

## Securitisation & Structured Finance - Switzerland

### Federal Financial Services Act – new regulation for financial products

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#### Developments

The financial crisis has led to various financial market regulatory projects and subsequent changes both in Switzerland and globally. Based on findings following the investigations of the collapse of Lehman Brothers and the Madoff scandal in particular, in October 2010 the Swiss Financial Market Supervisory Authority (FINMA) published a discussion paper –Regulation of the Production and Distribution of Financial Products to Retail Clients: Status, Shortcomings and Courses of Action. FINMA took the view that existing Swiss financial market legislation does not adequately protect clients. The paper therefore contained several proposals to enhance client protection when financial products are sold and marketed. FINMA also suggested codification in a general financial services act to implement its proposed courses of action. This was the first time that such an act was suggested.

Following a consultation process on this subject, the proposals were further developed by FINMA and on February 24 2012 FINMA published its position paper on distribution rules (Regulation of the Production and Distribution of Financial Products). In the paper, FINMA proposed to introduce a package of mutually complementary regulatory measures to strengthen client protection. It again stipulated that the implementation of the proposed measures requires codification in a cross-sector Financial Services Act.

Shortly after publication of the paper, the Federal Council instructed the Federal Department of Finance, in cooperation with the Federal Department of Justice and Police and FINMA, to commence work on a project to prepare a draft law. Eleven months later, the Federal Department of Finance released a hearing report on the project (Financial Services Act: Key Thrusts of Potential Regulation, February 18 2013) and put forward the first proposals on how gaps in the financial market legislation can be closed. The Federal Department of Finance received around 50 written statements on the key thrusts proposed in the hearing report.

After several postponements, the consultation draft of the act is now set to be presented by mid-2014. It is unlikely that the new law will enter into force before 2016. This update outlines the key changes proposed in the structured finance context.

#### Key investor document

For complex financial products, it is proposed that the issuers will have to produce a key investor document if offered in or from Switzerland. According to the hearing report, complex financial products are considered to be products for which the change in value does not rely solely on the credit standing and profitability of the issuer. Specifically mentioned are:

- structured products;
- shares or units of collective investment schemes;
- insurance products with an investment aspect; and
- bonds or participation rights with particular complex valuation.

In particular, the key investor document shall:

- comprise a readily understandable description of the product;
- set out the factors that influence the changes of the value of the product; and

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- contain a description of the return profile and a risk disclosure.

It is proposed that the key investor document will be subject to guidelines on structuring and content in order to improve the comparability of the different products.

Moreover, there shall be the general obligation to draw up and the publication of a prospectus for all securities offerings to retail clients in or from Switzerland, irrespective of whether the issuer in question is domiciled abroad or in Switzerland. Again, the Financial Services Act (presumably at ordinance level) is expected to regulate the structuring and the specific content of the prospectuses. It is further proposed that all prospectuses will have to be published on a central electronic platform. There will likely be an exception to the prospectus obligation for offerings exclusively targeted at professional clients. Further exceptions are proposed – for example, for securities offerings with a minimum denomination or minimum investment of Sfr100,000 in accordance with prevailing EU legislation, or for offerings which are addressed to a restricted circle of 150 persons.

### Review of prospectus

The Federal Department of Finance proposes that each prospectus and key investor document should require advance review by either FINMA or another institution (eg, SIX Swiss Exchange for listed products). Moreover, a cross-product prospectus liability should be implemented, similar to the liability provisions in Article 752 of the Swiss Code of Obligations. This means that issuers and other individuals involved will be liable towards clients that suffer a financial loss due to insufficient or deficient product documentation.

### Comment

Although the key thrusts set out in the hearing report are still proposals for new legislation and may change during the legislative process, it is expected that the act will have a significant effect on financial market participants and on the production and distribution of financial products. Financial service providers are advised to analyse how their business will be affected once the consultation draft of the act is published.

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