as a PEP lapses 18 months after the retirement from the relevant function. Such pre-defined period does not apply to foreign PEPs and PEPs from international organizations.

6. Modification of Regulation on SARs

(299) Art. 305ter para. 2 PC has been amended to grant financial intermediaries the right (*Melderecht*) to file an SAR with MROS in case of observations indicating that assets may originate from a crime, are related to an aggravated tax misdemeanour or are under the control of a criminal organization. Such right must be distinguished from the *duty* to file an SAR with MROS pursuant to Art. 9 of the AMLA (*Meldepflicht*).

(300) The revised regulation relates to the following points: (i) period of 20 working days (instead of five) for MROS to analyse the SAR and decide whether it will refer the case to the criminal prosecution authorities; (ii) the assets are, as a rule, frozen if and when MROS notifies the financial intermediary that it will pass the case on to the criminal prosecution authorities (immediate freezing is still required, however, where the assets of a person are affected which occurs on a list prepared by the Federal Department of Finance and forwarded to the financial intermediary by FINMA, the Federal Gaming Board or the financial intermedi-

ary's SRO); (iii) as a principle, the client(s) affected shall not be informed of the communication of the suspicions vis-à-vis MROS.

7. Involvement of a Financial Intermediary in Cases of Cash Payments in Excess of CHF 100,000 for Movable or Immovable Property

(301) While an absolute ban of cash payments in excess of CHF 100,000 was refused by the Parliament, the Swiss legislator decided to impose due diligence obligations on natural persons and legal entities trading professionally in movable assets or real estate that receive cash payments exceeding CHF 100,000 ("dealers" in the sense of Art. 2 para. 1 lit. b of the AMLA, *i.e.* natural persons or legal entities dealing professionally in goods and receiving cash payment in the context of a commercial transaction such as, *e.g.* art dealers, jewellers or real estate dealers). The due diligence obligations envisaged include verification of the identity of the contracting party, determination of the beneficial owner, preparation and safekeeping of documents, clarification of the background and purpose of the deal in cases where a specific transaction seems unusual or where there are grounds to suspect that the cash used to pay originates from a felony or an aggravated tax misdemeanour, and the obligation to report well-founded suspicions (Art. 8a paras. 1 and 2 and Art. 9 para. 1bis of the AMLA). To avoid the foregoing due diligence obligations, dealers may choose to have payments made through a financial intermediary instead of receiving cash payments exceeding CHF 100,000 themselves (Art. 8a para. 4 of the AMLA). Dealers are required to appoint auditors to verify compliance with the aforementioned obligations (Art. 15 of the AMLA).

(302) At its meeting of 11 November 2015, the Federal Council adopted the AMLO that entered into force on 1 January 2016. The new duties of care, due diligence obligations and reporting duties for dealers set out in the AMLA are further detailed in the new AMLO. They will be applied when dealers accept cash payments of more than CHF 100,000 in the course of trading activities. Also, the former PFIO was incorporated into the AMLO.

C. Further Amendment to the Anti-Money Laundering Act (Extension of Due Diligence Obligations with respect to Taxation)

(303) Cross-border tax evasion should be prevented with the help of the new global standard for the automatic exchange of information (AEI). To date, almost 100 countries, including all major financial hubs and Switzerland, have declared their intention to adopt the standard. Switzerland welcomes the new international standard, to which it contributed actively. It allows for a level playing field in the competition between financial centres, as these regulations apply to all, and is an important instrument in international efforts to combat tax evasion. Domestic bank client confidentiality will not be affected by the implementation of the new global standard.

(304) On 27 May 2015, Switzerland and the EU signed an agreement regarding the introduction of the global standard for the automatic exchange of information in tax matters. Switzerland and the 28 EU member states intend to collect account data from 2017 and exchange it from 2018 once the necessary legal basis has been created. By implementing the global standard, Switzerland and the EU will make an important contribution to the prevention of tax evasion.

(305) On 5 June 2015, the Federal Council submitted the dispatch on the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters and the dispatch on the required legal basis for implementing the standard for the automatic exchange of information in tax matters to the Parliament. The National Council has approved the project on 16 September 2015 and the Council of States on 2 December 2015.

D. CDB 16

1. General Overview

(306) The SBA's Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 16) has equally entered into force on 1 January 2016 (as well as the revised anti-money laundering regulations implemented by the various SROs on their members, mirroring the

revised AML provisions). While the CDB started as an agreement among almost all Swiss banks and, therefore, can be considered soft law, the CDB today represents the minimum regulatory standard of compliance with the most important due diligence and duty of care obligations (Art. 35 AMLO-FINMA) of financial intermediaries and, therefore, is one of the most important self-regulatory frameworks within the Swiss anti-money laundering regulation. According to Art. 2 para. 1 of the CDB 16 it "lays down binding rules for good conduct in banking in accordance with the code of professional ethics. It is designed to give specific effect to certain points of due diligence governed by the Anti-Money Laundering Act (Art. 3 to 5 AMLA) and the concept of "the diligence that can be reasonably expected under the circumstances" in accepting assets according to Art 305ter of" the Swiss Penal Code (PC). Almost equally relevant is the SBA's commentary to the CDB 16 that was published in November 2016 (Commentary). It serves as the SBA's guideline to interpretation of the CDB 16 while it does not form part of the CDB 16 itself. It should be taken into account when interpreting the CDB 16 (Art. 3 CDB 16).

(307) The Commentary summarises as follows (see p. 5 of the Commentary): "The revision of the FATF Recommendations and the legislative changes resulting from the revision of AMLA made it necessary to introduce new concepts and provisions, mainly with regard to establishing the identity of beneficial owners. The new term "controlling person" has also been added in this context and a new Form K has been created for establishing the identity of the controlling person of operating legal entities, partnerships, foundations and trusts not quoted on the stock exchange. Forms K (controlling person), I (insurance wrapper) and S (foundation) are now appended to the CDB in addition to the familiar Forms A and T. It was decided that Form R would not be included in this version of the CDB." (Form R is the form used by attorneys-at-law for accounts holding client assets).

(308) In comparison to its former version (CDB 08), the CDB 16 also provides for a new, simplified and more comprehensive structure split into chapters, sections and articles.

(309) The revised regulation summarised above focuses on the following areas:

2. Concept of the "Controlling Person"

(310) The concept of the controlling person has been newly implemented in the CDB 16. Under former versions of the CDB, beneficial owners of actively operating companies were not to be determined. The CDB 16 now states to undertake the determination of "beneficial owners of an operating legal entity [which] are defined as the natural persons who ultimately control the legal entity or who are effectively in control of it by any discernible means" (see p. 15 of the Commentary). Thus, the term of the "controlling person" addresses the beneficial owner of a not stock exchange listed, operating legal entity who, in principle, must be a natural person (certain exceptions apply, see Arts. 22–26 CDB 16) and directly or indirectly ultimately control the legal entity. The Commentary's appendix presents 11 practical examples as to under what circumstances what type of "look through" by the use of Form A and/or Form K is adequate, in particular as regards "multi-stage holding structures".

(311) The cascade in determining the controlling person is threefold: (i) if an operating legal entity has one or more controlling person(s) directly or indirectly holding voting rights or capital shares of 25% or more in such entity, these are to be identified in writing by using the newly implemented Form K (forming an annex to the CDB 16); (ii) if no such controlling persons exist, the natural persons who exercise control over the legal entity by other discernible means shall be identified by using either Form A and/or Form K; and (iii) if no controlling persons according to the foregoing can be determined, the top member of the governing body of the legal entity should be identified as a substitute for the controlling persons (Art. 20 para. 1, 3 and 4 CDB 16). The Commentary contains further explanation of the exercise of determination of the controlling person, see there pp. 17 *et seq.*

3. Holding and real estate companies

(312) As a rule, holding companies, *i.e.* "companies that hold a majority stake in one or more companies engaging in trading, manufacturing or other commercial operations and whose purpose is not primarily the management of third party assets" (Commentary p. 27) do not qualify as domiciliary companies in the sense of CDB 16. However, as an exception from the foregoing rule, holding companies "that merely combine and/or

manage the various assets (securities, real estate, commercial operations, etc.) of a family or another group of specified individuals or have the sole objective of enabling dividend distributions to be made to shareholders are to be regarded as domiciliary companies" (Commentary p. 27) and, consequently, the financial intermediary is required to determine the beneficial owner(s) on Form A.

4. New forms

(313) As Annexes to the CDB 16, the new Forms I (insurance wrappers), K (controlling persons of operating, not stock exchange listed legal entities), S (foundations) and T (trusts) were implemented, respectively, considerably adapted.

5. Identification of Ordinary Partnerships

(314) As a new requirement, the identity of at least one of the partners of ordinary partnerships has to be verified. The incumbent rule, according to which the verification of the identity of the designated signatory is sufficient, will continue to apply only in exceptional cases. For all partners that are beneficial owners of assets subject to the business relationship, and whose identity was not verified in the first place, a corresponding written declaration such as a Form A is now required.

6. FINMA Circular 2016/07 "Video- and Online-Identification"

(315) On 17 March 2016, FINMA published its circular 2016/07 containing additional regulation facilitating video and online client identifiaction. The circular came into force on 18 March 2016 and summarizes FINMA's specifications on AML due diligence requirements for digital businesses allowing client onboarding via digital measures. The facilitated applications are subject to certain particular requirements such as life-streaming between the contracting party and the financial intermediary, recording of the live-stream or special guidelines to be set by the financial intermediary.

(316) The circular's chapters III and IV regulate digital specifications in cases of video or online client identification and chapter V addresses the determination on the beneficial owner in such circumstances. The proce-

dures may be outsourced in accordance with Arts. 28 and 29 AMLO-FINMA.

(317) The circular applies to institutions directly supervised by FINMA (via the AMLO-FINMA) as well as, *per analogiam*, to the pertaining provisions of the CDB 16 and the regulations set by the SROs.

VII. Collective Investment Schemes – CISA

A. Amendments to the CISA as Part of the Introduction of the FIDLEG and FINIG

(318) With effect as per 1 March 2013, a major revision of the Federal Collective Investment Schemes Act (CISA) entered into force. The 2013 CISA revision led to a fundamental change amongst other aspects also in terms of the regulation of distribution of foreign collective investment schemes (CIS) into Switzerland and within Switzerland, in so far as the formerly available private placement exemptions under which foreign CIS could be marketed to certain types of qualified investors without any regulatory implications whatsoever, be it on product level or on distributor level, has been abandoned and replaced by a stricter regime. In particular, the distribution of foreign CIS to qualified investor in Switzerland newly requires the appointment of a Swiss representative and paying agent on product level as well as compliance with certain disclosures and code of conduct rules at the point of sale. In addition, the respective distributor must either be licensed by FINMA or be subject to at least equivalent foreign supervision in its home jurisdiction.

(319) As outlined in Section I "From Old to New: An Overview", the CISA will face substantial carve-outs but will continue to exist and to provide for certain product-specific regulations even after the entry in force of the FINIG and FIDLEG. It is, however, important to note that there will not only be carve-outs but also important material changes to the CISA in relation to introduction of the FINIG and FIDLEG – at least as per the current wording of the proposed drafts. The following material changes may be particularly noteworthy:

1. Abolition of the Status of a FINMA Licensed Distributor

(320) With the entry in force of the FINIG, distributors of CIS will no longer be subject to a licensing requirement. This applies both in context of distribution of CIS to non-qualified as well as to qualified investors. Instead

distributors will be subject to the code of conduct rules and, potentially, to the client adviser registration requirement of the FIDLEG.

2. Private Individuals with a Written Advisory Agreement with a Regulated Financial Intermediary are deemed Qualified Investors

(321) With the entry in force of the FIDLEG, any type of professional client (including institutional clients) as per the FIDLEG definition will, by way of reference in Art. 10 para. 3 draft CISA, automatically be deemed to be a qualified investor as per the CISA definition. It is, however, important to note that the qualified investor definition as per the CISA is broader than the professional client definition as per the FIDLEG. In particular, Art. 10 para. 3ter draft CISA provides that private individuals with a written asset management or advisory agreement with regulated financial intermediaries are also deemed qualified investors pursuant to the CISA (unless they opt-in), while such individuals are not deemed professional clients under the FIDLEG. In fact, the protection granted through the applicable code of conduct rules of the FIDLEG – which only fully apply if such individuals are deemed private clients for the purposes of the FIDLEG – is the very reason why a lesser level of additional protection is deemed to be required under the CISA in case such individuals are advised or their assets managed by a regulated financial intermediary.

(322) In addition, there will be the following changes as compared to the current regime: As per today's CISA, only clients with a written asset management agreement with regulated financial intermediaries or certain qualified regular asset managers are automatically deemed qualified investors (unless they opt-in). The same does, however, not yet apply in case of a written advisory agreement. With the introduction of the FINIG the latter will be changed and private individuals with a written advisory agreement may also benefit from getting access to a larger product universe. Further, the fact that all (currently unregulated) regular asset managers will newly be subject to a licensing requirement under the FINIG will certainly enlarge the scope of application of this automatic re-qualification.

3. Swiss Representative and Paying Agent only Required in Case of Retail Distribution and/or Distribution to HNWI

(323) As outlined in note (315) above, distribution to qualified investors in Switzerland requires since the 2013 CISA revision the appointment of a Swiss representative and paying agent on product level.

(324) With the introduction of the FINIG this change of regime will be reversed to a large extent. In the future, the appointment of a Swiss representative and paying agent will only be required in case of distribution to non-qualified investors (retail investors) and/or in case of distribution to high-net-worth individuals (HNWI) – in regards of the latter irrespective of whether the HNWI opted-out and required to be treated as qualified investor. Distribution to all other types of qualified investors as per the CISA (respectively, by way of reference, professional clients as per the FIDLEG definition) will be exempt from the Swiss representative and paying agent requirement. This affects, in particular, distribution to public pension schemes, companies with professional treasury operations and private individuals under a written advisory or asset management agreement with a regulated financial intermediary (unless they opt-in). This return to the *status quo ex ante* deserves merit in our view given that the existence of a Swiss representative and paying agent offered limited benefits in relation to qualified investor distribution at large costs.

(325) The question that remains, however, is whether the new possibility granted to all types of professional (and even institutional) clients to opt-in and require to be treated as private clients (both as defined in the FIDLEG) will lead to an automatic re-qualification of such client to a status as a non-qualified investor under the CISA and, thus, trigger these requirements on product level. If so, it will become more difficult to ensure that only eligible investors are targeted and accepted as investors in a CIS given that any type of investor may at any time declare an opting-in and therefore become non-eligible in relation to qualified investor funds. Another follow-up question is what would happen in case a (qualified) investor declares to opt-in at a time when such investor is already invested in qualified investor fund (*i.e.* after subscription). In our view, such investor may remain invested and no appointment of a Swiss paying agent and representative is required in such case for as long as such investor had the status of a qualified investor during the entire distribution and subscription process.

4. Swiss Jurisdiction in Case of Distribution to Retail Investors and/or HNWI

(326) The current wording of Art. 125 CISA provides that the place of performance in relation to CIS being distributed in Switzerland is at the domicile of the Swiss representative. Particularly in relation to retail distribution, FINMA's practice is, however, to additionally require that there is a forum at the domicile of the Swiss representative or else FINMA would not approve the foreign fund for retail distribution. The existence of a sufficient legal basis for this FINMA practice is controversial under current law.

(327) In relation to this it is noteworthy that SFAMA has published on 5 March 2015 a FINMA-acknowledged model annex "information for investors in Switzerland" that is considered as stipulating the minimum content of the required Swiss disclosures in the fund documentation in case of retail distribution. This model annex, *inter alia*, contains the following model disclosure language: *"In respect of the units distributed in and from Switzerland, the place of performance and jurisdiction is the registered office of the Representative."* Given that the same model annex stipulates that the very same wording should be applied *mutatis mutandis* in case of distribution to qualified investors, the question has arisen whether the above FINMA practice had even been extended to qualified investor funds distributed in Switzerland.

(328) With the introduction of the FINIG, Art. 125 CISA shall be amended and shall (i) explicitly contain a legal basis for the aforementioned FINMA practice in relation to retail distribution and (ii) provide investors with a choice of jurisdiction either at the domicile of the Swiss representative or at their own domicile. Given that this provision is integrated within the section governing the Swiss representative, we would be of the view that this jurisdiction clause would not apply in case no Swiss representative needs to be appointed (*i.e.* in case of distribution to any type of qualified investor other than HNWI). If so, this would also clarify the question outlined in note (324) above.

B. Total Revision of the FINMA Collective Investment Schemes Ordinance (CISO-FINMA)

(329) The revised FINMA Collective Investment Schemes Ordinance (CISO-FINMA) has entered into force on 1 January 2015 (transition period until 31 December 2015, in some cases until 31 December 2016).

(330) This revision aimed to enhance investor protection, maintain market access in light of the standards that have been changed at the national and international level and oblige license holders to ensure that appropriate and efficient risk management is in place. In particular, the revision, *inter alia,* includes the following rules:

- The rules on the delegation of fund manager's duties to third parties are governed principle-based by the revised CISO-FINMA in detail. The former practice was maintained but has been amended in certain aspects to allow a more flexible delegation considering the corporate and fund law legislation. These rules shall also apply to asset managers of collective investment schemes and representatives of foreign collective investment schemes. The new rules on the delegation in the CISO-FINMA abrogate the FINMA Circular 2008/37 "Delegation by fund management companies / SICAVs".
- The so-called commitment-approach II for the measurement of risk connected with the use of derivatives has been fundamentally revised in order to close the gap to the pertinent European regulation, especially the CESR-Guideline 10–788 on Risk Measurement and the Calculation of Global Exposure and Counterparty Risks for UCITS. Risk calculation excludes the calculation of risks according to the risk categories market, credit and currency risks.
- To minimise the risks involved in managing securities, rules on the requirements for the management and custody of securities have been introduced that comprise all OTC derivative investment techniques and business transactions. Particularly, securities must be highly liquid, have trading day values and be issued by a creditworthy issuer who is independent of the counterparty.
- The revised rules explicitly provide for the possibility to set up master feeder structures.
- Custodian banks have to introduce internal guidelines on controlling fund management companies and SICAVs.

- The revised CISO-FINMA sets out the details on the calculation of the *de minimis* threshold under which asset managers – which only market collective investment schemes to qualified investors – do not fall within the scope of the CISA.
- The new rules set out in the Swiss Code of Obligations for companies on accounting, valuation, accountability and publication requirements are reflected in the CISO-FINMA for collective investment schemes accordingly.

VIII. Insurance – ISA

A. Current Regulation of the Private Insurance Sector

(331) The two most important pieces of legislation governing the private insurance sector are the Insurance Supervision Act (ISA), which regulates the supervision of insurance companies and insurance brokers (*Versicherungsvermittler*) and is designed to protect the insured persons from abuses and the insolvency risks to which insurance companies are exposed and the Insurance Contract Act (ICA), which contains provisions relating to insurance contracts.

(332) In December 2012 and March 2013, the chambers of the Swiss Parliament decided not to deliberate on a bill proposed by the Federal Council on an overall reform of the ICA, which, *inter alia*, aimed at the improvement of the insured persons' legal position. The Parliament mandated the Federal Council to draft a bill for a partial reform of the ICA. Thus, the proposal for an overall reform which had been in preparation for a decade was dropped (the respective expert commission was already established in 2003).

B. Impact of the New Regulation on the Private Insurance Sector

(333) The FIDLEG, as proposed with the Federal Council's Message, will have two major impacts on the insurance sector: Firstly, certain life insurance products will fall under the definition of financial instruments (Art. 3 lit. b no. 6 FIDLEG) and, as a consequence, life insurance companies providing financial services in relation to such products will qualify as financial services providers in terms of Art. 3 lit. e FIDLEG and, thus, be subject to the relevant FIDLEG rules (see Section VIII.B.1 below). Secondly, the FIDLEG involves a partial revision of the ISA concerning the rules applicable to insurance brokers (see Section VIII.B.2 below).

(334) The Swiss Insurance Association (SVV) has opposed and continues to oppose the application of the new regulation to insurance companies. In the opinion of the SVV, additional measures to protect the insured persons should rather be integrated into the existing sector-specific regulation.

1. Qualification of Certain Life Insurance Products as Financial Instruments

(335) The proposed FIDLEG is intended to apply, *inter alia*, to all producers and providers of financial instruments (Art. 2 para. 1 lit. c FIDLEG). According to Art. 3 lit. b no. 6 FIDLEG, the definition of financial instruments includes redeemable life insurance policies (*rückkaufsfähige Lebensversicherungen*) with price-dependent benefits and settlement values as well as capital redemption operations (*Kapitalisationsgeschäfte*) and tontines (*Tontinengeschäfte*) and, thus, producers and providers of such insurance products will be subject to the FIDLEG.

- *Redeemable life insurance policies with price-dependent benefits and settlement values* are life insurance policies that include a savings process which depends on the performance of financial instruments, other assets or indices. Whether the client may select those instruments is irrelevant. Rather, it is decisive whether the client bears an investment risk. Accordingly, in particular the classical life insurance products where the savings capital is subject to a fixed rate of interest are not covered.
- A *capital redemption operation* is a contractual agreement between a life insurance company and its client regarding the takeover of client assets and their management in accordance with a mathematical model. The agreement ends on an agreed date or with the client's death. In contrast to conventional life insurance products, capital redemption operations involve no or very limited biometric risks (occupational disability, invalidity, death or survival), *i.e.* such products have a predominant investment character and are therefore closer to a bank product than to a life insurance product (for this reason, such products may not be labelled as insurance policy).
- In case of *tontines*, a group of persons purchases a life-long annuity (*lebenslange Rente*). Annually, the insurance company distributes the total amount of those annuities among the persons that are still

alive. As the number of beneficiaries decreases over time, the amount of the annuity per surviving insured person increases. Finally, one single person receives the entire amount of annuities. Thus, tontines have a certain lottery character.

2. Amendments to the ISA regarding Insurance Brokers

a) Insurance Brokers

(336) Insurance brokers are persons, irrespective of their designations, offering or entering into insurance policies (Art. 40 para. 1 ISA). Swiss supervisory law distinguishes between two types of insurance brokers, namely "tied" and "non-tied" insurance brokers. Non-tied insurance brokers (*ungebundene Versicherungsvermittler*) are those who have a relationship of trust with the insured persons and act in their interest (Art. 40 para. 2 ISA). All other insurance brokers are deemed to be "tied" (*gebundene Versicherungsvermittler*; Art. 40 para. 3 ISA).

b) Duty to Register

(337) Under current law, non-tied insurance brokers are obliged to have themselves registered in the register of insurance brokers, a public register maintained by FINMA. For tied insurance brokers such registration is voluntary, *i.e.* they have the right, but not the duty, to have themselves registered if they fulfil the relevant requirements. Importantly, such registration does not lead to any prudential supervision by FINMA, which the Federal Council considered as a problem as, in the Federal Council's view, a duty to register without any ongoing prudential supervision may lead to an expectation gap among insured persons and may generate unjustified trust in the supervision of the activities of those subject to the duty to register.

(338) Under the proposed new legislation, the existing register of insurance brokers will be abolished and insurance brokers will be obliged to have themselves registered in the new register of client advisers in accordance with Arts. 30–36 FIDLEG and comply with the respective new code of conduct rules. Due to the fact that the new register will be available only to client advisers of financial services providers that are not subject to prudential supervision in Switzerland, the duty to register will only apply to non-tied insurance brokers. With regard to those insurance

brokers who are at the same time client advisers in terms of Art. 3 lit. f FIDLEG, the provisions of the FIDLEG will apply directly. The Federal Council may provide for exemptions from the duty to register (Art. 42 para. 3 ISA).

c) *Basic Training and Continuing Professional Development Duty*

(339) Under the revised ISA, insurance brokers must have sufficient knowledge of the code of conduct set out in the ISA and the necessary expertise required for performing their activities (Art. 43 para. 1 ISA). Insurance companies and insurance brokers shall define industry-specific minimum standards for basic training and continuing professional development. For insurance brokers for which no appropriate minimum standards exist, the Federal Council will define the basic training and continuing professional development requirements (Art. 43 paras. 2 and 3 ISA).

(340) Insurance companies shall ensure that their insurance brokers have the basic training and continuing professional development necessary for the service to be provided and that insured persons can obtain information on the basic training and continuing professional development of their insurance broker (Art. 44 ISA).

d) *Duty to Provide Information*

(341) Insurance brokers will be subject to a duty to provide information (Art. 45 ISA) analogous to the one according to Art. 9 FIDLEG. The existing duties to inform insured persons on the person with liability for negligence, errors or incorrect information relating to the insurance brokers' activities as intermediaries and on the processing of personal data will be maintained. In addition, advertising will have to be indicated as such (Art. 45 para. 4 ISA).

(342) In particular, insurance brokers will be required to inform the insured persons in a transparent manner on the services and insurance products offered and the associated costs. The compensation received by a tied insurance brokers for transactions, such as commissions or brokerage fees, does not qualify as cost and, therefore, does not have to be disclosed.

(343) As a rule, such information needs to be provided prior to the conclusion of a contract (Art. 45a ISA thus corresponds to Art. 10 paras. 1 and 5 FIDLEG).

e) Duties of Loyalty and Diligence

(344) Art. 45b of the revised ISA requires insurance brokers to comply with general duties of loyalty and diligence. The provision generally corresponds to Art. 8 FIDLEG. However, as tied insurance brokers only advise on the existing product shelf of their insurance companies, the best advice rule according to Art. 8 FIDLEG has been slightly modified. Thus, while insurance brokers are required act in the interests of the insured persons, the best advice rule only applies within the available product shelf.

f) Code of Conduct

(345) Insurance brokers shall determine the objectives and needs of the insured persons, or the persons to be insured, and check whether insurance products are appropriate for them before recommending them (Art. 45c para. 1 ISA). If an insurance policy is concluded at the insured person's request or if the information received is insufficient to assess the appropriateness of an insurance product, the insurance broker shall inform the insured person that no assessment of appropriateness will be performed (Art. 45c para. 2 ISA). If insurance brokers are of the opinion that insurance products are not appropriate for the insured persons, they shall advise them against these products before concluding any such insurance contracts (Art. 45c para. 3 ISA).

g) Compensation from Third Parties

(346) The provision regarding compensation from third parties (Art. 45d ISA) corresponds to Art. 28 FIDLEG. Thus, for non-tied insurance brokers a transparency requirement in relation to compensation received from third parties will be introduced, *i.e.* the proposed new legislation does not provide for a complete ban of the acceptance of such compensation. Art. 45d ISA does not apply to tied insurance brokers, due to the absence of a relationship of trust between them and their clients.

IX. Timeline and Key Issues to Observe

A. Timeline

(347) Under the currently envisaged timelines, the various new acts may move at different speeds and become effective at different times.

(348) The FINFRAG and its implementing ordinances (FINFRAV and FINFRAV-FINMA) entered into force on 1 January 2016. However, various transitional periods apply – (see N (82)–(85) and (138)–(142)) – that need to be monitored by market participants. Thus, the effective implementation of the FINFRAG provisions relating to FMIs and derivatives trading occurs in several phases.

(349) In relation to the FIDLEG and FINIG, the long expected Message (*Botschaft*) of the Federal Council to Parliament commenting the proposed wording of the acts for Parliamentary debate has finally been issued in November 2015. Both of these acts are/will be discussed and debated in Parliament in 2016 and, possibly, in 2017. On 17 February 2016, the competent Parliamentary Committee, the Economic Affairs and Taxation Committee (EATC) of the Council of States decided in an unanimous vote to start discussing the legislative proposals. However, the EATC announced that it reserves its right to substantially amend the draft bills and that it will require the FDF to provide suggestions for certain amendments (which is a novum in Swiss law making), and explanations on the consequences of introducing certain reductions of the regulatory requirements, particularly in relation to insurers and regular asset managers, prior to discussing the proposals in detail. Such first detailed discussion of the draft bills by the EATC occured in April 2016 which means that the *plenum* of the Parliament will not start related discussions prior to the Summer session 2016[51].

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51 On the whole, cf. <https://www.parlament.ch/press-releases/Pages/mm-wak-s-2016-02-17.aspx>, last visited on 3 March 2016.

(350) While officially it is still communicated that the FIDLEG and FINIG may become effective as per 2017/2018, the general view is that these acts will not enter into force prior to 1 January 2018 at the earliest. Both the FIDLEG and the FINIG will contain transitional periods as well. Regular asset managers, for example, need most likely not apply for a license until 2020. The changes to the FINMAG will become effective together with the relevant acts they are proposed together with.

(351) Market participants will be well advised to closely observe the developments and the debates around the new acts in- and outside Swiss Parliament in 2016 and 2017.

B. Key Issues to Observe

(352) Key issues to be aware of include, in particular, the following:

Supervision

i. Increased cross border exchange of information between *Swiss* and *foreign* authorities relating to market participants;
ii. creation of one or several new semi-public supervisory authorities for the supervision of regular asset managers, trustees and precious metal traders;
iii. non-compliance with new code of conduct rules by non-supervised *Swiss* or *foreign* financial services providers may lead to criminal sanctions and provide grounds for civil claims;

Financial Infrastructures and Derivatives Trading

iv. new licensing requirements for *domestic* FMIs/institutions: trading venues, operators of organised trading facilities, central counterparties, central securities depositories, trade repositories and payment systems;
v. new recognition requirements for *foreign* FMIs/institutions: trading venues, operators of organised trading facilities, central counterparties and trade repositories;
vi. new rules applicable to derivatives trading, e.g.: clearing obligation, reporting obligation, risk mitigation obligation and platform trading obligation;

Financial Institutions

vii. introduction of general licensing obligations for all institutions investing or managing third party assets on a professional basis;

viii. subjection of asset managers of Swiss occupational benefit schemes to the same supervision and licensing requirements as asset managers of collective investment schemes;

Financial Services, Code of Conduct Rules and Offering Documentation

x. new rules applicable to inbound cross-border business, in particular, that *foreign* financial institutions must comply with the same rules of conduct as Swiss financial institutions;

xi. distinction between Swiss "internal" and "external" as well as "*non-Swiss*" client advisers and applicability of specific rules (and in case of Swiss "external" and "non-Swiss" client advisers a registration duty) to each of them;

xii. implementation of the appropriateness and suitability rules, obligation to perform client segmentation and providing of appropriate client information for asset management, advisory and to a limited extent execution only business;

xiii. scope of rules on inducements (retrocessions) extended to all financial services;

xiv. new requirement to prepare, update and dispatch BIBs in case of offerings of financial instruments (except shares) to private clients;

Anti-money Laundering and Automatic Exchange of Information

xv. stock corporations as well as limited liability companies that have issued bearer shares must comply with the new rules regarding bearer shares and amend their articles of association and by-laws within two years after the entry in force of the respective new CO provisions, *i.e.* by 30 June 2017 at the latest;

xvi. introduction of qualified tax offences (against Swiss or *foreign* tax laws, so-called "aggravated tax misdemeanour") as predicate offence for money laundering as per 1 January 2016 and, correspondingly, enhanced due diligence duties of financial intermediaries and traders being subject to the AMLA in connection with qualified tax offences;

xvii. under the AEI, Switzerland and the 28 EU member states intend to collect account data starting in 2017 and exchange it from 2018 once the necessary legal basis has been created;

Collective Investment Schemes

xviii. abolition of the license for distributors of collective investment schemes, but introduction of a registration duty for all individual client advisers;

xix. limitation of the requirement to appoint a Swiss representative and paying agent on the level of the foreign collective investment scheme to constellations where there is distribution to Swiss retail investors and/or HNWI;

xx. introduction of an investor's choice of jurisdiction either at the domicile of the Swiss representative or at the investor's domicile in case of distribution of collective investment schemes to Swiss retail investors and/or HNWI;

Insurance

xxi. applicability of the FIDLEG to life insurance companies in relation to certain insurance products;

xxii. new conduct rules applicable to non-tied insurance brokers; and

xxiii. abolition of the existing register of insurance brokers, which is replaced by the duty of non-tied insurance brokers to be registered in the new client adviser register as introduced by the FIDLEG.

(353) In summary, any participant in the Swiss market, regardless of whether it is a Swiss or a foreign player, needs to review its current business model and evaluate whether and to what extent it needs to be adapted to comply with the comprehensive changes of the Swiss regulatory architecture.

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