



Revision of the Swiss Insurance Supervision Act – Novelties in the field of insurance intermediation

18.05.2021

Key takeaways

The revision of the Insurance Supervision Act (**ISA**) and its implementing ordinance (**ISO**) brings various changes to existing regulations. In particular, the draft ISA proposed by the government in October 2020 includes new provisions affecting insurance intermediaries and their customers.

Most recently on 3 May 2021, the draft ISA took a first hurdle in parliament. As one of two parliament chambers, the National Council (*Nationalrat*) discussed and adopted the draft ISA as proposed by the government, except for the provisions relating to a new ombudsman's office. The draft ISA as now also proposed by the National Council provides for the following key changes concerning insurance intermediation:

- The notions of tied versus non-tied insurance intermediaries are redefined and intermediaries can no longer act simultaneously as tied and non-tied.
- The registration of non-tied intermediaries is subject to new hurdles including the proof of guarantee of irreproachable business activity and the proof of sufficient education and advanced training.
- Tied insurance intermediaries can no longer be registered with the Swiss Financial Market Supervisory Authority (**FINMA**) unless they demonstrate that they wish to take up an activity abroad for which the relevant state requires an entry in the Swiss register.
- Insurance intermediaries will be subject to stricter information and disclosure obligations and non-tied insurance intermediaries must expressly inform the policyholders of all compensation they receive from an insurance undertaking or third parties (e.g. commission, rebate or similar financial benefits) in connection with the provision of their services.
- The ISA states a new general obligation for insurance intermediaries to avoid conflicts of interest.
- The draft ISA as published in October 2020 by the government provided for a new obligation for insurance companies and non-tied insurance intermediaries to register with an ombudsman's office. This change has, however, been recently rejected by the National Council.

As a next step, the proposed law (and the suggested deletion of the ombudsman office) will have to pass the second chamber of the Swiss parliament, the Council of States (*Ständerat*), which is not expected to fundamentally amend the draft ISA and the respective rules relevant for insurance intermediaries are expected to become law. No delay for the entry into force of the revised ISA has been announced. However, the originally discussed target date of 2022 has not been confirmed either.

In any event, although the legislative process is still ongoing today, in all likelihood, significant changes to the regulation of insurance intermediaries are to be expected in short- to midterm and insurance intermediaries and insurance undertakings should prepare for the upcoming changes.

Introductory remarks

Insurance intermediaries are persons offering or concluding insurance contracts on behalf of insurance companies or other persons. They can be either dependent on or independent of insurance companies in a legal and economic sense, the former category being commonly referred to as "insurance agents" and the latter as "insurance brokers".

As of today, and subject to the modifications that are expected to enter into force with the ISA revision, insurance agents are entitled but not obliged to register themselves with FINMA, as opposed to insurance brokers who are required to register. The supervision of insurance intermediaries is low compared to insurance companies. For instance, changes in the ownership of insurance intermediaries will not alone trigger notification duties, as could be the case for insurance companies. Also, registered insurance intermediaries are not subject to ongoing prudential supervision by FINMA. It may, however, from time to time verify their compliance with regulatory requirements and take enforcement action in case of irregularities.

The ISA revision proposes to increase the regulatory requirements applicable to insurance intermediaries with the aim of protecting policyholders and aligning Swiss law with international standards. Nevertheless, supervision of insurance intermediaries will remain at a significantly lower level than that applicable to insurance companies.

New provisions regarding tied versus non-tied insurance intermediaries

The current law defines non-tied insurance intermediaries, which are required to register (Art. 43 para. 1 ISA), and also sets out the criteria characterising tied insurance intermediaries in Art. 183 ISO. An exemplary list of criteria is provided in Art. 183 ISO to distinguish between tied and non-tied intermediaries. For instance, insurance intermediaries are considered to be tied if they generate more than 50% of their commission volume in the course of a calendar year with one or two insurance undertakings, exercise a managerial function in an insurance undertaking, have a direct or indirect holding of more than 10 % in the equity of an insurance undertaking, or otherwise influence the business of an insurance undertaking.

Under the current legal framework, tied insurance intermediaries can opt to be entered in the FINMA register. This register contains information as to the name, legal form and address of the intermediary, as well as the insurance fields in which the intermediary is active (and until the ISA revision enters into force whether the intermediary is tied or non-tied for each field).

The distinction between tied *versus* non-tied insurance intermediaries is key as each category is subject to different rules. With the revision of the ISA, the terms of tied *versus* non-tied insurance intermediary will be defined in Art. 40 para. 2 and 3 draft ISA. It is clearly stated that non-tied insurance intermediaries have a fiduciary relationship with the policyholders and that they act in their interest. As a result, pursuant to Art. 44 para. 1 lit. b draft ISA, insurance intermediaries cannot act as tied and non-tied at the same time; only non-tied intermediaries have a fiduciary relationship with the insured party (Art. 40 para. 2 draft ISA). As of today, intermediaries are allowed to present as tied for certain types of insurance and as non-tied for other types of insurance.

The revised ISA further provides that tied insurance intermediaries can no longer be registered in the FINMA register. Tied insurance intermediaries have an identifiable fiduciary relationship with the related insurer so FINMA can indirectly supervise them via the insurance undertaking subject to prudential supervision by FINMA. There is an exemption, however, in that tied insurance intermediaries can be registered with FINMA if they demonstrate that they wish to take up an activity abroad for which the relevant state requires an entry in the Swiss register.

New requirements for the registration of non-tied intermediaries

The revision of the ISA raises the hurdles for registration of non-tied intermediaries by adding new requirements to the existing criteria. As of today, insurance intermediaries must prove that they have sufficient professional qualifications and professional indemnity insurance covering damages of at least CHF 2 million per year or an equivalent financial security.

The ISA revision proposes the following additional criteria:

- Non-tied intermediaries need to have their registered office, domicile or a branch office in Switzerland to allow effective supervision by FINMA (Art. 41 para. 2 lit. a draft ISA). In contrast to the current regulatory regime, non-tied intermediaries will no longer be able to operate without any physical presence or establishment in Switzerland. In justified cases, FINMA can grant exemptions based on Art. 41 para. 5 draft ISA.
- Non-tied intermediaries need to provide a proof of guarantee of irreproachable business activity. This requirement for good reputation encompasses all factors of character and expertise that enable a person to correctly manage a supervised company. In addition to excerpts from the commercial and debt enforcement registers and any court rulings, evidence must be provided of professional qualifications and reports from audit firms. These requirements are in line with those of other financial service providers subject to prudential supervision in Switzerland.
- The proof of sufficient education and advanced training in accordance with Art. 43 draft ISA is added as a new requirement for registration. This new article provides that insurance intermediaries (both tied and non-tied) must have the necessary skills and knowledge for their activity. The minimum standards in terms of education and advanced training are set by insurance companies and insurance intermediaries. The Federal Council can set such standards if necessary, i.e. if no standard is set by insurance companies or if the standard that is set is insufficient.
- In the initial ISA revision proposed by the Federal Council, non-tied intermediaries also needed to provide evidence that they are affiliated with an ombudsman's office. This requirement has however been recently rejected by the National Council.

New information and disclosure obligations

The revised ISA extends the scope of information that insurance intermediaries must communicate to customers in line with the revision of the Swiss Financial Services Act (**FinSA**) that entered into force on 1 January 2020. The law provides that this information must be communicated in an easily understandable way and that it can be transferred electronically.

As is already the case under current law, the general duty to provide information includes giving details of the name and address of the intermediary and whether the brokerage is tied or non-tied. If the brokerage is carried out on behalf of one or more insurance companies, the duty to provide information also includes the name and address of the insurance company.

Insurance intermediaries must newly draw the attention of their policyholders to how they can obtain information on the status of their education and advance training in accordance with Art. 43 draft ISA. Further, the revised ISA clarifies in Art. 45b para. 1 draft ISA that non-tied insurance intermediaries must expressly inform the policyholders of all compensation they receive from an insurance undertaking or third parties (e.g. commission, rebate or similar financial benefits) in connection with the provision of their services.

Non-tied intermediaries who - in addition to the compensation from insurance companies or third parties - receive compensation from the insured as a result of the contractual relationship with the latter may only retain the compensation from insurance companies or third parties if (1) they have expressly informed the insured in advance of such compensation and the insured expressly waives the right to have the compensation passed on to them or (2) if the non-tied insurance intermediary passes the compensation on to the insured (Art. 45b para. 2 draft ISA), which is comparable to the retrocession rule under the FinSA. In addition, under the proposed draft ISA, the disclosure of the compensation must indicate the type and amount of compensation and occur prior to entering into an agreement. According to the latest Supreme Court practice with respect to retrocessions when providing financial services, calculation parameters and range of compensation amounts must be disclosed if the amount cannot be determined in advance (Art. 45b para. 3 Draft-ISA). The new law does not only follow the practice with respect to retrocessions in the financial service industry, it goes even beyond and requires an express waiver (as opposed to a silent waiver as for the financial service industry).

These disclosure rules do not apply to tied insurance intermediaries.

Conflicts of interest

The general obligation for insurance companies to avoid conflicts of interest as far as possible, as set out in the revised Art. 14a of the draft ISA, also applies to tied and non-tied insurance intermediaries as set forth in the revised Art. 45a of the draft ISA.

No affiliation requirement with ombudsman's office for insurance intermediaries

In its vote over the revised ISA, the National Council agreed with all proposals made by the Federal Council, except for the provisions relating to a new ombudsman's office and the obligation for insurance intermediaries to be affiliated to such ombudsman's office. These provisions were deleted because, according to the majority, the already existing ombudsman's offices suffice and there is no need for a new statutory regulation of ombudsman's offices.

As of today, no specific ombudsman's office for insurance intermediaries exists in Switzerland. The two ombudsman offices already set up in the private insurance sector (i.e. the "Private Insurance and Suva Ombudsman's Office" and the "Health Insurance

Ombudsman's Office") relate to insurance companies. Ombudsman offices have already been rendered compulsory in the financial services sector with the latest revision of the FinSA, which recently entered into force. The role of ombudsman's offices is to allow both parties to appeal to an independent, impartial and state-recognised institution and to offer an alternative consensual dispute resolution mechanism.

In this context, the revised ISA initially provided for a new obligation for insurance companies and non-tied insurance intermediaries to register with an ombudsman's office. An entire new chapter dealing with ombudsman's offices was planned to be introduced in Art. 82 et seq. of the draft ISA. These rules were considered superfluous by the National Council. Unless the second chamber of parliament, the Council of States, holds differently and insists on an ombudsman office (which is not expected) these rules will not become law.

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

No legal or tax advice

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

© 2021 Pestalozzi Attorneys at Law Ltd. All rights reserved.

Andrea Huber

Partner
Attorney at law, LL.M.

Pestalozzi Attorneys at Law Ltd
Loewenstrasse 1
8001 Zurich
Switzerland
T +41 44 217 92 41
andrea.huber@pestalozzilaw.com



Beat Schwarz

Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Loewenstrasse 1
8001 Zurich
Switzerland
T +41 44 217 92 44
beat.schwarz@pestalozzilaw.com

