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2020

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# Business

# Law

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January 2020

**Ten Points for Choosing the Governing Law of an International Business Contract**

Philip R Wood

**The New Rules for Providing Financial Services in Switzerland: Fundamental Changes to the Cross-border Provision of Financial Services for Non-Swiss Financial Service Providers and Producers of Financial Instruments for the Swiss Market**

Martin Liebi and Merlin Haldemann

**Keeping the Freezer Stocked: Interim Relief in Aid of Foreign Proceedings before the DIFC Courts**

Patrick Dillon-Malone SC

**Regulation of Crowdfunding in Singapore**

Adrian Ang and Samuel Kwek

**Case Comment: Fiat and Starbucks: the Repurposing of Competition Law for Anti-Tax-Avoidance Schemes**

Omar Asfar

**Case Comment: The Prorogation Case 2019: Changing the Law to Preserve the Constitution**

Charles Falconer



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# **The New Rules for Providing Financial Services in Switzerland**

## **Fundamental Changes to the Cross-border Provision of Financial Services for Non-Swiss Financial Service Providers and Producers of Financial Instruments for the Swiss Market**

Martin Liebi\* and Merlin Haldemann

The Swiss Financial Services Act ('FinSA'), which entered into force on 1 January 2020, regulates for the first time comprehensively the cross-border provision of financial services by non-Swiss financial service providers to clients in Switzerland, as well as the production of financial instruments for the Swiss market by non-Swiss producers. The new obligations contain certain information, documentation and behavioural rules, as well as organisational requirements and an obligation to enter client advisers into a newly established client adviser register and to affiliate with an ombudsman. Prospectuses used for public offers must be reviewed by a newly established prospectus review body.

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### **What is required under the new Swiss Financial Services Act?**

Swiss and non-Swiss financial service providers within the scope of the FinSA must comply with extensive obligations with regard to information, client segmentation, appropriateness, suitability and documentation requirements. In addition, such financial service providers must comply with organisational obligations, such as rules to prevent conflicts of interest and rules relating to commissions.

In particular, client advisers from non-Swiss financial service providers with clients in Switzerland must register into a newly created register of advisers. Financial institutions that provide cross-border financial services in Switzerland must also affiliate with an ombudsman.

The non-Swiss producers of financial instruments that are meant for distribution on the Swiss market are now also subject to extensive obligations. In the case of a public offering of securities, a prospectus must first be published, which must be checked or approved by a reviewing body. The distribution of financial instruments to retail clients is subject to an obligation to produce a key information document and additionally the creation of structured products is subject to extensive regulations.

Obligations under the FinSA are regulatory requirements and therefore cannot be changed by means of contractual agreements. Most obligations under the FinSA entered into force on 1 January 2020. However, there are transition periods with regard to several obligations.

### **Scope of application of the new FinSA**

#### *Scope*

The FinSA regulates for the first time comprehensively the cross-border provision of financial services in Switzerland. The FinSA explicitly applies to cross-border financial services originating in Switzerland or the provision thereof by third parties from abroad, that is, by phone, in writing or by email and without permanent staff being available onsite, for Swiss clients or for other clients in Switzerland. The offering of financial instruments is also part of the scope of application of the FinSA. Accordingly, it also applies to producers of financial instruments offered in Switzerland.<sup>1</sup> However, as is customary in EU law, it is also possible to provide financial services in Switzerland at the express request of the client by phone or in writing without complying with the regulatory obligations ('reverse solicitation

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1 Art 1 para 2 and art 3 para 1 lit g FinSA.

principle’).<sup>2</sup> The FinSA therefore establishes the principle of territoriality, according to which any provision of financial services on Swiss territory, even if such provision is made only on a temporary basis (eg, visit of the client during a ski holiday in St Moritz), falls within the scope of the FinSA.

*Affected financial services of non-Swiss financial service providers operating in Switzerland*

Financial services are any of the following activities carried out for clients:<sup>3</sup>

- Purchase or sale of financial instruments, that is, of equity and debt securities, structured products, funds, derivatives, bonds and structured deposits. This type of financial service covers trading in financial instruments for clients (client trading). Affected are the acquisition of financial instruments that were created by a third party or the financial service provider itself. However, proprietary trading and any form of multilateral trading in which the intermediary merely enables the multilateral trade are not affected. In addition, financial services also include the distribution of financial instruments. This includes every activity that is specifically targeting the acquisition or sale of financial instruments, but does not yet constitute an acquisition or a disposal of a financial instrument.<sup>4</sup>
- Receipt and transmission of orders related to financial instruments. Also, the classic introduction of brokerage business, that is, the acceptance and transmission of orders regarding financial instruments to third parties, constitutes a financial service and falls within the scope of the FinSA.
- Administration of financial instruments (asset management). Asset management, that is, all activities in which the financial services provider is authorised to invest assets for the account of clients, is a central financial service. This also applies to authorisations that relate solely to individual transactions and situations in which transactions are to be approved by the client despite an existing external authorisation.<sup>5</sup>
- Provision of personal recommendations on transactions with financial instruments (investment advice). In investment advice, the financial services provider recommends to certain clients the purchase or sale of financial instruments. It is a personal recommendation addressed to the client.

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2 Explanatory report on the consultation procedure of the Financial Services Ordinance (FinSO), Financial Institutions Ordinance (FinIO) and Supervisory Organisation Ordinance (SOO), 24 October 2018, p 18.

3 Art 3 para 1 lit c FinSA.

4 Art 3 para 1 lit a FinSA.

5 Federal Gazette 2015, 8946.

Generally, no personal recommendation is present if a group of clients is approached. This usually lacks the personal nature of the recommendation.<sup>6</sup>

- Granting of loans to finance transactions with financial instruments. Credit transactions are generally not covered by the scope of the FinSA. However, such activities may fall within the scope of the Swiss Banking Act (SBA). An exception is the granting of loans for the execution of transactions in financial instruments. Such granting of credit, however, must serve ‘directly’ the conducting of transactions in financial instruments in order to be covered by the FinSA.<sup>7</sup>

#### *Affected non-Swiss financial service providers operating in Switzerland*

Financial service providers are persons who provide financial services on a commercial basis in Switzerland for clients in Switzerland.<sup>8</sup>

#### *Affected financial instruments*

Financial instruments under the FinSA are equity and debt securities (ie, securities that are not equity securities), units in collective investment schemes, structured products and derivatives, structured deposits, whose redemption value or interest is risk or price-dependent, excluding those whose interest is linked to an interest rate index, as well as bonds, that is, units in an overall loan subject to uniform conditions.

#### *Affected Swiss clients*

Clients may be any natural or legal persons or partnerships, as well as entities governed by foreign law. A client relationship exists from the moment the financial service is offered, even if there is not yet an existing contractual relationship between the financial service provider and the client. A purely factual relationship is therefore sufficient for the establishment of a client relationship.<sup>9</sup> The FinSA distinguishes between retail clients, professional clients and institutional clients.<sup>10</sup> Retail clients are clients that are not professional clients. Professional clients are financial intermediaries under the SBA, the Financial Institutions Act and Collective Investment Schemes Act, insurance companies under the Swiss Insurance Supervision Act (ISA),

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6 Federal Gazette 2015, 8947.

7 Federal Gazette 2015, 8942.

8 Art 3 para 1 lit d FinSA.

9 See n 2 above.

10 Art 4 para 1 lit a-c FinSA.

foreign clients under prudential supervision, such as Swiss banks and other financial intermediaries, central banks, public entities with professional treasury, pension funds and occupational pension funds with professional treasury, large corporations (which exceed two of the following: balance sheet total of CHF 20m; turnover of CHF 40m; equity of CHF 2m); as well as investment structures with professional treasury created for high-net-worth retail clients.<sup>11</sup> Institutional clients are domestic and foreign companies licensed under financial market law and supranational public entities with a professional treasury.<sup>12</sup> A company has a professional treasury, provided that a technically qualified person experienced in the financial sector deals with the management of the funds.

*Affected non-Swiss client advisers with clients in Switzerland*

Client advisers are natural persons who provide financial services on behalf of a financial service provider or in their own capacity as financial service providers.<sup>13</sup> They are staff of a financial service provider who provide financial services effectively and directly to the client.

*Affected (public) offers of securities of non-Swiss issuers and financial service providers in Switzerland*

In the case of an invitation to purchase a financial instrument, an offer is made, provided that it contains sufficient information about the terms of the offer and the financial instrument itself, and that it must be understood by the client in good faith as such.<sup>14</sup>

*Affected non-Swiss producers of financial instruments for offerings in Switzerland*

A producer of a financial instrument is any person who produces financial instruments.<sup>15</sup>

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11 Art 4 para 3 FinSA.

12 Art 4 para 4 FinSA.

13 Art 3 lit d FinSA.

14 Art 3 para 1 lit g FinSA, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) of 4 November 2015, Federal Gazette 2015, p 8901 *et seq.*, 8948.

15 Art 3 para 1 lit i FinSA.

*Affected advertising of non-Swiss financial service providers for financial services or instruments in Switzerland*

If the financial services provider advertises only for the provision of financial services, such communication must be marked as advertising.<sup>16</sup>

**New regulation for the provision of cross-border financial services from abroad to Swiss clients and clients in Switzerland**

*How a non-Swiss financial service provider can be affected by the FinSA*

Non-Swiss financial service providers can be affected by the FinSA in the following ways:

- Situation 1: Direct provision of financial services to Swiss clients and clients in Switzerland by staff members of the financial service provider. In this case, obligations under the FinSA apply directly to financial service providers and their client advisers.
- Situation 2: Provision of financial services by outsourcing of certain activities. By the outsourcing of certain activities, the provision of certain aspects of financial services is permanently transferred to a third party.<sup>17</sup> The non-Swiss financial service provider provides financial services to Swiss clients on the basis of an outsourcing arrangement with another Swiss domiciled financial service provider.
- Situation 3: Provision of financial services through chains of providers. A 'chain of providers' refers to the commissioning of other service providers for the provision of a financial service.<sup>18</sup> In principle, the financial service provider who leads the client relationship and contracts with the other financial service providers is obligated to comply with obligations under the FinSA.<sup>19</sup> A different regulation applies if there are clear indications of false information or a breach of duty by the first financial service provider.<sup>20</sup>

*Behavioural obligations in detail*

Financial service providers providing cross-border financial services to retail clients in Switzerland must comply with the obligations explained in more

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16 Art 8 para 6 FinSA.

17 Cf Lukas Fahrlander, 'Chain of providers when providing financial services: Regulatory coverage by the FinSA and contractual liability of the custodian bank', *Swiss Review of Business and Financial Market Law*, SZW Zurich 2018, p 474.

18 *Ibid.*

19 Art 24 para 1 FinSA.

20 Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) of 4 November 2015, Federal Gazette 2015, p 8901 *et seq.* 8953.

detail in this section. Professional clients may opt out of the obligation to provide them information, documentation and rendering of account. They must do so in writing or in any other form demonstrable via text. The appropriateness and suitability test must only be carried out with professional clients if there are indications of doubt as to the sufficient understanding of the business.<sup>21</sup>

#### CLIENT SEGMENTATION OBLIGATION

Financial service providers must assign the persons to whom they provide financial services to the segments of either retail clients, professional clients or institutional clients, based – in general – on the qualification of the client.<sup>22</sup> However, clients acting through an authorised person may request, in writing or in another form demonstrable via text, that they be assigned to a segment in accordance with the knowledge and experience of that person.<sup>23</sup> The client has the opportunity to declare that he or she would like to change the segment. High-net-worth retail clients and private investment structures created for them may declare that they wish to be treated as professional clients (opting out). A professional client is a person who can credibly declare that on the basis of training, education and professional experience or on the basis of comparable experience in the financial sector, he or she possesses the necessary knowledge to understand the risks associated with the investments and has at their disposal assets of at least CHF 500,000. A professional investor can alternatively also have at his or her disposal assets of at least CHF 2m, in which case no knowledge or experience is required. Professional clients who are not institutional clients may declare that they wish to be treated as retail clients at the higher protection level (opting in). Furthermore, institutional clients may declare that they wish to be treated only as professional clients (opting in). The client segmentation obligation must be met within two years of the entry into force of the FinSA and the FinSO, which is by 1 January 2022.

#### OBLIGATION TO PROVIDE INFORMATION

The financial service provider is obliged to provide information about both its general activities and specific activities. The clients must be informed before the signing of the contract or provision of the service of such matters

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21 See n 20 above, p 8901 *et seq.*, 8957 *et seq.*

22 Guillaume Braidi, 'Classification of clients according to the Financial Services Act', *Swiss Review of Business and Financial Market Law*, 2018, p 485.

23 Art 4 para 4 FinSO.

in order to have sufficient time to understand the information regarding the client relationship or the provision of the financial service.<sup>24</sup> Where financial instruments are personally recommended, financial service providers must also make a key information document (KID) available to the retail client insofar as such a document has been produced. However, no KID is required to be made available if Execution Only services (sale and purchase of financial interests) or Introducing Brokerage (transmission of client orders) are provided, unless a key information document has already been produced for the financial instrument. Financial service providers must satisfy this duty within two years of entry into force of the FinSO, which is by 1 January 2022.

#### OBLIGATION TO CONDUCT AN APPROPRIATENESS AND SUITABILITY TEST

If financial service providers provide investment advice only for individual transactions without taking into account the entire client portfolio, a suitability assessment must be carried out.<sup>25</sup> Financial service providers must check whether a particular financial instrument is appropriate for a particular client before recommending them.<sup>26</sup> In case of investment advice, taking into account the client portfolio or portfolio management, the financial service provider must enquire about its clients' financial situation and investment objectives as well as their knowledge and experience.<sup>27</sup> Based on the information gathered, the financial services provider prepares a risk profile for each client.<sup>28</sup> If a natural person appoints a representative, the financial service provider will take account of the knowledge and experience of the representative.<sup>29</sup> These duties must be met within two years of entry into force of the FinSO, which is by 1 January 2022.<sup>30</sup>

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24 Art 9 para 1 FinSA in conjunction with art 13 FinSO.

25 Cf Distinction of selective investment advice from investment advice, which takes into account the entire portfolio, see Luc Thévenoz, 'FinSA and contract law. An introduction', in Susan Emmenegger (ed), *Bank Contract Law*, SBT Swiss Banking Law Day 2017, 249.

26 Art 12 FinIA.

27 Adrian Andermatt, 'Transaction-oriented investment advice under the new Financial Services Act (FinSA)', *Law Journal on Corporate and Capital Markets Law*, GesKR 2017, p 75 *et seq.*

28 See n 20 above, p 8901 *et seq.*, 8959.

29 Art 16 FinSO.

30 Art 105 FinSO.

#### OBLIGATION TO DOCUMENT AND RENDERING OF ACCOUNT

Financial service providers are subject to extensive documentation requirements relating to financial services agreed with clients, information about them, information about a missing or unsuccessfully conducted appropriateness or suitability test, and the services provided to clients. In investment advice, they also document the needs of clients, as well as the reasons for each recommendation that leads to the purchase or sale of a financial instrument.<sup>31</sup> Upon request, financial service providers will provide clients with a copy of the documents that are subject to the documentation requirement or make it available to them in a different and more appropriate way. Upon request, they also report to the client on the items subject to documentation requirements, the composition, valuation and development of the portfolios or the costs associated with the financial services.<sup>32</sup> Both obligations must be met within two years of entry into force of the FinSA and FinSO, which is by 1 January 2022.<sup>33</sup>

#### OBLIGATION TO PROVIDE DOCUMENTS

Clients are entitled at any time to receive a copy of their dossier and all documents concerning them. The request for such documentation must be made in writing or in another form demonstrable via text. One copy is sufficient.

#### HANDLING OF CLIENT ORDERS

Financial service providers must uphold the principles of good faith and equal treatment when handling client orders.<sup>34</sup> The financial services provider must have systems and processes that are commensurate in size, complexity and business and ensure equal treatment of a client's interests.<sup>35</sup>

#### BEST EXECUTION OF CLIENT ORDERS

The best execution principle is mainly used by financial service providers that either execute transactions themselves or forward orders to third parties. They have to ensure in the execution of their clients' orders that the best possible outcome is achieved in terms of cost, timing and quality. Both own

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31 Art 15 FinSA.

32 See n 20 above, p 8901 *et seq.*, 8960; art 19 para 2 FinSO.

33 Art 105 FinSO.

34 Art 17 FinSA.

35 Art 20 FinSO.

and third-party costs have to be considered.<sup>36</sup> Each financial service provider establishes its own 'best execution policy' in the form of an internal policy based on the size and content of the affected transactions and the relevant client categories.

#### USE OF FINANCIAL INSTRUMENTS OF THE CLIENT

Clients must agree, in a separate agreement to the terms and conditions, in writing or in another form demonstrable via text, that financial instruments belonging to them are being lent to counterparties by the financial service provider or that the financial service provider is brokering such transactions.

#### *Obligation to enter non-Swiss client advisers of Swiss clients and client advisers who provide financial services in Switzerland into the client adviser register*

Client advisers of non-Swiss domiciled financial service providers that provide financial services to Swiss-based clients (eg, in the form of distribution of financial instruments) must, like client advisers of Swiss-based financial service providers that are not subject to authorisation by the Swiss Financial Market Supervisory Authority (FINMA), be entered in a client adviser register. The obligation to be entered in the client adviser register will also apply to prudentially supervised foreign financial service providers, unless they provide financial services exclusively to professional clients and institutional clients.<sup>37</sup> Non-prudentially supervised foreign financial service providers must be entered into the client adviser register if they are providing financial services to Swiss-based clients. The client adviser must be entered into the client adviser register prior to the provision of any financial services in Switzerland or prior to the provision of financial services from outside Switzerland to Swiss-based clients.<sup>38</sup> The entry into the client adviser register is thus a non-negotiable requirement for access to the Swiss market. The wording within the FinSA suggests that this obligation affects every client who (even temporarily) resides in Switzerland (eg, a US-domiciled client is on a ski holiday in St Moritz and his German financial adviser from Frankfurt calls him to provide investment advice). The entry into the register of advisers (which can be found at [www.regservices.ch](http://www.regservices.ch)) must by law be finalised no later than 30 June 2020 respectively six months after the client adviser register has received the licence (about July or August 2020).<sup>39</sup>

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36 Art 18 FinSA, art 21 FinSO.

37 Art 31 FinSO.

38 Art 28 FinSA.

39 Art 95 para 1 FinSA.

The requirements for entry are sufficient knowledge of the behavioural rules under the FinSA, required knowledge related to the activity, a professional liability insurance or equivalent security, the affiliation to an Ombudsman (which can be reached under [www.regservices.ch](http://www.regservices.ch)), no entry in the criminal register regarding property under the Swiss Criminal Code and no industry ban or prohibition issued by FINMA.<sup>40</sup> The client adviser register has the discretion to decide whether a specific client adviser has sufficient knowledge about the behavioural rules under the FinSA and for conducting financial services. Client advisers must have the necessary knowledge within one year of the entry into force of the FinSA and the FinSO, likely to be by 1 January 2021.<sup>41</sup> The client advisers must prove at the time of application, based on documents and eventually also by means of an oral interview, that they have the required knowledge and capabilities. The client adviser register contains as a minimum the following information about client advisers:<sup>42</sup>

- name and surname;
- name or firm and address of the financial service provider for which they are active;
- function and position of the client adviser within the organisation;
- fields of activity;
- education and continuing professional education;
- the name of the Ombudsman to whom the financial service providers are affiliated;
- date of entry.

Furthermore, client advisers must report the following developments to the register within 14 days:<sup>43</sup>

- any change in their name or address and of the financial service provider for which they work;
- any change in their function and position within the organisation and their areas of activity;
- completed basic training and continuing professional development;
- any change of the Ombudsman;
- the complete or partial termination of professional liability insurance;
- termination of activity as client adviser;
- issued loss certificates (*Verlustscheine*) in their name;

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40 Art 29 FinSA.

41 Art 104 FinSO.

42 Art 30 FinSA.

43 Art 41 FinSO.

- convictions for criminal offences under the Swiss financial market acts or for criminal offences against property or comparable convictions handed down by foreign authorities; and
- Swiss and non-Swiss prohibitions imposed on them from performing respective activities/from practising.

*Requirements for the organisation of financial service providers that provide cross-border financial services*

All financial service providers that provide cross-border financial services in Switzerland must comply with the following organisational obligations, regardless of whether they serve institutional, professional or retail clients. Financial services providers must have within one year of the entry into force of the FinSA and the FinIO, likely to be by 1 January 2021, an appropriate organisation.<sup>44</sup>

- **Appropriate organisation.** Non-Swiss financial service providers, which fall under the scope of the FinSA, must also ensure compliance with obligations under the FinSA through an organisation that is appropriate to their size, complexity, business activity and risk profile, and through internal rules. Staff must be carefully selected, trained and registered in the register of advisers. The remuneration policy must be designed in such a way that there are no incentives for staff to disregard statutory duties or to conduct themselves in a manner detrimental to clients.<sup>45</sup>
- **Organisational precautions to prevent conflicts of interest.** The financial service provider is primarily responsible for representing the client's interests when conducting financial services. Conflicts between different client interests must be avoided. The self-interest of the financial service providers, their staff's interests and the interests of third parties must not conflict with the clients' interests.<sup>46</sup> In organisational terms, the financial services provider must have an internal directive that adequately addresses and regulates conflicts of interest.
- **Compensation from third parties (commissions).** A particularly common type of a potential conflict of interest is compensation from third parties, that is, financial benefits, for example, in the form of 'soft dollars', brokerage fees, discounts or commissions, which the financial service provider receives in connection with the provision of financial services from third parties. Under supervisory law and contract law, commissions generally belong to

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44 Art 106 FinSO.

45 Art 21 FinSA in conjunction with art 23 FinSO.

46 Art 28 FinSO in conjunction with art 25 FinSA.

the client in their entirety. If they cannot be passed on to the client, such as ‘soft dollars’, they must be disclosed to the client as a conflict of interest.<sup>47</sup>

- Staff transactions. The FinSA also provides an explicit provision for a second conflict of interest constellation: staff transactions. This includes all natural and legal persons who work for the financial service provider and their family members and other related persons.<sup>48</sup> Financial service providers must take adequate measures to prevent staff from misusing for their own-account transactions or any information made available to them only by virtue of their function.<sup>49</sup>

#### *Comparison between contract law and supervisory law pursuant to the FinSA*

The duties under the FinSA are supervisory law. In principle, this cannot be changed by means of contractual agreements. It may therefore be the case that the financial service provider does not comply with obligations under the FinSA despite a different contractual agreement. Contract law and supervisory law basically coexist, with the supervisory law having an impact on contract law regulations and helping to substantiate these.<sup>50</sup>

#### *Obligation to affiliate with an Ombudsman*

An additional obligation to which non-Swiss financial service providers are subject is the obligation to be affiliated with an Ombudsman (see for the Ombudsman [www.regservices.ch](http://www.regservices.ch)).<sup>51</sup>

#### **New provisions for the cross-border offering of financial instruments from non-Swiss producers and financial service providers to clients in Switzerland**

When offering financial instruments on a cross-border basis to Switzerland, a distinction is made between three categories: offering of securities; offering of financial instruments to retail clients; and offering of structured products.

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47 Art 29 para 1 FinSO.

48 Art 30 FinSO. Explanatory report on the consultation procedure of the Financial Services Ordinance (FinSO), Financial Institutions Ordinance (FinIO) and Supervisory Organisation Ordinance (SOO) 24 October 2018, p 31.

49 Art 27 FinSA.

50 Susan Emmenegger, ‘FinSA and the contract law. An introduction’, in Susan Emmenegger (ed), *Bank Contract Law*, SBT Swiss Banking Law Day 2017, p 200.

51 Art 74 FinSA.

*Offering of securities in Switzerland*

## PROSPECTUS REQUIREMENT

The submission of a public offer for the acquisition of securities or the request for admission to trading on a Swiss trading venue within the meaning of Article 26 (a) of the Financial Market Infrastructure Act is subject to the prior publication of a prospectus. A duty to publish a prospectus exists in principle both in the primary market when issuing securities as well as in the public resale of securities in the secondary market, if there is no valid prospectus and all persons responsible for the prospectus agree to its use.<sup>52</sup> If such consent is not given, the seller must create a new prospectus. There are many exceptions to the obligation to publish a prospectus, which are essentially shaped according to the provisions of EU law. The obligation to publish a prospectus begins six months after the approval of a reviewing body, likely to be on 1 July 2020. However, the provisions on prospectuses will apply to all securities subject to a public offer on 1 January 2020 or for which admission to trading has been sought before the entry into force of the FinSA, at the latest after two years.<sup>53</sup> As a result, according to the view expressed here, a backloading obligation arises for all public securities offerings pending on 1 January 2022.

## CHECK OF PROSPECTUS BY REVIEWING BODY

A prospectus must always be checked for completeness, coherence and comprehensibility by a reviewing body prior to its publication (see, for an example of a reviewing body, [www.regservices.ch](http://www.regservices.ch)). Foreign prospectuses, in particular the ones that have been prepared in accordance with the provisions of the EU Prospectus Regulation and approved by a foreign authority, may be accepted automatically or upon request.<sup>54</sup> The offerer of securities or the person applying for admission to trading must, after approval, deposit the prospectus with the reviewing body and at the latest at the beginning of the public offering or trading publish it in a newspaper, at the issuer's domicile, in electronic form on the website of the reviewing body, the issuer, the guarantor and security provider, the trading venue or the issuing body. The reviewing body lists the approved prospectus and makes

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52 Art 35 para 2 and art 36 para 4 FinSA.

53 Art 95 FinSA.

54 Art 54 FinSA.

it available for a period of 12 months.<sup>55</sup> Prospectuses of Swiss and foreign collective investment schemes are subject to approval by FINMA.<sup>56</sup>

### *Offering of financial instruments to retail clients*

Where a financial instrument is offered to retail clients, the producer must first produce a KID. There is no need to prepare a KID for financial instruments that may be acquired for retail clients only within the scope of a portfolio management agreement or if securities in the form of shares, including share-like securities allowing for participation rights, such as participation certificates, dividend rights certificates and non-derivative debt instruments, are offered.<sup>57</sup> The KID pursuant to the EU Packaged Retail and Insurance-Based Investment Products Regulation ('PRIIPs regulation') and information sheets pursuant to the German Securities Trading Act (WpHG) are recognised as equivalent and may be used as KIDs for Swiss purposes.<sup>58</sup> However, the provisions on KIDs shall be applied at the latest after two years to all financial instruments that were submitted to retail clients before the entry into force of the FinSA on 1 January 2020. As a result, according to the view expressed here, a backloading obligation arises for all securities offerings to retail clients pending on 1 January 2022.

### *Offering of structured products in Switzerland*

Structured products may be offered by non-Swiss financial service providers or producers in Switzerland to retail clients with whom there is no permanent portfolio management only if these are issued, guaranteed or secured in an equivalent manner by a Swiss bank, insurance company, securities firm or a foreign institution that is subject to equivalent prudential supervision.<sup>59</sup>

### **Sanctions in case of non-compliance with the new rules and regulations**

Explicit criminal sanctions are set out in the FinSA that apply in the case of non-compliance with its provisions and requirements. The general sanctions set forth in other financial market supervisory acts could also be imposed. An enforcement procedure could also be initiated in case of

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55 Art 64 FinSA.

56 Art 51 para 3 FinSA.

57 Art 58 paras 1-3 and art 59 FinSA.

58 Annex 14 FinSO.

59 Art 70 FinSA.

suspected breaches of the law and other compliance issues.<sup>60</sup> The FINMA can in such a case make use of the general supervisory measures set forth under Article 29 *et seq* of the Financial Market Supervisory Act.<sup>61</sup>

Non-compliance with the behavioural rules under the FinSA can be sanctioned with fines up to CHF 100,000 where false information has been given or essential facts have been omitted, the duty to make a suitability or appropriateness test has materially been breached or the provisions regarding the repayment of commissions have been breached.<sup>62</sup> Anyone who wilfully provides false information, withholds material facts or fails to publish a prospectus or KID can be subject to a fine of up to CHF 500,000.

A fine not exceeding CHF 100,000 shall be imposed on any person who wilfully fails to make the KID available prior to subscription or conclusion of the contract.<sup>63</sup>

A fine not exceeding CHF 500,000 shall be imposed on any person who wilfully offers retail clients structured products without complying with the applicable regulations under the FinSA.<sup>64</sup>

There are also good arguments that the supervisory provisions of the FinSA serve consumer protection purposes and their breach can thus trigger liability claims under tort law if all requirements are not met.<sup>65</sup>

### **Next steps for implementation according to the FinSA for non-Swiss financial service providers and producers of financial instruments**

Non-Swiss financial service providers with clients in Switzerland should take the following steps and ask the following questions to ensure that they comply with the new rules under the FinSA in good time:

- Determine financial services activities in Switzerland with regard to retail clients, professional clients and institutional clients on an ongoing and opportunistic basis (eg, meeting with a client while skiing in St Moritz).
- In which constellations do I provide financial services to clients in Switzerland (directly, as outsourcing service provider, in a chain of providers)? Which requirements result from this?

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60 Urs Zulauf, David Wyss and Daniel Roth, *Financial Market Enforcement* (Berne 2014), 85 *et seq*.

61 Federal Act on Swiss Financial Market Supervisory Authority (Financial Market Supervision Act, FINMASA) (SR 956.1).

62 Art 69 FinSA.

63 Art 93 FinSA.

64 Art 91 FinSA.

65 Joerg Schmid, 'FinSA and the contract law: obligations to inform for the financial service provider in "Execution-only-transactions"' in Susan Emmenegger (ed), *Bank Contract Law*, SBT Swiss Banking Law Day 2017, p 239.

- Which staff members with financial services activities are client advisers?
- Did I register my client advisers in the client adviser register ([www.regservices.ch](http://www.regservices.ch))?
- To what extent is my compliance organisation and set-up in line with the requirements of the FinSA?
- To what extent are the financial instruments with respect to which I provide financial services or that I produce in accordance with the new regulations under the scope of the FinSA? Are the securities that I distribute in Switzerland licensed for public distribution ([www.regservices.ch](http://www.regservices.ch))?
- Did I affiliate with an Ombudsman's office?

For the producers of financial instruments for the Swiss market, the question arises whether the financial instruments produced meet requirements under the FinSA, in particular with regard to advertising:

- Has a KID been created for distribution to retail investors?
- Has a prospectus been created and published for the public offering of securities (see [www.regservices.ch](http://www.regservices.ch))?

Wilful non-compliance with obligations under the FinSA can result in fines of up to CHF 500,000 or even in an investigation of the enforcement department of the FINMA for execution of an illicit financial market activity.

**Conclusion: can the new changes be a deterrent for market entry and is investor protection truly enhanced vis-à-vis the status quo?**

Besides increasing investor protection, the aim of the FinSA is to ensure that Swiss financial market law complies with applicable international standards and that a level playing field for the supervised financial service providers is created through uniform competitive conditions. Owing to the close intertwining of the Swiss financial market with European financial markets, the rules of the FinSA are based on EU regulations such as the Markets in Financial Instruments Directive II, the Prospectus Directive and the PRIIPs regulation, which simplifies matters for financial service providers serving clients both in Switzerland as well as in the EU. However, the FinSA takes into account the special characteristics of the Swiss financial market and therefore does not simply adopt the European regulatory rules as a whole. Under current law, financial service providers are treated differently with regard to the intensity of the regulation and their supervision. This inconsistent design of the regulatory requirements for financial service providers leads to unequal conditions of competition for the provision of financial services.<sup>66</sup>

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66 See n 20 above, p 8913.

As aforementioned, the FinSA deals with many requirements that financial service providers will have to meet and subjects that are new or complementary to EU regulations, which – prima facie – could be interpreted as a deterrent for market entry. However, these new cross-sectoral rules create more transparency and equal competitive conditions, which ultimately serve financial services providers as well. By fulfilling international requirements, financial service providers will hopefully benefit from the high reputation of the Swiss financial market abroad, which in turn promotes their business with foreign clients. Furthermore, clients benefit from the good quality of Swiss financial services and the new measures that are designed to improve the protection of their interests.<sup>67</sup>

The conduct of financial service providers towards their clients as well as sufficient transparency about the financial instruments offered have been key elements for the legislator for increased client protection, which is addressed by the FinSA. Under current financial services law, shortcomings exist in the areas of code of conduct and product regulations. For example, it is common that clients are not well informed about financial service providers and their services or products and are not being asked about their knowledge and experience. Furthermore, prospectuses used in public market transactions are often very detailed and hard for clients to understand. The FinSA addresses this issue by increasing information requirements and financial service providers have to, inter alia, give clients appropriate explanations and advice and to supply a KID to retail clients with regard to financial instruments. Also, the ability to switch to a different client segment or to refrain from advice from the financial service provider gives clients the possibility to determine the level of care and service they expect from their financial service provider. Although the question of enhanced client protection has been a controversial one, it can be said that the new rules under the FinSA are supporting clients in a way that is more tailored to their needs when engaging in businesses on the financial markets and thereby enhanced level client protection is afforded in comparison to the status quo.<sup>68</sup> However, it remains to be seen what value these client protection measures have for clients in practice.

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67 See n 20 above, pp 8913, 8918.

68 *Ibid*, p 8912 *et seq*, p 8919.