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The Proposed New Swiss Prospectus Regime – A First Analysis

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On 4 November 2015, the Swiss Federal Council adopted the draft Financial Services Act and submitted it to the Swiss Parliament. If enacted as proposed, it will impose new requirements on financial services providers and will introduce a new Swiss prospectus regime. Modeled largely after the EU prospectus framework, the new prospectus regime will be a veritable paradigm change to Swiss capital market regulation, introducing a number of novelties for issuers of securities in the Swiss market, such as the requirement for an ex ante approval for most financial instruments, coupled with some important long-awaited explicit exemptions from such requirement and the requirement for a prospectus for secondary public offerings.

By Christian Rehm / René Bösch

1) The Swiss Federal Council's Proposed Revision of the Swiss Prospectus Regime

On 4 November 2015 following a well-used public hearing, the Swiss Federal Council finalized the draft of the Financial Services Act (FinSA) and submitted it, together with a dispatch (*Botschaft*), to the Swiss Parliament. The FinSA sets forth the new prerequisites for providing financial services, as well as requirements applicable to offerings of financial instruments. As far as the rules on the offerings of financial instruments are concerned, the FinSA would introduce a number of fundamental changes to the Swiss prospectus regime. Most notably, a requirement for an ex ante approval of prospectuses, the long-awaited codification of private placement exemptions in line with international standards, a duty to publish a prospectus in the case of secondary public offerings, and a requirement to prepare a basic information document in the case of offerings to private clients.

The details will be set forth in an implementing ordinance that is yet to be published.

2) Duty to Publish an Approved Prospectus

a) New Approval Requirement

The existing Swiss prospectus regime requires the publication of a rather short offering prospectus in the case of primary public offerings and of a listing prospectus which is in line with international standards in the case of a listing on a Swiss stock exchange. It does not currently require offering prospectuses to be filed with, or approved by, any Swiss governmental or other authority or body. Only in the case of a listing of financial instruments in Switzerland, *e.g.*, on the SIX Swiss Exchange Ltd. (SIX), is such an approval required by the relevant stock exchange as the competent self-regulatory body.

The FinSA would introduce an approval requirement for offering prospectuses by a new regulatory body, the so-called approval authority or reviewing body. This body, while still a private body, must be licensed by the Swiss Financial Supervisory Authority FINMA for this purpose and would be vested with administrative powers. It is currently expected in the Swiss market that the SIX will apply to be appointed as approval authority.

This prospectus and approval requirement will apply to all public offerings (primary and secondary offerings) in Switzerland and to all securities that are to be admitted to trading on a trading platform in Switzerland. Securities that are at the time publicly offered or are the subject of a request for admission to trading filed prior to the entry into effect of the FinSA will benefit from a transitional period. The Swiss Federal Council may extend this transitional period or introduce an additional transitional period specifically for the prospectus and approval requirement should the appointment of, and start of operations by, the approval authority be delayed.

b) Ex Ante Approval and Exemptions

In principle, the approval authority would have to approve the prospectus *prior* to a public offering or an admission of securities to trading on a trading platform in Switzerland. First-time issuers (*i.e.*, issuers who either have not yet published a prospectus approved by the approval authority or do not have securities admitted on a Swiss trading platform) would be required to submit the prospectus for approval at least 20 calendar days prior to commencement of the envisaged offering or admission to trading, all other issuers at least 10 calendar days. These are the periods within which the approval authority would have to state that the prospectus is approved – or that the prospectus has to be revised, in which case the applicable period for approval would start anew after submission of the revised prospectus. However, if the approval authority does not react within the required period, this does not mean that the prospectus is automatically deemed approved.

Other than the European bond markets which are to a large extent wholesale markets targeted at institutional clients, the Swiss fixed income market is largely a retail market with standard denominations of CHF 5,000. This would mean that in a system requiring the pre-approval of prospectuses, bond issuers would always have to prepare a full-fledged prospectus prior to listing, in particular as for many issuers the Swiss market is not deep enough to warrant the preparation of a program documentation. This dilemma between having to obtain a pre-approval on the one hand and the issuers' need to be able to very quickly access the markets on the other side has in the past been solved by the SIX by allowing the provisional admission to trading before the formal listing approval is obtained, but only for fixed income and structured products. Based on industry input received in the public hearing, the draft FinSA took note of this important practice and introduces an exception to the rule of *ex ante* approval

for certain securities to be specified in the implementing ordinance. The dispatch explicitly states that bonds shall be designated as exempted securities. However, the exemption as worded in the FinSA is – in contrast to the prior consultative draft – not limited to bonds. Accordingly, other debt instruments that currently benefit from the SIX's provisional admission to trading, *e.g.*, structured products, convertible bonds, etc. may (and in our opinion should) also be eligible to benefit from this exemption. Where this exemption applies, issuers must nonetheless ensure that a prospectus whose contents conform to the requirements of the FinSA is available and published no later than the day on which the public offering commences or admission to trading is applied for. The review and approval of such a prospectus by the approval authority will, however, only take place *ex post* (*i.e.*, after the offering has been completed or after the admission to trading) rather than *ex ante*. According to the draft FinSA, a Swiss bank or broker dealer will have to confirm (more appropriate would be to verify) that the most important information about the issuer and the relevant securities is available at the time the prospectus is published. The prospectus that is so available on the offering date or date of admission to trading will be required to contain a statement that it has not yet been approved by an approval authority.

c) Automatic Approval of Certain Non-Swiss Prospectuses

Another important feature of the FinSA is that foreign prospectuses qualify for approval by the approval authority if they were drafted according to standards of the International Organization of Securities Commissions (IOSCO) and the disclosure and ongoing reporting duties are equivalent to those of the FinSA. Prospectuses that have been approved in accordance with certain foreign standards to be specified by the approval authority would be automatically deemed approved.

A foreign prospectus automatically deemed approved must be published no later than at the time of commencement of the public offering or admission to trading and be deposited with the approval authority.

d) Publication and Validity of Prospectuses

In the case of an initial public offering of equity securities, the approved prospectus must be published at least six business days prior to the end of the subscription period. This introduces a new statutory requirement for the length of the subscription period and will make discussions in the Swiss equity markets about the minimum duration of the subscription period obsolete. For the offering of all non-equity securities, the approved prospectus must be published prior to the start of the public offering or before the admission of the security to trading. The publication may be made by electronic means only (*e.g.*, on the website of the issuer or guarantor or of the approval authority), but, in such case, the prospectus must also be made available free of charge in printed form upon request.

Once approved, the prospectus is valid for 12 months for purposes of a public offering in Switzerland and/or admission to trading on a Swiss trading platform, subject to the duty to update in case of material new developments (see below).

3) Contents of the Prospectus

Prospectuses must be prepared in an official language of Switzerland or in English. As to their contents, the FinSA only states the golden rule of prospectus drafting, i.e. that the prospectus must contain all information material for the investment decision of the investor, and lists some specific items with respect to the issuer and, if applicable, the guarantor, the securities, and the offering. The prospectus will also have to include a summary that contains the important information, presented in an easily comprehensible way. If benefiting from an exemption from the *ex ante* approval requirement, the prospectus must include the relevant disclaimer (see above). The details of the required content of a prospectus will be set out in the implementing ordinance, i.e. the SIX will no longer be the standard setting authority in the Swiss market. In this respect it seems important to note that the European system certainly is a well-functioning capital market regime that can serve as a reference for developing the new Swiss prospectus regime; however, the content requirements for prospectuses set by the European regulator are extremely formalistic and much too detailed. Therefore, the Federal Council should rather take the well-established SIX regulations as a starting point when drafting the new content requirements in order to preserve the competitive edge of Swiss markets.

The FinSA explicitly permits a prospectus to incorporate certain information by reference. Such incorporation by reference is not permissible in the summary, and is only possible for documents published prior to, or concurrently with, the prospectus; so-called forward incorporation is thus not possible. Apart from these limitations, the implementing ordinance should preferably allow incorporation by reference as much as possible. Incorporation by reference not only serves the interests of issuers but by precisely referencing the relevant information without unnecessary duplication also those of investors.

In the case of new developments that occur prior to the end of the subscription period or, in the case of an admission to trading, prior to the start of trading on the relevant trading platform, if likely to materially affect the price of the securities, a supplement to the prospectus must be prepared and published. This supplement must also be approved by the approval authority prior to its publication within a maximum of seven calendar days. The approval authority is required to publish and maintain a list of events, the occurrence of which would generally not trigger an approval requirement but simply a duty to publish a supplement to the prospectus.

4) Exemptions from the Duty to Publish a Prospectus

The draft FinSA introduces a set of explicit exemptions from the prospectus requirement largely in line with the current Prospectus Directive of the European Union and existing SIX regulations.

a) Type of Offering

The list of exempted transactions includes, *inter alia*, public offerings limited to professional clients (*e.g.*, financial intermediaries within the meaning of the banking act, the financial institutions act (including asset managers) and the collective investment schemes act, insurance companies, companies with a professional treasury and – subject to certain yet to be specified criteria – wealthy private clients), offerings addressed to less than 150 private clients, and offerings with a minimum investment of CHF 100,000 or of securities with a denomination of at least CHF 100,000. Also, *de minimis* offerings of less than CHF 100,000 over a period of twelve months are exempted. These exemptions largely mirror the European Prospectus Directive which is currently under review. Therefore, it seems important that the legislator closely follow European developments (hearing participants proposed e.g. to increase the number of private clients in a private placement from 150 to 500) to ensure that the Swiss regime when enacted does not go beyond what is required in Europe.

b) Type of Security

The public offering of certain types of securities may – subject to certain conditions – also be made without an approved prospectus. For example, the following transactions can all be made without an approved prospectus: the exchange of outstanding equity securities for equity securities of the same class, the delivery of equity securities following a conversion of debt instruments of the same issuer or any of its affiliates, the offering of securities to executives or employees, and the offering of money market instruments (commercial paper).

c) Exemptions for Admission to Trading

There are also exemptions from the prospectus requirement in the case of admission to trading without a concurrent public offering in Switzerland. For example, as already the case under the listing rules of the SIX, the admission to trading of securities that, calculated over a 12-month period, account for less than ten percent of the equity securities of the same class that are already admitted to trading on the same trading platform, can be made without a new prospectus. Most notably, the FinSA continues the SIX practice (*e.g.*, regarding the Sponsored Segment of the SIX) of exempting securities that are already traded on a foreign trading platform that is either deemed eligible by the trading platform or where the transparency for investors is otherwise safeguarded from the prospectus requirement. The FinSA also introduces a new pro-

spectus exemption for admission to trading on trading segments that are only open to professional clients.

d) Further Exemptions

In the implementing ordinance, the Swiss Federal Council may also provide for additional exemptions from the prospectus requirement, *e.g.*, for small and medium-sized issuers, well-known seasoned issuers, or for the offering of pre-emptive subscription rights. Given that the Swiss Federal Council shall have the authority to enact full-fledged exemptions, the ordinance could, and in our view should, also provide for lighter documentation requirements for certain types of issuers, e.g. well-known seasoned issuers which should be allowed to incorporate previously filed materials to the maximum extent possible.

e) Information in Private Placements

The FinSA requires that all material information must be given to all offerees in a private placement. This requirement seems to be somewhat at odds with the concept of a private placement. If the regulatory assessment is that a certain placement shall be considered private, the test whether the offeror provided sufficient information should be left to applicable contract law.

5) Basic Information Document

Whenever a financial instrument other than shares (or comparable equity securities) is offered to private clients, a so-called basic information document must be prepared.

This basic information document must contain all information material for the client's investment decision, presented in an easily comprehensible way, and is designed to make financial instruments easier to compare.

In the case of material changes to the information contained in the basic information document, the basic information document must be updated, which in case of a long-term bond is a rather heavy burden. In fact, while the basic information document seems to be targeted at short-term financial investment products, and in particular structured products, the document is not really well-suited for debt offerings. Also, the dispatch fails to give a compelling reason why a basic information document shall be prepared for plain-vanilla debt offerings while no additional information shall be required for equity offerings, which has a much higher risk profile. Consequently, this requirement should be carefully reconsidered.

Although the drafting and updating of the basic information document may be delegated to qualifying third parties, the responsibility and liability for the basic information document remains with the manufacturer (*Ersteller*). Again, the fact that the manufac-

turer shall be and shall remain responsible for the basic information document shows that this instrument is really targeted at complex financial instruments and not at corporate bonds where no manufacturer exists.

It is expected that the implementing ordinance will ensure that the requirements for the basic information document are aligned with those applicable to the Key Investor Documents (KIDs) under the EU PRIIP Regulation.

6) Prospectus Liability

Notwithstanding the new prospectus approval requirement, the prospectus liability regime applicable to anyone participating in the drafting of the prospectus that is currently provided for in Swiss civil law will continue to exist. Consequently, a person responsible for drafting or contributing to a prospectus may incur liability for false or misleading information contained in the prospectus or if the prospectus does not fulfill the legal disclosure requirements.

Unlike the current prospectus liability regime, in order to avoid any such liability, the FinSA would require the drafters of the prospectus to prove that they did not act intentionally or negligently. This reversal of the burden of proof for liability would constitute a novelty in Swiss law. It remains to be seen whether the Swiss Parliament will accept this change to the status quo. Nonetheless, even if it were to do so, the investor would have to still prove that the prospectus contained false or misleading information or was incomplete, that he or she relied on the prospectus when making the investment decision (with predominant probability), the amount of the damages, and that the defect in the prospectus caused these damages. With this requirement to prove causality, the Swiss Federal Council declined to introduce the fraud-on-the-market theory, which would assume reliance on the prospectus by the investor when making the investment decision.

While a prospectus will need to include forward-looking statements, liability for such statements is rightfully limited. Wrong or misleading forward-looking statements can only lead to prospectus liability if they are made against better knowledge or made without including a disclaimer that future developments are subject to uncertainty (similar to the bespeaks caution doctrine in the U.S.). Summaries can only lead to liability if they are still incorrect or misleading if read together with, or inconsistent with, the rest of the prospectus.

The FinSA also introduces administrative criminal liability in the case of an intentional violation of the Swiss prospectus rules. While a similar provision can be found in the Swiss Federal Act on Collective Investment Schemes, the concept seems to be at odds with traditional Swiss law concepts. As with the reversal of the burden of proof for pro-

spectus liability, it remains to be seen whether the Swiss Parliament will accept this aspect of the FinSA.

7) Appraisal

Aside from the basic information document for bonds, the change in the burden of proof in the case of prospectus liability and the introduction of administrative criminal liability for intentional non-compliance with Swiss prospectus rules, the FinSA would introduce a modern and practical prospectus regime in Switzerland that in our assessment is largely compatible with the EU prospectus regime and other international standards.

In our view, by taking the Prospectus Directive and its exemptions as a model, by accepting that established Swiss practice should continue, and by giving regard to the needs of both small and medium-sized issuers as well as large well-known seasoned issuers, the proposed regime will not introduce major obstacles for Swiss and foreign issuers. Rather, it will enhance transparency for investors and create more legal certainty for issuers.

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The Reviewing Body – a New Element in the Prospectus Law according to the Federal Financial Services Act (FinSA)

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The Draft Federal Financial Services Act (FinSA) provides for uniform rules for the requirement to publish a prospectus for all public securities offerings and for the admission of securities to trading on a trading venue. A central element of the new regulations is the requirement for a mandatory check of the prospectus by a reviewing body (Prüfstelle), prior to the publication of the prospectus.

This article discusses the new prospectus requirements according to the FinSA and introduces the reviewing body as a new element of the listing procedure. Further, the possible impact of these new regulations on the listing process will be illustrated and some initial conclusions drawn.

By Rodolfo Straub / Therese Grunder / Regina Tschopp

1) Introduction

Federal legislation does not currently contain any comprehensive regulation of the prospectus as a basis for the issue and public placement of securities. The Swiss Code of Obligations/CO (Federal Act on the Amendment of the Swiss Civil Code, Part Five; The Code of Obligations, SR 220) only contains a requirement for a prospectus to be published in the event of a capital increase by a company limited by shares (article 652a CO) and by the issuance of bonds (article 1156 CO). Detailed regulations on prospectuses are contained in the Listing Rules/LR of SIX Swiss Exchange issued under the stock exchanges' statutory self-regulatory competence (article 35 of the Financial Market Infrastructure Act/FMIA, in force since 1 January 2016, previously article 8 of the Swiss Federal Act on Stock Exchanges and Securities Trading/SESTA), although these rules apply only to the listing prospectus. The Listing Rules set out the obligation to publish a listing prospectus, any exemptions to this requirement, the contents of the listing prospectus and the listing procedure, which also comprises the approval of the prospectus.

The Draft Federal Financial Services Act/FinSA (Federal Gazette 2015 9093 ff. (German only)), includes a chapter on securities prospectuses. It is intended to create uniform rules for the requirement to publish a prospectus for all public securities offerings and for the admission of securities to trading on a trading venue. A central element of the new regulations is the requirement for a mandatory check of the prospectus by a reviewing body (the Reviewing Body; *Prüfstelle*), in general before the prospectus is published.

Hereinafter, the current regulations of SIX Swiss Exchange will be set out and the new prospectus requirements according to FinSA analyzed, followed by an introduction of the Reviewing Body. Then, the possible impact of these new regulations on the listing process will be illustrated and some initial conclusions drawn.

2) The listing prospectus as a key element of the Listing Rules

Under the Financial Market Infrastructure Act/FMIA; stock exchanges are required to issue regulations on the admission of securities to trading and the listing of securities. These regulations must in particular lay down rules for the publication of information on which investors rely for assessing the characteristics of securities and the quality of the issuer (article 35 FMIA). The stock exchanges are empowered to issue these regulations as part of their self-regulatory competences under federal law mentioned above (Listing Rules and Additional Rules).

The Listing Rules and Additional Rules are issued by the Regulatory Board of SIX Swiss Exchange and implemented by SIX Exchange Regulation as an independent

unit within SIX. A significant element of the Listing Rules is the listing prospectus, the review and approval of which forms an integral part of the listing process.

The listing prospectus must provide sufficient information for competent investors to reach an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer, as well as of the rights attached to the securities (article 27 (1) LR). In particular the prospectus schemes, which form part of the Listing Rules and the Additional Rules, govern the requirements for the contents of the prospectus in the different listing standards. Article 33 LR provides for exemptions from the obligation to publish a prospectus. It is also possible to shorten the listing prospectus in certain cases (article 34 LR) and to omit certain information normally required under the prospectus schemes (article 36 LR). The review and approval of the listing prospectus by SIX Exchange Regulation is part of the listing process. The prospectus must be submitted to SIX Exchange Regulation together with the listing application. In the case of new listings, applications for listings must be submitted at the latest 20 trading days before the first trading day, in the case of capital increases 10 trading days before the first trading day or the first trading day of the subscription rights (article 12 Directive on the Procedures for Equity Securities/DPES).

For bonds and derivatives there is a special procedure in the form of provisional admission to trading where the listing process including the review of the prospectus is completed after the admission to trading. Under this procedure, bonds and derivatives are provisionally admitted to trading within one or three trading days, with the listing procedure and the review and approval of the prospectus only taking place in a second phase.

SIX Exchange Regulation processes the listing application within 20 trading days and checks that the prospectus contains the information required in accordance with the applicable prospectus scheme and, if necessary, submits the application to the Regulatory Board for a decision. If according to SIX Exchange Regulation required information is missing in the prospectus, the applicant is requested to complete the document. If the requirements laid down in the Listing Rules are met, i.e. the listing prospectus is complete, the listing application is approved (article 47 LR). This decision constitutes the official approval of the listing including the prospectus. The issuer may lodge an appeal against the listing decision to the Appeals Board within 20 trading days provided the issuer has an interest worth of protection in having the decision amended (article 62 LR). In turn, appeals against the decisions of the Appeals Board may be lodged with the SIX Swiss Exchange Board of Arbitration within 20 trading days.

On the basis of these regulations SIX Exchange Regulation decided on 97 listing applications for equities (apart from IPOs or capital increases, listing applications must also be filed for other transactions such as stock splits, exchanges of securities, change of

regulatory standard etc.) , 279 for bonds, 97 for collective investments schemes and 42'798 for derivatives in 2015.

3) Prospectus requirements under the FinSA

According to the FinSA dispatch, one of the aims of the act is to improve client protection, which is also intended to strengthen Switzerland's competitiveness as a financial center (dispatch by the Federal Council to the Federal Assembly on the draft Federal Financial Services Act and the draft Federal Financial Institutions Act of 4 November 2015, Federal Gazette 2015 8901 ff). Alongside rules on the provision of financial services and the assertion of customers' rights, rules on offerings of financial instruments are a central element of this new legislation. In terms of the documentation requirements for financial instruments, the FinSA draft legislation contains provisions on the prospectus and the basic information sheet. The chapter "Prospectus for Securities" in Title III "Offering of Financial Instruments" of the FinSA establishes uniform prospectus requirements both for public offerings of securities and for the admission of securities to trading on a trading venue. The old sections in the Code of Obligations on issuance prospectuses for equities and bonds are to be revoked.

Under article 37 FinSA the duty to publish a prospectus is triggered when a public offering is made or alternatively when securities are admitted to trading on a trading venue (whether a stock exchange or a multilateral trading facility as defined by FMIA). In both cases a prospectus must be published in advance. Thus, with the new law, the scope to publish a prospectus and the timing of when to publish it underwent a significant change. In future the prospectus will no longer only be needed once the security is listed, dated from the first day of trading. It will have to be available from the beginning of the public offering, even if there is no subsequent listing or admission on a trading venue. This introduces in Switzerland what has been in force in the EU for around 10 years under the aegis of the Prospectus Directive.

The FinSA contains exemptions from and facilitations of the requirement to publish a prospectus in articles 38ff. and articles 49ff. The basic requirements for the contents of the prospectus are laid down in article 42ff. FinSA. The detailed requirements depending on the issuer category and security will be set out in the ordinances and are not known at present. Further provisions govern the format in which the prospectus may be published (article 67ff. FinSA), the distinction to public advertising (article 71 FinSA) and the liability for the prospectus (article 72 FinSA).

In its transitional provisions, the FinSA sets a deadline of two years from the entry into force of the Act for the implementation of the new prospectus regime (article 97 (4) FinSA).

4) The Reviewing Body

The prospectus must be submitted to the Reviewing Body before it is published. The Reviewing Body checks that it is complete, coherent and understandable (article 53 (1) FinSA).

In contrast to the current position, where only listing prospectuses are subject to review, under the FinSA all prospectuses required by law must be reviewed and approved by the Reviewing Body. This review must take place before the prospectus is published. However, the Federal Council may designate securities whose prospectus does not need to be reviewed until after publication. This will allow for the special issuance procedure as well as the provisional admission to trading – both essential, in particular for bonds – to be maintained.

The act does not stipulate who the Reviewing Body must be. Anyone who can carry out this task sufficiently independent and obtain authorization from FINMA can apply to be a Reviewing Body. According to the dispatch this market-based approach has been chosen because FINMA does not currently have the resources in terms of infrastructure and personnel to carry out this task (which is fulfilled by public authorities in the EU) itself (FinSA/FinIA dispatch p. 8981). FINMA may approve more than one Reviewing Body if this is objectively justified (article 54 (1) FinSA). It is notable that the limitation for FINMA to approve more than one Reviewing Body in objectively justified cases was introduced after the consultation only. The consultation draft had stipulated the possibility for a number of Reviewing Bodies to operate under the FinSA. There are no indications in the consultation report on the FinSA or the dispatch of when such an approval might be objectively justified. If there is no private Reviewing Body available on the market, the Federal Council may designate a body to carry out this task (article 54 (5) FinSA).

The review of the prospectus by the Reviewing Body is carried out under public law on the basis of the Administrative Procedure Act/APA dated 20 December 1968 (article 55 (1) FinSA). A public task is therefore being carried out by a private entity. A private Reviewing Body qualifies in this function as a public authority as defined by article 1 (2) (e) APA. The review decision has the status of an official administrative decision which can be appealed to the Federal Administrative Court (Article 47 (1) (b) APA).

As already mentioned, when reviewing the prospectus the Reviewing Body is required to verify the three criteria of completeness, coherence and comprehensibility. The review is therefore far more extensive than a purely formal check of completeness. However, the dispatch also makes it clear that the review does not entail a check of the substantive accuracy of the information in the prospectus. The dispatch also explains that the requirement for coherence should be interpreted as meaning that the prospectus may not contain any internal contradictions (FinSA/FinIA dispatch, p. 8981).

Under the law as it stands currently, SIX Exchange Regulation mainly checks listing prospectuses for completeness. SIX Exchange Regulation also draws any evidently contradictory or incorrect information in the listing prospectus to the issuer's attention. However, unlike in the FinSA requirements, the review of prospectuses under the Listing Rules does not focus explicitly on coherence and comprehensibility. Just as now, neither in the future there will be a check of an issuer's credit standing. If the Reviewing Body decides that the prospectus that has been submitted does not meet the requirements of the act, it will request the submitting institution to rectify it. The Reviewing Body does not intervene in the creation of the prospectus with its review work and is, according to the view taken by the authors, not covered by the liability for the prospectus according to article 72 FinSA.

The Reviewing Body is required to check the prospectus within 10 calendar days. This period is interrupted by any requests to correct the prospectus and begins again afresh once the corrected version has been received, i.e. the Reviewing Body then has another 10 calender days to audit the prospectus. For new issuers the review period is 20 calendar days (article 55 FinSA). This represents a significant difference from the listing procedure carried out by SIX Exchange Regulation, which is almost always completed within 20 trading days, including checking any corrections and rectifications of the prospectus. The mentioned deadlines are regulatory periods (*Ordnungsfristen*). If the Reviewing Body does not make a decision within the deadline set for it, this does not amount to the approval of the prospectus. Once approved, a prospectus remains valid for 12 months (article 57 FinSA).

As discussed above, the contents of the prospectus – and therefore the contents of the review as well – will be laid down in the acts and ordinances. Article 43 FinSA gives the Reviewing Body powers to permit exceptions to the content requirements for the prospectus. An extension of these powers in the ordinances would be welcome. This could, for example, make it easier to respond to market developments and the documentation of new instruments. One possible solution could be for the Reviewing Body to demand other equivalent information in the prospectus instead of the information normally required, if this is justified by the nature of the issuer or the security.

The Reviewing Body levies fees to cover its expenses (article 59 (1) FinSA). The relevant fee regulations will be issued by the Federal Council. This provision will prevent any competition on fees which could otherwise arise seeing it would be possible, in theory at least, for several Reviewing Bodies to be active under FinSA.

5) Review of the prospectus and listing on stock exchange: impact on the procedure

The new prospectus regime established by the FinSA divides the procedure set out in section 2 above into two parts: the publication and review of the prospectus in accord-

ance with the FinSA in advance of the public offering or admission to trading in a first step and the listing under the stock exchange's listing rules in a second step. This division of the process into two parts corresponds to the system currently in force in the EU.

Even after the entry into force of the FinSA, the stock exchange will still need listing and admissions regulations in accordance with article 35 FMIA. Once the securities have been listed, the investor will therefore have access to information on the issuer and the securities based on two different legal requirements: information on the issuer and the securities in the prospectus in line with the content requirements of the FinSA and information on the issuer and of the securities in accordance with the listing rules. FinSA does not limit the right for stock exchanges to issue their own prospectus rules based on their self-regulatory competences. However, in practice, it would be less than ideal having to comply with both the FinSA and the stock exchange prospectus requirements. To have two sources of law would also mean having to address two authorities for prospectus approval: the Reviewing Body under FinSA and the body in charge of vetting prospectuses under the listing rules. This could entail serious difficulties in the issuance and listing procedures, for instance when the request from the stock exchange to amend some information given in the prospectus based on the listing rules encroaches on information required by FinSA. In such a case, issuers might have to revert back to the Reviewing Body, possibly resulting in delays in the issuance and listing procedure which could endanger the success of a transaction. Therefore, the content requirements for issuers in the prospectus under the FinSA will have to be designed in such a way as to meet the requirements for the subsequent listing in full. As regards information requirements for securities, these evidently need to be more comprehensive for a listing, particularly with regard to the technical data relevant for trading, than if the offering does not relate to a listing. The listing rules can be expected to contain additional requirements here.

A closer look at the two steps – the drafting and reviewing of the prospectus and the listing application and decision – highlights some important differences. The review of the prospectus in the first step is carried out, as discussed, by private-sector review bodies but on the basis of public law as laid down in federal administrative law with a right of appeal to the Federal Administrative Court. The fees are based on the fee regulations laid down by the Federal Council. The subsequent listing decision, however, is the responsibility of the stock exchanges' regulatory bodies under their self-regulatory competences, with a right of appeal to the Appeals Board and the SIX Swiss Exchange Board of Arbitration. The fees for this procedure will be laid down in the List of Charges of SIX Swiss Exchange (we are leaving aside the question of whether the listing regulations should be considered to be public-law or private-law norms. The fact that article 35 (5) FinIA explicitly refers to the *contractual sanctions* is a possible indication of their private-law nature). Whether it will still be possible in future for both

steps to be carried out by the same regulatory unit in the stock exchange, is currently under discussion. SIX will apply to become a Reviewing Body and take the necessary organisational measures. How the Reviewing Body will be organised in detail and what impact the establishment of the Reviewing Body by SIX Swiss Exchange will have on the existing listing procedure is still uncertain at the moment. One of the key issues is the question of how to ensure that a review body that is part of the SIX Group is able to meet the independence requirement of the FinSA.

6) Summary and conclusion

A comprehensive and uniform law on prospectuses that also covers the use of a prospectus on the primary market is a welcome development on investor protection grounds and in terms of creating a level playing field. Many of the comments and suggestions for improvements made in the course of the consultation are reflected in the FinSA dispatch. It should therefore be possible to implement the proposed new regulations without a significant impact on the transaction forms in use today.

The current listing process will change with the introduction of the Reviewing Body. It will be split into two separate steps of the drafting and review of the prospectus, followed by the subsequent listing.

It is too early for an in-depth assessment of the impact of the FinSA and the Reviewing Body. Before doing so the texts of the Federal Council's ordinances, which will be critical for the detailed implementation in this area in particular, are needed. It is uncertain if a number of issues still can be handled in a rather flexible manner as under the current structure of SIX Swiss Exchange and SIX Exchange Regulation. As examples could be mentioned the ability to modify the content of the prospectus in order to account for new financial instruments and market developments as well as the assignment of the competence to grant exemptions from the requirement to publish a prospectus. In order to achieve an as market-friendly solution as possible which ultimately contributes to strengthen the financial center, it will therefore be essential to involve market participants when drafting the ordinances.

The range of financial instruments, which require a prospectus and are listed will not change significantly as a result of the FinSA. However, the requirement to review the prospectus in advance of a public offering of securities represents a significant change. By applying to become a Reviewing Body SIX aims to ensure that it will be able to carry out the new two-stage process of prospectus review and listing/admission to trading in future as efficiently as before and to the satisfaction of issuers in coordination with the existing in-house expertise and available systems infrastructure.

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Regulation of the Point of Sale – An Update on the Rules of Conduct of Financial Services Providers under the proposed FIDLEG

Reference: CapLaw-2016-3

On 4 November 2015 the Swiss Federal Council has published the Message (Botschaft) on the Financial Services Act (Finanzdienstleistungsgesetz, FIDLEG). In the industry, it has been expected with great excitement and interest, as it will have a major impact, inter alia, on how financial services and products may be offered and sold to clients. Also, the FIDLEG, together with the new Financial Institutions Act (Finanzinstitutsgesetz, FINIG), will define how equivalent the relevant Swiss regulation will be when compared with, in particular, EU regulation. This article aims to provide a short overview on the core content of the FIDLEG, namely, the conduct duties to be complied with at the point of sale.

By Sandro Abegglen / Luca Bianchi

1) Introduction

As is well known, the new Financial Services Act (FIDLEG) aims to enhance client protection and to establish a level playing field with respect to the regulatory framework of financial services (cp. CapLaw-2015-33, CapLaw-2015-3, and CapLaw-2014-5). The recently published message of the Federal Council to the FIDLEG, which is discussed in the Council of States' Committee for Economic Affairs and Taxation (WAK-Ständerat) these days, allows for another outlook on the proposed law (which, however, may be subject to further changes). The stipulation of regulatory conduct rules remains a key aspect of the proposed FIDLEG, and apart from a number of general duties that have mainly been transferred from civil law, some new duties concerning the point of sale will have to be implemented by financial institutions.

This article provides a high level overview on the new regulatory conduct rules that will apply to financial services providers under the FIDLEG. It does not further discuss other aspects such as the regulatory product transparency rules on the offering of financial instruments of the FIDLEG (cp. CapLaw-2016-1 and CapLaw-2016-5).

2) The new Regulatory Conduct Rules

a) General Duties

i) Loyalty, Information and Due Diligence Duties

As a general, now also regulatory, principle, financial services providers will be obliged to act in the best interest of their clients and provide the required information, due diligence and care vis-à-vis their clients under the FIDLEG. These general regulatory du-

ties (that are well known from civil law) comprise additional, more detailed regulatory provisions (as described in Paragraph 2) a).

In particular, financial services providers must provide to their clients key information such as 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.

Furthermore, financial services providers must inform on the offered financial services and the connected risks and costs, their economic ties to third parties that are connected with the offered financial services, the offered financial instruments (including the connected risks and costs), the market offering considered for the selection of the financial instruments, and the type of custody of the financial instruments (as well as the connected risks and costs).

The information set out above must be comprehensible and may be provided to the clients in standardized form and electronically.

ii) Documentation Duties

Pursuant to the message, financial services providers will have to document their services adequately. 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.

In addition, financial services providers will be obliged to deliver a copy of the required documentation to their clients and must inform their clients in detail about the services actually provided.

iii) Duty of Best Execution

The principles of bona fide and equal treatment while processing client orders represent further duties – though not new – that financial services providers will have to implement. Specifically, financial services providers must comply with the duty of best execution concerning financial, temporal, and qualitative aspects. The creation of internal guidelines concerning the execution of client orders will be mandatory.

iv) Duties regarding Securities Lending

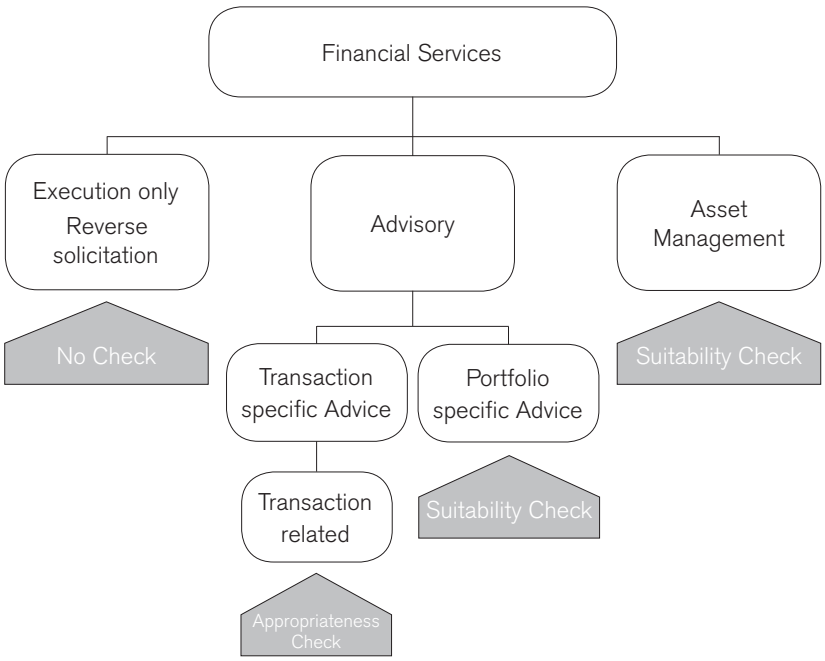
Financial services providers are only allowed to borrow financial instruments from client holdings as counterparties or lend them to third parties (securities lending) if the clients agree to such transactions in a separate agreement in writing or another form that allows for text verification. Uncovered securities lending transactions with financial

instruments of private clients will not be permitted. This rule reflects the currently applicable practice of the Swiss Financial Market Supervisory Authority FINMA.

b) Duties for the Point of Sale

i) Assessment of Appropriateness and Suitability

Financial services providers that offer investment advisory or asset management services will have to perform appropriateness or suitability assessments. The following graph describes possible client relationships and the regulatory rules applicable thereto.



(Source: Federal Council, Message on the Financial Services Act (FIDLEG) and the Financial Institutions Act (FINIG), 4 November 2015 version, p. 52, free translation)

A financial institution that provides investment advice (*i.e.* makes a personal recommendation) for a transaction but without evaluating the complete client portfolio must examine only the appropriateness of financial instruments for the client (duty to perform an appropriateness check). For this purpose, it is obliged to request information on the expertise (knowledge) and experience of its clients with respect to the specific type of transaction that is targeted; should the client lack expertise or experience, such may be *produced* by appropriate specific information/education.

A financial services provider that renders investment advice under consideration of the client portfolio, or asset management services, must make a suitability check (duty to perform a suitability check). This means that he is obliged to inquire about the finan-

cial situation and investment objectives, and also the expertise and experience (like in the appropriateness check) of the clients, before making a recommendation regarding appropriate financial instruments or making respective investments in its function as an asset manager. In case of discretionary mandates, however, appropriateness in our view must only be pertinent in respect of the strategy chosen, not the individual transaction.

Summarized, an adviser or asset manager will only be able to recommend financial instruments or, alternatively, make investment decisions, if the recommendation or transaction, as applicable, is appropriate or suitable, respectively, for the client.

In the context of the above stated point of sale duties, the following exceptions apply:

– With respect to transactions with institutional clients (*i.e.* regulated financial intermediaries such as Swiss banks, securities firms, collective investment schemes, fund management companies, asset managers of collective assets, asset managers, insurance companies, or foreign financial intermediaries and insurance companies that are subject to an equivalent supervision, as well as central banks), only very selected rules of conduct will be applicable. In particular, vis-à-vis institutional clients neither appropriateness nor suitability checks are required.

– Unless contrary indications arise, professional clients (such as public entities and retirement benefits institutions with professional treasury operations, companies with professional treasury operations, as well as HNWI that opted-out of their private clients status; but excluding institutional clients as set out above) may be deemed to possess the required expertise (knowledge) and experience. They may be looked at as being able to bear the risk of financial services at all times and must be enquired only on their investment objectives.

– Finally, with respect to mere execution only transactions, financial services providers will not be obliged to perform appropriateness or suitability checks. Before executing the services, the financial institutions will have to inform execution only clients that these checks will not be made.

In addition, some of the regulatory documentation and accountability duties will not be mandatory vis-à-vis institutional clients. However, accountability duties that are based on civil law may still be applicable.

ii) Duties related to Product and Fee Transparency

The rules on product transparency will affect both the issuer and the point of sale. For the issuer, compliance with the new prospectus regime will be required. At the point of sale, the basic information sheet (BIB; *Basisinformationsblatt*) – required basically for

all financial instruments other than shares – must be made available to private clients whenever an investment is offered.

Furthermore, the rules on fee transparency described above require the respective appropriate information of the clients, in particular, at the point of sale.

3) Conclusion

Swiss and foreign financial services providers will need to timely implement the new conduct rules. Although many aspects of them are already to be observed today, the granularity of the new regime applicable at the point of sale will require time and effort to implement systems and processes that ensure compliance in an efficient and reliable fashion.

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Draft Financial Services Act to Expand Clients' Enforcement Rights vis-à-vis Financial Services Providers, Leaves Key Questions Unaddressed

Reference: CapLaw-2016-4

While the draft Financial Services Act (FinSA) primarily has a regulatory purpose, it also contains provisions set to effect the private law relationship between providers of financial services and clients. The proposed measures include a claimant-friendly rule regarding the allocation of costs in litigation proceedings, stricter requirements for financial services providers regarding documentation, information and disclosure of documents for the purpose of enforcement of clients' rights, and a quasi-mandatory ombuds system for all disputes arising out of financial services contracts, including loan contracts, insurance contracts and all normal retail client bank relationships.

By Thomas Werlen / Jonas Hertner

1) Legislative History

On 4 November 2015, the Swiss Federal Council adopted the Dispatch on the draft Financial Services Act (FinSA), sending it to parliament for consideration. Among the purposes of the bill is to strengthen the rights of clients, retail clients in particular, vis-à-vis financial services providers (FSP). Work on the bill began in early 2012, when the Federal Council tasked the Department of Finance (DoF) to draft a set of comprehensive rules for the regulation of financial products and services on the basis of a 2012 discussion paper by the Swiss Financial Market Supervisory Authority (FINMA). FINMA notably called for the improvement of enforcement options of retail clients'

claims against financial services providers, stating that, under the current law, high costs and uncertainties prevent clients from litigating their claims and effectively enforcing their rights. The preliminary draft of the FinSA then provided for extensive provisions in relation to judicial protection for clients, including reversals of the burden of proof in favor of the client, proposals for collective redress mechanisms, a procedural costs fund and an arbitration court. In March 2015, the Swiss Federal Council dropped the most far-reaching of these provisions after fierce criticism in the course of the public consultation proceeding. With regard to the enforcement of clients' rights, three elements remained in the draft or were newly introduced: (1) a stricter disclosure obligation of FSP to provide documentation to clients, (2) an obligation of FSP to become affiliated with a certified ombuds body, and (3) new rules governing the allocation of costs in financial market litigation. These proposals are discussed below.

2) Proposed Measures

a) Providers' Obligation to Produce Documents and Clients' Right to Information

The first element of the proposed measures reflects the argument that clients are routinely underdocumented when litigating claims against FSP. Under the current law, FSP have a contractual obligation to document the client relationship and to produce documentation upon client's request based on the provisions on the simple agency contract (article 400 of the Swiss Code of Obligations (CO)). FSP are also required to disclose all information concerning the client under article 8 of the Federal Act on Data Protection (DPA). When litigating claims against financial services providers, clients have increasingly resorted to filing DPA disclosure requests to obtain documentation for assessing chances of success and evidence purposes. Such requests have been found admissible even when filed to obtain evidence to be used in a compensation claim ('pre-trial discovery', as long as the disclosure request is filed separately and before a claim for damages). Claimants can further take advantage of the defendants' obligation to produce documents based on the procedural duty to cooperate (articles 160 et seq. of the Code of Civil Procedure (CCP)) or might even initiate a precautionary taking of evidence pursuant to article 158 CCP (which however requires the claimant to designate or sufficiently describe the document he or she expects to be produced by the defendant).

The draft FinSA is set to add a further layer to the area of document production. First, article 17 requires FSP to keep documentation on a specific set of facts and events, namely: (1) content and scope of the financial services agreed upon with the client, (2) information collected on clients, (3) whether the client was informed that the FSP would not effect a so-called 'suitability/adequacy test' (in *execution-only* and *reverse-solicitation* contracts), or that the FSP informed the client that it either was not able to undertake the 'suitability/adequacy test' for lack of sufficient information or that it

considers the specific financial instrument unsuitable or inadequate, and (4) all financial services provided to the client. If the client relationship involves wealth management or investment advice, FSP must additionally keep records of clients' investment requirements and needs as well as the reasons for every recommendation resulting in a decision to buy, hold or sell.

Draft article 18 then requires FSP to produce the information referred to in article 17 to the client. In addition, FSP are required to regularly inform clients on (1) services agreed and executed, (2) portfolio composition, valuation and development, and (3) all costs and expenses incurred in connection with the services. Disclosure timing and minimum content of the additional information would be laid out in an ordinance of the Federal Council. With the disclosure obligation being a regulatory duty, the FSP is not entitled to charge the client directly for the production of documents within the scope of article 17.

As an addition to the existing bases for document production claims, articles 75 and 76 of the draft FinSA allow the client to directly request documentation and information. In accordance with article 75, the FSP must produce, upon client's request, a copy of the client file (paper and electronic), including all information detailed in article 17 and further documents prepared in the context of the client relationship. Production of documents must occur within 30 days of the client's written request and at no additional cost to the client (article 76). If the FSP does not produce the documents requested within the 30-day time limit, the client can file a claim in summary proceedings and have a positive decision enforced pursuant to the general provisions of Swiss civil procedure. Article 76 (4) further provides that the refusal of a FSP to comply with the disclosure request can be taken into account by a court in subsequent proceedings on a client's substantive claims if such claims were brought by the client in good faith.

The scope of the obligation to document the client relationship derives from regulatory provisions (articles 17 and 18 of the draft FinSA) as well as from the rules governing the agency contract and the relationship between FSP and client. While it may be argued that articles 17 and 18 further concretize the scope of the obligation, it is difficult to see why the provisions governing the agency relationship in the Swiss Code of Obligations on the one hand, and the disclosure obligations under the Data Protection Act on the other hand would not be a sufficient basis for enforcing production requests. At any rate, as is the case today, purely internal documents such as preparatory studies, notes and drafts used for the internal decision making process would not have to be disclosed under the draft FinSA, based on the assumption that they are not required to assess whether an FSP has complied with its contractual and statutory obligations.

The obligation to document, inform and disclose is linked to the question of the burden of proof in situations where the client incurs damage as a result of a breach of these obligations. In its Dispatch, the Federal Council regrets the overwhelming negative response in the consultation proceeding to the proposed reversals of the burden of proof, which would have required an FSP to prove that it complied with its documentation and information obligations (Dispatch of 4 November 2015, p. 21). At the same time, the Federal Council notes that not implementing the initial proposals would not alter the status quo significantly given the current case law of the Federal Tribunal. This is correct insofar as pursuant to article 400 (1) CO, the agent is required to comprehensively inform the principal on the execution of the mandate, and in light of the Federal Tribunal's jurisprudence to require a lowered standard of evidence in certain situations where documentation is lacking. However, it must be noted that the requirement to prove a causal link between damage and breach of obligation will continue to be critical and routinely difficult to demonstrate for claimants – an issue that the draft FinSA does not directly address.

b) Ombuds System

As it is proposed under the draft FinSA, the ombuds system is in line with the principle of Swiss civil procedure law that litigation shall be preceded by an attempt at conciliation (article 197 CCP). The draft FinSA requires all FSP to affiliate themselves with certified independent ombuds bodies and to inform clients of the possibility that claims can be brought to the ombuds body before FSP and client enter into financial services contracts as well as in every instance in which a FSP rejects a client's claim. These bodies will, as is the case today, not have the competence to decide individual disputes nor would they substantially inform ordinary civil proceedings. Yet, under the draft FinSA, the conduct of the parties in a dispute before an ombuds body could be taken into account by a civil court in ordinary proceedings with respect to the allocation of costs to the parties.

Article 78 provides that the ombuds proceeding must be unbureaucratic, fair, quick, impartial and that the client pursuing a claim either must not incur expenses for the proceeding or only have to bear a minimal fee. It further states that, except for the final recommendation (which may include an assessment of facts and law by the ombuds body), the ombuds proceeding would be confidential, each parties' submissions would, as a rule, not be shared with the other party, and that parties' correspondence generally could not be used in other proceedings such as before an ordinary civil court.

The ombuds body will be competent to hear not only disputes on substantial claims but also on other claims such as document production requests. It will deem a claim admissible if (1) the claim is submitted using an official form, (2) the client can show that he or she has informed the FSP of the claim and made a reasonable effort to

reach an agreement with the FSP, (3) the claim is not an evident abuse of rights and an identical claim was not brought to the ombuds body before, and (4) the claim was not brought in another forum, such as before a conciliation authority or a state or arbitration court, before.

The definition of procedural rules would largely fall within the competency of each ombuds body. Notably, the draft FinSA does not require ombuds bodies to hear both parties in an in-person negotiation. It merely requires that, absent an agreement between the parties, the client could choose in which official language the ombuds proceeding would take place. To conclude the proceeding, an ombuds body could adopt an assessment of the dispute and include it in the notification to the parties that would serve as a conciliation proposal. The proceeding would end either (1) with the withdrawal of the claim, (2) an agreement between the parties, (3) the refusal of the conciliation proposal by at least one party, or (4) the dismissal of the claim by the ombuds body if the request constituted an abuse of right or if one of the parties had initiated ordinary proceedings in the same matter. If the result of the ombuds proceeding were rejected by one party, claimant could file a claim in ordinary civil proceedings without being required to initiate another conciliation proceeding (new article 199(2)(e) CCP).

The ombuds system as proposed will require FSP to inform clients of the conciliation system and to participate in a proceeding if it is instituted by a client. The proceeding will be independent of ordinary proceedings and would notably not have an effect on the question of jurisdiction. Hence, if an FSP were to file a claim with the ombuds body, the client would not be required to participate but could, for instance, file a civil claim irrespective of the stage of the ombuds proceeding.

The draft FinSA proposes to secure financing the ombuds system through contributions by affiliated FSP in accordance with the ombuds body's respective by-laws. Ombuds bodies will be free to require FSP to directly cover individual proceedings and/or to set flat or relative sum contributions. The draft FinSA does not require the ombuds proceedings to be completely free of costs for clients. However, ombuds bodies would have to ensure that costs charged to clients are not prohibitory.

As prerequisites for certification as ombuds body, article 87 of the draft FinSA provides a set of criteria: (1) impartiality and independence of the body and the individual ombudspersons employed by it, (2) the individual ombudspersons must be adequately qualified and have specific knowledge in the field of financial instruments and services, finance and capital markets, as well as conciliation/negotiation experience, and (3) the ombuds body must have organizational by-laws ensuring efficiency and operational capability as well as rules on procedure and costs, all of which must meet the FinSA prerequisites. If an FSP were to repeatedly disregard its obligations under the ombuds system, the ombuds body could exclude that FSP and cancel its affilia-

tion. As a result, the FSP would be required to reapply for affiliation with the same or a new ombuds body. In accordance with the draft FinSA, the FoJ will publish a list of certified ombuds bodies. The FoJ may force ombuds bodies to accept affiliation with a specific FSP if required. All ombuds bodies will be required to publish an annual report on their activities.

c) Allocation of Litigation Costs

The draft FinSA recognizes the difficulties damaged clients face in bringing claims against financial services providers, notably the potential total costs which in many scenarios exceed the actual amount in dispute. To mitigate the cost risk, the draft FinSA proposes three measures which include partially abandoning the basic rule of 'costs follow the event' or 'loser pays'.

Pursuant to a new article 114a CCP, retail clients in the sense of article 4(2) of the draft FinSA (as opposed to qualified and professional investors) will be freed from paying advances of court costs and security for party costs and legal fees of the opposing side. In addition, an FSP would bear its own legal costs irrespective of the outcome of the proceedings if all of the following criteria are met (1) the retail client, acting as claimant, has brought the contentious matter to a certified ombuds body with which the respective FSP is affiliated, (2) the claimant does not have 'extraordinarily good' financial resources, (3) the amount in dispute does not exceed CHF 250,000, and (4) the claimant has not brought the matter to the ombuds body maliciously or in bad faith. If the FSP is not affiliated with a certified ombuds body, requirement (1) would not apply.

If the retail client, as claimant, does not succeed with his or her claim, the court may diverge from the loser pays rule and allocate court costs at its discretion, if (1) based on the outcome of the ombuds proceeding, the retail client is acting in good faith when filing a claim, (2) the claimant has reasonable grounds to file a claim based on the FSP's conduct, (3) the claimant does not dispose of of 'extraordinarily good' financial resources, (4) or allocating the full court costs would prove incompatible with the aim of customer protection. Decisions on costs in financial market disputes pending at the time of entry into force of FinSA would be decided in accordance with the new law (new article 407c CCP).

It must be noted that as proposed in the draft FinSA, application of these provisions will not be restricted to disputes arising out of financial services contracts but also take effect in connection with mortgage or other loan contracts, insurance contracts and all normal retail client bank relationships (the article's marginal note reads 'litigation proceedings in disputes arising in connection with services in the financial market'). As a consequence, claimants filing a claim with a certified ombuds body will be privileged over those filing a claim with the ordinary conciliation authority. This meas-

ure reiterates a focus on specialized dispute resolution bodies which, in sum, is to be welcomed.

3) Outlook and Commentary

The provisions in the draft FinSA regarding the protection and enforcement of clients' rights follow an international trend. Looking at measures implemented in other countries, which are often more far-reaching, the proposals contained in the draft FinSA appear humble and uninspired. Even if one ambition of the draft FinSA is to further a specialized court system for complex financial disputes, the bill does little to address this. As the draft FinSA recognizes that specialized ombuds bodies will indeed be better suited to potentially resolve complex matters between clients and FSP, it would be a missed opportunity not to pursue this proposal further, looking not least at the activities, for instance, of the ombudsman scheme under the UK Financial Services and Markets Act 2000 or the arbitration and mediation proceedings under auspices of the Financial Industry Regulatory Authority (FINRA) in the United States.

One of the most ambitious of the initial ideas – the introduction of a collective redress mechanism – has not found its way into the current draft. Rather, further legislation will be proposed on the basis of the *Birrer-Heimo* motion (no. 13.3931). It is to be expected that in parliamentary debate, questions will be raised as to the interaction of FinSA with the efforts to introduce such mechanisms. This is especially so as the original impetus to strengthen the rights of retail clients in the financial services industry was the occurrence of high profile cases such as the insolvency of the Lehman group which resulted in a large number of small investors with compensation claims too small to litigate in civil courts – because potential costs of pursuing litigation often exceeded the amount in dispute. The draft FinSA does not respond to this challenge directly. Even with the proposed measures, damaged clients will be required to individually litigate claims in connection with standardized financial products sold to a large number of clients, and the risk of incurring high costs in litigation is still there, if somewhat mitigated. The debate revolving around the benefits of a collective redress mechanism, however, is one not to be had in the context of financial services alone.

Against this background then, legitimate questions as to the necessity of the proposed provisions relating to the enforcement of clients' rights in the draft FinSA arise, given that already today (1) a client can request full documentation and information from an FSP based on the provisions governing the agency contract and based on article 8 DPA, (2) the banking ombudsman hears client claims in a conciliatory proceeding at no cost to the client, and (3) a court can allocate costs in proceedings at its discretion on the basis of article 107 CCP while the client can file a partial claim with a view to reducing the cost risk.

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A Key Information Document Helps to Turn Retail Clients into Mature Investors

Reference: CapLaw-2016-5

On 4 November 2015 the Swiss government published the dispatch on the Financial Services Act (FinSA). In line with international standards, the FinSA will introduce an obligation for financial service providers to make a key information document available to retail clients, when offering them financial instruments. According to the dispatch, the aim of the proposed information document is to provide to retail clients "*the information which are required, to treat them as "mature" investors, capable of taking responsibility for their own investment decisions*".

By Enrico Friz

1) Key Information Document as International Standard

One of the common regulatory themes that have developed across a number of jurisdictions since the onset of the financial crisis is the desire to increase investor protection at the point of sale. In this context, the International Organization of Securities Commissions (IOSCO) and other international groups have proposed the introduction of a short-form or summary disclosure, either to be provided separately, or as part of a broader disclosure document, particularly where the disclosure document is lengthy (see as an example: IOSCO, Regulation of Retail Structured Products, http://www.iosco.org/library/pubdocs/pdf/IOSCOPD410.pdf, in relation to a possible "regulatory toolkit" for retail structured products). Such summary disclosure is envisaged to include, amongst other key information, product description, potential downside risks, details of any applicable guarantees, scenario analysis, risk indicators, secondary market opportunities and comparisons to alternative investment products.

The Swiss Financial Market Supervisory Authority (FINMA) had come to similar conclusions in its "position paper on distribution rules" and had recommended the introduction of a concise and easily comprehensible document to be made available for all compound financial products offered to (retail) clients in Switzerland (FINMA, Regulation of the production and distribution of financial products (FINMA position paper on distribution rules), 24 February 2012, Key points 1 to 3). An equivalent document had already been introduced in 2007 for structured products, in the form of the Swiss simplified prospectus according to article 5 of the Collective Investment Schemes Act (CISA). Similarly, the CISA required the publication of a simplified prospectus for certain types of collective investment schemes, which as of June 2013 was replaced for securities funds and funds for traditional investments by a "document with key information for investors" (article 76 (1) CISA).

In its dispatch, the government takes up the FINMA recommendation and proposes to introduce a key information document (KID; *Basisinformationsblatt*) for all financial instruments offered to retail clients, which for structured products will replace the simplified prospectus and for collective investment schemes the relevant key information document. The main goal of a standardized KID is to allow retail clients to easily compare the key features of different investment products and, thus, to assist them in their investment decision. The proposal is comparable to the EU regulation known as PRIIPs (Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)), which introduced the obligation for a key information document for packaged retail and insurance-based investment products.

2) What are the key requirements of the Regulation?

Article 60 FinSA states, that where a financial instrument is offered to retail clients (i.e., clients which do not qualify as professional clients, which includes all individuals, except the high-net-worth individuals who opted out in accordance with article 5 (1) FinSA), the manufacturer must first produce a KID. If the financial instruments are offered on an indicative basis, i.e. prior to all their terms having been fixed, at least a draft version with indicative information must be produced.

a) What financial instruments need a KID?

A KID must be produced for all types of financial instruments (as defined in article 2 (h) FinSA) offered to retail clients, other than shares and share-like securities allowing for participation rights, such as participation certificates and dividend rights certificates. Besides structured products and units in collective investment schemes, for which similar information documents are already required, the definition also includes plain vanilla debt instruments, which are out of scope of the PRIIPs. In addition, also derivatives (defined in article 2 (c) of the Financial Market Infrastructure Act as financial contracts whose value depends on one or several underlying assets and which are not cash transactions) will require a KID to be offered to retail clients. Derivatives do not need to be issued as securities, which are suitable for mass trading (such as warrants or mini-futures), but include also bilateral swap agreements and other OTC derivatives offered to retail clients. A KID is also required for redeemable life insurance policies with price-dependent benefits and settlement values as well as capital redemption operations and tontines and for deposits whose redemption value or interest is risk- or price-linked, excluding those whose interest is linked to an interest rate index.

b) Who is responsible for preparing the KID?

According to the proposal, the manufacturer of the financial instrument must produce the KID (article 60 (1) FinSA). For securities, the manufacturer of the instrument is the issuer and the obligation also applies to foreign issuers. The manufacturer may assign the preparation to qualified third parties (according to article 60 (2) FinSA, the Federal Council can designate qualified third parties to whom the preparation can be assigned). However, manufacturers of financial products will not be able to limit their responsibility by such assignment, as by statute they will remain liable for the completeness and accuracy of the details in the key information document, as well as for compliance with the other duties in connection with the KID.

The manufacturer and not the distributor will have to regularly check the information contained in the KID and revise it in the event of material changes during the term of the financial instrument (article 65 FinSA).

c) Who is responsible for providing the KID and when must it be delivered?

The responsibility for providing the KID is on the financial service provider who makes an offer for the purchase of a financial instrument to a retail investor. An offer is defined as any invitation for the acquisition of a financial instrument that contains sufficient information on the terms of the offer and the financial instrument itself (article 2 (h) FinSA). Contrary to the rules under PRIIPs, execution only transactions concluded at the initiative of a retail client in Switzerland can be entered into without making a KID available. The FinSA does not contain any provision which would exempt the financial service provider from the obligation to make a KID available when an offer to buy a financial instrument is made to an asset manager acting for a retail client in Switzerland.

Whenever the manufacturer of a financial instrument has not prepared a KID, the relevant financial instrument may not be offered to retail clients in Switzerland, neither by a financial service provider in Switzerland nor by a foreign financial intermediary on a cross-border basis. The financial service provider may not itself prepare a KID (except where the financial service provider qualifies as *qualified third party* according to article 60 (2) FinSA and the manufacturer has assigned to it the preparation of the KID) or provide the relevant key information by any other means. This is likely to result in a considerable reduction of the number of financial instruments which can be offered to retail clients in Switzerland, even with respect to plain vanilla bonds, as in particular foreign manufacturers may not want to expose themselves to Swiss liabilities and sanctions. A partial relief of this situation may come from article 61 (2) FinSA, which provides that documents produced under foreign law, which are equivalent to a KID, can be used. However, only second level legislation will define when a foreign document qualifies as equivalent, although there can be no doubt that a PRIIPs-KID will.

According to article 10 (2) FinSA, the financial service provider will have to make the KID available to its retail clients free of charge prior to subscription or conclusion of the contract. According to the dispatch, the disclosure must be made in good time before concluding a transaction, so that retail clients have enough time to read and understand the KID (dispatch, pages 50 et seq.). In addition to the KID for the financial instrument itself, if the value of a financial instrument is calculated based on the development of one or more other financial instruments and if a KID exists for these instruments, the KID for the underlying must be made available as well (article 10 (3) FinSA; according to the clear wording of the provision, the KID for the underlying must only be made available if it exists, i.e. financial instruments for which no KID exists may be used as underlying of a structured product offered to retail investors in Switzerland).

d) How is the KID to be made available?

In contrast to the relevant obligations under PRIIPs, the manufacturers of financial instruments offered to retail investors in Switzerland will not generally be obliged to publish the KID. A publication is only required for financial instruments which are publicly offered in Switzerland (article 69 (1) FinSA), and even in this case, the publication does not need to be on the manufacturer's website. Based on relevant statements in the dispatch, the author believes that the Swiss government will not impose an obligation to hand out a KID in paper form, but that it will suffice to inform the retail client on what website the KID can be viewed (dispatch, pages 50 et seq.). The KID does not need to be filed for review to the Swiss reviewing body or to the regulator, not even if the relevant financial instrument is publicly offered.

e) What information must the KID contain?

Article 63 FinSA reads very similar to the current provision relating to the simplified prospectus for structured products. The KID shall contain the essential information for making a well-founded investment decision and a comparison of different financial instruments by investors and shall be easy to understand. In particular, the information shall cover (a) the name of the financial instrument and the identity of the producer, (b) the type and characteristics of the financial instrument, (c) the risk/return profile of the financial instrument, specifying the maximum loss the investor could incur on the invested capital, (d) the costs of the financial instrument, (e) the minimum holding period and the tradability of the financial instrument, and (f) information on the authorizations and approvals associated with the financial instrument.

All further details on content, language and layout will be specified by the Swiss government in the ordinance (article 66 FinSA). In order to achieve the goal of making KIDs for different financial instruments comparable, it is believed that detailed regulations will be imposed on matters like risk/return profile or costs disclosure. It is to be

hoped, though, that the requirements will not be as complicated and its implementation not as costly as is feared for the PRIIPs regulation. The government should give manufacturers more discretion and flexibility as to the content of the KID than the EU regulators. Given the vast array of financial instruments that are caught by the KID obligation, it is more than questionable whether standardization of disclosure across products can be achieved in any meaningful way.

f) Liability and Sanctions

Where information that is inaccurate, misleading or that in violation of statutory requirements is given or disseminated in a KID, any person involved is liable to the acquirer of a financial instrument for the resultant losses, unless they can prove that they were not at fault (article 72 (1) FinSA).

In addition to this very comprehensive liability provision, the draft law will introduce sanctions for any person who wilfully provides false information or withholds material facts in the KID or fails to publish the KID by the beginning of the public offer (fine not exceeding CHF 500,000 (article 93 (1) FinSA)) and on any person who wilfully fails to make the KID available prior to subscription or conclusion of the contract (fine not exceeding CHF 100,000 (article 93 (2) FinSA)).

3) When will the KID obligation enter into force?

The Swiss Parliament is expected to deal with the FinSA in 2016. Considering the opposition from various industries, it is likely that the Parliament will take more than one year and possibly several years to release the bill. Thus, the FinSA is unlikely to come into force prior to 2018.

However, in the current draft a transition period of two years only applies to financial instruments that were offered to retail clients before the entry into force of the FinSA. For all other financial instruments the KID will have to be ready and available as of the date the FinSA comes into force. Thus, manufacturers and distributors are well advised to familiarize with the new requirements in time in order to be ready when the FinSA comes into force.

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FinSA Business Conduct Rules and MiFID II

Reference: CapLaw-2016-6

European legislation as well as other international standards increasingly influence Swiss financial market regulation; the new Financial Services Act (FinSA) is the direct

consequence. As expected, the Swiss legislator tailored the new business conduct rules towards the EU directive. The remaining questions, however, lie in the interpretation, application, and development of the new provisions by the regulatory authorities and courts.

By Peter Sester / Linus Zweifel

1) Equivalence as the Holy Grail of Swiss Financial Market Regulation

In recent years, the EU has constantly amended its legal framework regarding financial markets with an increasing impact on non-Member States. Both through its third-country regime as well as the legislation's broadening scope of application, EU financial market legislation and regulation steadily gain influence over non-EU matters. Switzerland is not at all exempted from this particular development and the proposed new Swiss financial market legislation is its direct answer to it.

International standards, in particular the EU financial market legislation and regulation, therefore constitute one of the driving forces in the development of FinSA. With the Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR), the EU furthers its equivalence requirement for the cross-border provision of financial services from third-country firms to professional clients based within the EU. Only in case the European Commission confirms the equivalence of a third country's financial market regulation with the one in the EU, respective third-country firms may offer their services within the EU and to EU based clients without the establishment of an EU branch. For the offering of services to retail clients, the Lugano Convention already provides for the application of the legal framework of the client's domicile. Member States, however, retain the power to require the establishment of a branch for the cross-border provision of financial services to retail clients.

It is therefore (and must be) the legislator's explicit goal to establish provisions equivalent to the ones in the EU (without going beyond these) in order to ensure market access for Swiss firms to the European single market. In fact, any discrepancy between Swiss and EU regulation also affects the firm's costs; the more equivalent the legal framework to EU regulation is, the less "double compliance work" financial intermediaries will face.

As laid down in article 47 MiFIR the legal framework of a third country may be considered equivalent if, *inter alia*, financial intermediaries are subject to appropriate conduct of business rules. Considering the necessity of equivalence with EU regulation, this article aims to take an exemplary look at the proposed FinSA provisions on business conduct rules from a European perspective.

2) Rules of Conduct for Financial Service Providers

Conduct of business rules constitute a main component of FinSA as well as of MiFID II whereas the FinSA provisions have been tailored towards the European directive. As a general principle, financial service providers need to act in accordance with the best interest of their clients. The following obligations for financial service providers are to be considered:

i) Informational duties included in articles 9 and 10 FinSA materially correspond with articles 24 (3)-(6) MiFID II. Clients under both legal frameworks are, *inter alia*, to be informed in a comprehensible manner and in due time about all risks and costs related to the financial service or the financial instruments offered. Furthermore, the firm's information needs to encompass whether advice is offered based on an independent basis, and advertising must be clearly identifiable as such.

ii) The assessment of appropriateness and suitability forms one of the corner stones of the proposed law. Under the suitability test (article 13 FinSA; 25 (2) MiFID II) financial service providers, when offering investment advice taking account of the client's portfolio or portfolio management, must assess the client's financial situation, its investment objectives, and its specific knowledge and experience in the relevant field to enable it to recommend suited financial instruments or services. For other services a test of appropriateness must be conducted (article 12 FinSA; 25 (3) MiFID II) aiming at whether a specific financial instrument is appropriate for a specific client. Exceptions exist for "execution-only" transactions and the mere reception and transmission of client orders (article 14 FinSA; 25 (4) MiFID) as well as for the provision of services to professional clients (article 15 FinSA; under the MiFID II regime it is suggested to also apply this distinction in analogy to article 36 MiFID I Implementing Directive).

iii) FinSA further provides for extensive documentation and reporting duties (articles 17 and 18) which mostly reflect article 25 (5) and (6) MiFID II. Firms need to render account of their financial services, the client's portfolio as well as the costs related to the financial services. Moreover, clients need to be informed about the "grounds for each recommendation leading to the acquisition, holding or disposal of a financial instrument" when offering portfolio management or investment advice.

iv) Lastly, FinSA entails provisions on the handling of client orders and the use of client's financial instruments (articles 19 to 21). In particular, article 20 FinSA provides for the duty to achieve the best possible outcome for the client in terms of costs, timing and quality (best execution) reflecting article 27 (1) MiFID II. Regarding costs consideration is to be given not only to the actual price but also to further expenses and compensation from third parties.

3) Criminal Provisions for the Violation of the Code of Conduct

Financial service providers must be aware that the violation of aforementioned business conduct rules can lead to criminal, prudential and/or civil consequences. At least, the criminal provisions in FinSA (articles 92 to 94) have been adapted compared to the consultation draft; penalties for negligent behavior are no longer included and the level of penalties has been lowered considerably.

4) Outlook: Implementation, Interpretation, and Development

The legal framework regarding business conduct rules set out by FinSA is largely based on the corresponding EU provisions. Indeed, the prevailing majority of provisions is almost identical (apart from the fact that EU legislative texts can barely be qualified as particularly reader-friendly). One might even say the Swiss legislator followed a "tick-the-box" approach when ensuring equivalence of the FinSA provisions with MiFID II.

This is not surprising given that the Federal Council itself described equivalence to EU financial market law as one of the main goals on the one hand, and the fact that most efforts in financial market regulation find their grounds in international standards on the other hand. Concerning the latter, Switzerland is committed to voluntary adherence anyway. Economic and political reality as well as dependence of Swiss financial service providers from access to the EU market did the rest to ensure that equivalence will indeed be fulfilled.

For aforementioned reasons the adoption of FinSA is crucial. From a EU perspective, it is not predictable how the necessary requirement of equivalence can otherwise be reached within a reasonable period of time. A failure of this legislative project would, therefore, heavily throw back Swiss efforts in getting its financial market legislation recognized as equivalent and, concurrently, complicate the market access for Swiss financial service providers to the EU single market.

Having said that and under the assumption that FinSA indeed enters into force, a few remaining questions with regard to the interpretation and the development of the law remain (partly) open. The question whether FINMA and the European Securities and Markets Authority (ESMA) will apply identical standards when interpreting certain provisions will be a crucial topic. What is relevant at the end of the day are not the laws in the book but the way regulatory authorities apply them in practice. This question logically extends to the approach of courts when confronted with the application of the law. Will Swiss courts take the "underlying" EU documents and case law into consideration when interpreting the new Swiss financial market law, since it is to a large extend inspired by EU legislation and regulation? To say it straight forward: Will FINMA and Swiss courts rather decide in accordance with EU practice and case law? Or will

they apply an autonomous interpretation of a basically identical set of rules? The former approach would prevent national courts to consider Swiss peculiarities; the latter bears the risk of another drifting apart between Swiss and EU regulatory efforts. Obviously, these questions are not new from a Swiss perspective; however, the ever growing grade of detailed legislation and the shift from EU directives to regulations as well as the dependency on EU market access of the Swiss financial sector will lift them to a new level.

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Something Old, Something New: The Supervision of Financial Intermediaries under the Draft Federal Act on Financial Institutions

Reference: CapLaw-2016-7

On 4 November 2015, the Federal Council published a Bill to parliament for a Financial Services Act (FinSA) and a Financial Institutions Act (FinIA). As expected, the FinIA proposes to revise the regulatory architecture for financial institutions. Instead of the current sectorial approach, the FinIA proposes to introduce a regulatory pyramid with a light regulatory framework for asset manager and trustees, and an increasingly more stringent regime for collective asset, securities houses and, at the top, banks.

By Rashid Bahar

1) Regulatory Pyramid

On 4 November 2015, the Federal Council published a Bill to parliament for a Financial Services Act (FinSA) and a Financial Institutions Act (FinIA). As expected, the FinIA proposes to revise the regulatory architecture for financial institutions. Instead of the current sectorial approach, the FinIA proposes to introduce a regulatory pyramid with a light regulatory framework for asset manager and trustees, and an increasingly more stringent regime for collective asset managers, who manage collective investment schemes and pension funds, securities houses – the new denomination for securities dealers – and, at the top, banks. Following this approach, a more stringent license automatically carries the license to carry out the business of a less stringent entity. Banks will, thus, be allowed to carry out the business of entities with a less stringent license. More specifically, banks will be automatically authorized to engage in the business of a securities house, a collective asset manager, a trustee or an asset manager (article 5 (1) FinIA); securities houses will be authorized to manage assets of collective investment schemes and pension funds, act as asset manager and as trustee

(article 5 (1) and (2) FinIA). Collective assets managers will similarly be entitled to engage in "simple" asset management (article 5 (4) FinIA).

The pyramid is, however, not complete, since it branches out for fund management companies: entities with a more stringent license, e.g. banks or securities dealers, will not be entitled to engage in fund management (article 5 (1) and (2) FinIA a contrario), although fund management will have carry the right to engage in the business of collective asset managers and asset managers (article 5 (3) FinIA). Similarly, only banks and securities houses will be automatically licensed to act as trustees. Fund management companies and collective investment managers will not be authorized to act as trustees although they hold a more stringent license (article 5 (3) and 5 (4) FinIA *a contrario*).

Moreover, the system will not be as elegant as several functions under the Collective Investment Schemes Act of 23 June 2006 (CISA, SR 951.31) will continue to require a specific license, even for banks. Thus banks will continue to apply for a specific license to act as a depository bank (article 13 (2) (e) CISA). Banks, securities dealers, and collective asset managers will also continue to need a specific license to act as representative of foreign collective investment schemes (article 13 (3) CISA and article 8 (1) and (3) of the Ordinance on Collective Investment Schemes of 22 November 2006, SR 951.311).

Finally, the Federal Council decided not to maintain the systematic approach of the FinIA. In response to the consultation proceedings, banks will continue to be governed by the Banking Act of 8 November 1934 (SR 952.0) and will not be integrated in the FinIA. At the same time, this is a pyrrhic victory for the opponents of an integrated regulatory framework: while the Banking Act will survive the FinIA, it will be overhauled and to a large extent aligned with the provisions of the FinIA.

2) Licensing Requirements

a) Core Requirements

Under the FinIA, all institutions will be subject to common core requirements that they need to comply with. These requirements will be largely modelled on the current regime applicable to banks and securities dealers as applied by FINMA: all institutions will be required to have an appropriate organization (article 8 FinIA), including risk management and an effective internal control system (article 8 (2) FinIA). In line with the current practice of FINMA, both the institution as such and the members of the board of directors and executive management will be subject to a fit and proper requirement, which extends also to their reputation and professional qualifications (article 10 (1) and (2) FinIA). A similar requirement will apply to qualified shareholders (article 10 (3) FinIA), who will, as is currently the case, be subject to a duty to disclose their share-

holding prior to reaching or crossing thresholds of 10, 20, 33 and 50 per cent of the shares or capital of a financial institution (article 10 (5) FinIA).

The FinIA, further, generalizes the rules of the CISA on outsourcing by permitting financial institutions to third parties only if they have the requisite skills, knowledge and experience and hold the requisite licenses to carry out their business (article 13 (1) FinIA). In this context, the FinIA empowers FINMA to condition the delegation of investment management to persons in other jurisdictions on the existence of an agreement between FINMA and the foreign regulator on cooperation and exchange of information (article 13 (2) FinIA).

Finally, all financial institutions will be required to join an ombuds-organisation upon starting their business (article 15 FinIA). This requirement ensures the effectiveness of the rules on alternative dispute resolution for investor disputes provided for by the FinSA.

b) Specific Requirements

In parallel, each type of institution will be subject to specific requirements. As the institutions raise in the regulatory pyramid, they become increasingly stringent: Asset managers and trustees are subject to fairly limited specific requirements: they will need to have either post collateral or a professional liability coverage (article 19 FinIA).

Collective asset managers will be subject to fairly straightforward organizational requirements, which focus on the delegation of duties (article 23 FinIA). They will not be subject to full capital adequacy and liquidity requirements. Instead, they will be expected to maintain a certain level of capital, post collateral or subscribe a professional insurance policy (article 24 FinIA) as well as minimal capital requirements. However, rules for consolidated supervision requirements kick in at this stage (article 26 (1) FinIA).

Securities houses and banks remain fundamentally subject to the current regime, including in terms of consolidated supervision. They are subject to full capital adequacy and liquidity requirements imposed by Basel III at entity and on a consolidated basis (article 42 FinIA). The flip-side of this regime is the possibility offered to banks and securities dealers to rely on additional capital instruments to prevent or overcome a situation of financial distress (article 43 FinIA and article 13 (1) Banking Act).

This being said, the FinIA introduces some novelties: for example, securities houses will be authorized to accept public deposits in connection with the settlement of securities trades (article 40 (1) and 2 FinIA) and credit such deposits to interest-bearing accounts, although they will probably not be allowed to advertise this aspect of their business (article 40 (3) FinIA) since the permission to accept deposits for settlement

accounts does not extend to advertising for such services (article 43 (2) FinIA). This regulatory framework falls, however, short from an English-style client-money protection regime, although the FinIA mandates the Federal Council to issue provisions on the use of public deposits.

3) Supervision of Asset Managers and Trustees

a) Scope

In this context, the key novelty of the FinIA is the licensing requirement of asset managers and trustees. The former are defined as persons, who manage in a professional capacity on the basis of an asset management agreement assets of third parties in the name and for the account of clients (article 16 (1) FinIA), whereas the latter are defined as persons who act as trustees in connection with a trust within the meaning of the Hague Convention on the Applicable Law and the Recognition of Trusts of 1 July 1985 (article 16 (2) FinIA). Both will be subject to a similar regulatory regime implying a license, which will be granted provided the applicant complies with the common core requirements and the fairly limited specific requirements.

b) Exemptions

The scope of the business of asset managers and trustees is fairly broad and could subject numerous market participants to choose between seeking a license or limiting their activity to investment advice. Other participants will look to apply one or the other exemption to the FinIA. Indeed, the FinIA explicitly claims not to apply to persons exclusively managing assets of related parties or funds provided in connection with an employee participation plan (article 2 (2) (a) and (b) FinIA).

Moreover, the act does not apply to lawyers and notaries who act within the realm of their "typical" duties, namely within the realm of their function as legal counselor or notary rather than an atypical function as director or asset manager of a client (article 2 (2) (c) FinIA). More generally, the act does not apply to persons managing funds pursuant to a statutory mandate, such as guardians or other public officials (article 2 (2) (d) FinIA). In all these cases, the statute and professional ethics standards act as a sufficient control to protect investors.

Furthermore, other regulated institutions, such as pension institutions (article 2 (2) (f) FinIA), insurance companies (article 2 (2) (h) FinIA) as well as social security insurances and compensation funds (article 2 (2) (g) FinIA) will remain out of the scope of the FinIA. As such they will not be subject to the licensing requirements set forth by FinIA and will continue to be able to offer such services without seeking a dedicated license.

c) Licensing and Supervisory Authority

Following the consultation process, the Federal Council opted to regulate asset managers and trustees through one or more supervisory authorities rather than submitting them to the oversight of FINMA. The supervisory authorities will, however, be licensed and supervised by FINMA (article 43a (2) of the Financial Markets Supervisory Authority Act of 22 June 2007, FINMASA, SR 956.1, as amended by the FinIA). Unlike the self-regulatory authorities in charge of implementing the anti-money laundering rules, the supervisory authorities under the FinIA will be treated as fully-fledged governmental authorities under the Administrative Procedure Act of 20 December 1968 (APA, SR 172.021).

They will be empowered to take most actions that are currently reserved to FINMA: ranging from requesting information (article 29 *cum* article 43*p* FINMASA as amended by the FinIA), issuing declaratory rulings (article 32 *cum* article 43*p* FINMASA as amended by the FinIA), ordering any measure necessary to reinstate an orderly situation (article 31 *cum* article 43*p* FINMASA as amended by the FinIA), naming-and-shaming wrongdoers (article 34 *cum* article 43*p* FINMASA), and even confiscating undue profits (article 35 *cum* article 43*p* FINMASA as amended by the FinIA). While the supervisory authorities will be authorized to ban traders and client advisers (article 33a *cum* article 43*p* FINMASA as amended by the FinIA), their powers will stop short from issuing such orders against directors and executive managers (article 33 FINMASA *cum* article 43*p* FINMASA as amended by the FinIA *a contrario*). Similarly, it seems that the supervisory authorities will not be entitled to appoint a special investigator (*Untersuchungsbeauftragte*) for fact finding or administering an asset manager or a trustee (article 36 *cum* article 43*p* FINMASA as amended by the FinIA *a contrario*).

Conceptually, the supervisory model will be mirrored on the one currently applicable to banks and securities dealers: rather than auditing investors directly, the FinIA proposes to allow a supervisory authority to require supervised institutions to appoint an auditor whose function would be to review the institution's compliance with the requirements of the FinIA (article 43*n* FINMASA as amended by the FinIA). However, rather than an annual audit enhanced by additional audits, the FinIA proposes to reduce the audit cycle to every three years and requiring supervised institutions to self-certify compliance when no assurance was provided.

4) Registration of Advisers of Investment Advisers and Foreign Financial Service Providers

The scope of the FinIA does not mirror the scope of the Draft Federal Act on Financial Services (FinSA). Thus, certain activities subject to the FinSA will not be carried out by licensed financial institutions. As mentioned above, certain regulated entities will continue to be able to offer their portfolio management services. Even if they are not subject to the FinIA, they will remain subject to regulatory oversight by their supervisory

authority. At the other end of the spectrum, certain types of financial services, e.g. investment advice, remain unregulated.

To close the gap, the FinSA introduces a toned-down version of its obligation to register all client advisers: it suggests to subject client advisers working for investment advisers as well as advisers from foreign financial service providers to a registration requirement (article 30 FinSA). As with supervisory authorities, the register would be maintained by a private organisation acting under a public mandate (article 33 (1) FinSA) and will therefore be subject to the Administrative Procedure Act (article 36 FinSA). However, the function of the register would be limited to ascertain that the applicant satisfies the requirements to be registered without subjecting it to the ongoing supervision. Even then, a register will be required to de-register any financial intermediary who would no longer satisfy the registration requirements (article 34 (2) and (3) FinSA), e.g. if they committed an offence under the FinSA or more generally any offence against property under the Criminal Code of 21 December 1937 (CPS, SR 311.0).

5) Conclusion

Overall, the FinIA falls short from its ambition of introducing a comprehensive and systematic regulation of financial intermediaries. Arguably, this goal is not justified: while the same business should be subject to the same rules; many financial intermediaries are not involved in the same business.

On the substantive level, the FinIA aims to close an important gap in the regulatory regime: the lack of licensing requirement for asset managers. The approach it proposes, which relies on supervisory authorities licensed by FINMA to exercise prudential supervision, seeks to strike a balance between the existing regime which relies on self-regulation at the industry-level and government supervision. The reliance on two different regulators to license, supervise and enforce the regulations will lead to varying practices. The challenge will, therefore, be for FINMA as the direct prudential supervisor for collective asset managers, fund managers, securities house and banks and, through its role as supervisor of the supervisory authorities, indirect supervisor of asset managers and trustees, to ensure that the law is applied consistently while accounting for the complexity and specificities of each type of organisation.

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Supervision of Portfolio Managers and Trustees

Reference: CapLaw-2016-8

Under current Swiss law, portfolio managers, which are not acting as asset managers for collective investment schemes, and trustees are not subject to a comprehensive prudential supervision. Portfolio managers and trustees are only required to register with a self-regulatory organization in order to comply with Swiss anti-money laundering laws. Other financial services providers, most notably banks, have criticized this lack of regulatory oversight. Furthermore, the current Swiss regulatory framework for portfolio managers is not in line with international regulatory standards, such as the EU/EEA's Markets in Financial Instruments Directive (MiFID). This situation is about to significantly change under the proposed new Financial Institutions Act (FinIA). This new act will subject the approximately 2,300 portfolio managers to authorization requirements and comprehensive supervision by a FINMA-approved supervisory organization.

By Patrick Schleiffer / Patrick Schärli

1) Proposed New Supervisory Framework

Under the FinIA, portfolio managers and trustees will be required to obtain an authorization from a supervisory organization approved by the Swiss Financial Market Supervisory Authority (FINMA). Like other financial institutions, a portfolio manager or a trustee will have to meet a number of authorization requirements, such as organizational requirements and the guarantee of irreproachable business conduct. The authorization requirements also extend to qualified participants in a portfolio manager or trustee. A qualified participant is a person who directly or indirectly holds at least ten percent of the share capital or votes or who can significantly influence the portfolio manager's or trustee's business activities in another manner. Qualified participants will have to show that they have a good reputation and that their influence is not detrimental to prudent and sound business activity of the portfolio manager or trustee.

Once licensed, a portfolio manager or a trustee may also provide certain additional services, such as investment advice, portfolio analysis, and offering of financial instruments. Portfolio managers and trustees will be, like any other financial service provider, subject to the conduct rules of the new Financial Services Act (FinSA).

a) Scope of the New Rules

The new regulatory framework applies to portfolio managers and trustees, both of which are not subject to prudential supervision under the current regulatory rules. A portfolio manager is an individual or entity that manages assets on a commercial basis in the name of and on behalf of clients or who may dispose of clients' assets in any other manner. A trustee is defined as an individual or entity that on a commercial basis manages or disposes of a separate fund for the benefit of a beneficiary or for a speci-

fied purpose based on a restricted grant given namely in the instrument creating a trust within the meaning of the Hague Trust Convention of 1985.

Individuals or entities who manage assets on a commercial basis in the name and on behalf of collective investment schemes and pension plans are required to obtain a license as a manager of collective assets, and they are subject to direct FINMA supervision. The FinIA will incorporate the already existing authorization and supervision requirements of the Collective Investment Schemes Act (CISA). The FinIA will also include the existing *de minimis* rules of the CISA. Managers of collective assets that fall under the *de minimis* rules, will be required to obtain a license as a portfolio manager.

Persons who solely manage assets of persons with whom they have business or family ties are outside of the scope of the FinIA. Most importantly, this excludes single family offices from the new license requirements.

Finally, the FinIA, as currently drafted, provides for a grandfathering rule for certain portfolio managers: Portfolio managers who already are in the business for at least 15 years are not required to obtain an authorization, provided, however, that they do not accept new clients. Thus, the scope of this grandfathering rule is rather limited, and essentially, will only be available in a run-off scenario.

b) Examination of Portfolio Managers and Trustee

Portfolio managers and trustees will be supervised by a FINMA-approved supervisory organization. As part of this new supervisory framework, portfolio managers and trustees will be subject to periodic examinations. Portfolio managers and trustees will not be directly examined by the supervisory organization. Rather, the examination procedure follows the dualistic approach that already exists in other areas of Swiss financial institutions regulation. Under this dualistic supervisory model, portfolio managers and trustees will have to appoint a special licensed audit firm to perform an annual audit.

As with regards to periodic examination of financial institutions, the FinIA proposes a new feature, namely a risk-based audit frequency. Specifically, the supervisory organization may increase the audit frequency to a maximum of four years, taking into account the portfolio manager's or trustee's business and associated risks. In years without periodic examination, portfolio managers and trustees will have furnish to the supervisory organization a (standardized) report on their business activities and compliance with regulatory rules and regulations.

c) Transitional Period

Portfolio managers and trustees that will be subject to the new authorization requirement of the FinIA will have to report to one of the new supervisory organizations within six months of the entry into force of the FinIA. They must meet the authorization re-

quirements and submit an application for authorization within two years of the entry into force of the FinIA. These deadlines may be extended by the competent supervisory organization.

2) The Supervisory Organization

a) Organizational Requirements

As mentioned above, portfolio managers, trustees, and managers of collective assets that fall under the *de minimis* rules of the FinIA, will be licensed and supervised by so-called supervisory organizations. The FinIA will amend the existing Financial Markets Supervisory Act (FINMASA) to include rules relating to the supervisory organizations and their powers.

The amended FINMASA sets out the authorization requirements for supervisory organizations. According to the proposed new rules, a supervisory must effectively be managed from Switzerland, it must have appropriate management rules, and it must be organized in such a manner that it can fulfill its duties under the FINMASA. This includes having sufficient financial and personnel resources to perform its tasks.

In addition, the supervisory organization and the persons responsible for its management must provide the guarantee of irreproachable business conduct. The persons responsible for administration and management must enjoy a good reputation and have the specialist qualifications required for their functions. In addition, the FINMASA sets out certain independence requirements. More specifically, most of the persons charged with administration must be independent of the supervised persons and entities, and the members of the management board must be independent of the persons and entities supervised by the supervisory organization. The same applies to persons charged with supervision.

b) Multiple Supervisory Organizations

It is possible that multiple supervisory organizations will be established, and the relevant provisions of the amended FINMASA explicitly acknowledge this possibility. Moreover, the amended FINMASA specifically addresses a situation where there are multiple supervisory organizations: In this case, the Swiss Federal Government may enact rules for the coordination of the organizations' activities and the subjection of the supervised persons and entities to a given supervisory organization. It is not yet clear, pursuant to which criteria the activities of multiple supervisory organization will be coordinated. We take the view that primarily the market should determine the number of supervisory organizations and their field of activities. Coordination rules should only be implemented to prevent regulatory arbitrage.

The already existing industry organizations for independent asset managers are the likely candidates for becoming a supervisory organization of portfolio managers. Already today, these industry organizations implement rules and procedures for the supervision of their members (e.g. through their FINMA-recognized minimum standards for asset management services). It is to be expected that some or even all of these industry organizations will try to obtain an authorization as a supervisory organization. In light of the authorization requirements, it is however not likely that every industry organizations will be successful in obtaining an authorization as a supervisory organization.

c) Funding

The supervisory organizations will be funded with fees for supervisory proceedings and services. In addition, like FINMA, the supervisory organizations will levy an annual supervision charge on supervised persons and entities to cover their costs that are not covered by the fees. This supervisory charge will be based on the amount of assets under management, the gross earnings, and the size of the business of the supervised persons and entities.

d) Powers

The new supervisory organizations can make use of a wide array of supervisory powers and instruments. It can request information and documents from supervised entities, open supervisory proceedings, publish its supervisory rulings, prohibit persons from acting as client advisers, confiscate profits, and revoke licenses.

The supervisory organizations may also issue circulars in their field of supervision on the application of the financial markets laws. These circulars will require FINMA approval, which will be granted as long as the circulars do not lead to a conflicting supervisory practice.

e) Transitional period

The draft FinIA does not provide for transitional rules with respect to supervisory organizations. However, establishing these new supervisory organizations and obtaining the required FINMA approval will take time, even for the already existing industry organizations. To prevent a gap in supervision, the FinIA should provide for a rule that allows the existing industry organizations for independent asset managers to continue their operations for a certain period of time (or until they obtained a FINMA approval). Further, portfolio managers should continue to be members of these industry organizations until they receive an authorization from one of the new supervisory organizations.

3) Proposed Swiss Rules Compared to Foreign Jurisdictions

a) Supervision of Investment Firms under MiFID/MiFID II

Under MiFID/MiFID II, persons who provide investment services to third parties or perform investment activities on a professional basis are subject to licensing requirements under the relevant national laws. Investment services include, among other things, portfolio management and investment advice. MiFID II also sets out certain minimum requirements that investment firms have to meet in order to obtain the required license. These requirements relate to, *inter alia*, effective and prudent management of the investment firm (including prevention of conflicts of interests), policies, and organizational structure. Additionally, the members of the management of an investment firm must have a good reputation, possess sufficient knowledge, skills and experience and commit sufficient time to perform their function.

In addition to defining initial licensing requirements, MiFID II requires that each member state ensures that the competent authorities monitor the activities of investment firms as to assess compliance with the operating conditions of MiFID II.

b) Supervision of Investment Advisers in the United States

U.S. law does not provide for a single supervisory framework for persons and entities that engage in the business of managing assets for others. Rather, the supervisory status of asset managers, or, to use the U.S. term, investment advisers, depends on the nature and size of an investment adviser's business. As a general rule, investment advisers with more than $100 million in assets under management are required to register with the United States Securities and Exchange Commission (SEC) pursuant to the Investment Advisers Act. Small and midsized investment advisers are generally required to register with the relevant State securities commission instead. In case an investment adviser advises on such things as commodity futures, swaps, or foreign currency transactions, a registration as a commodity investment adviser under the Commodity Exchange Act is required. Commodity investment advisers are subject to the supervision of the Commodity Futures Trading Commission (CFTC). Additional licensing may be required if the investment adviser also acts as a broker. In this case, a registration with the Financial Industry Regulatory Authority (FINRA) is required pursuant to the Securities Exchange Act.

Similar to the proposed rules of the FinIA, the Investment Advisers Act also exempts family offices from the registration requirement. Under this fairly detailed rule, single family offices may render investment advice to family members and certain former family members.

The SEC's Office of Compliance Inspections and Examinations (OCIE) is responsible for examining investment advisers. Under the Investment Adviser Act, the OCIE

conducts both periodic and special examinations. Special examinations include such things as examinations of an investment adviser based on customer complaints, and industry-wide reviews of particular compliance risk areas. The entire examination process is risk-based and takes into account, among other things, the investment adviser's risk profile. In addition, investment advisers are required to prepare an annual report that is filed with the SEC.

4) Conclusion

The proposed new regulatory framework of the FinIA will subject portfolio managers and trustees to a set of significantly stricter authorization and supervision rules.

While the FinIA does provide for some relief for smaller businesses, most importantly the risk-based examination, higher overall regulatory costs will most likely lead to a consolidation of the asset management industry. It is to be expected that a lot of smaller businesses will wind down in light of the new regulatory requirements and associated costs. Also, the FinIA only provides for a limited grand fathering that will only be available in a run-off scenario.

The proposed rules appear to be in line with rules known in other jurisdictions, most importantly, the rules applicable in the European Union. Compatibility with European law is one of the key reasons for overhauling the current Swiss regulatory framework. Under MiFID II, market access will only be granted to those third countries that provide for an equivalent regulatory framework.

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Public Tender Offer by China National Chemical Corporation for All Listed Shares in Syngenta AG

Reference: CapLaw-2016-9

On February 3, 2016, China National Chemical Corporation (ChemChina) announced that it has agreed to acquire the Swiss agrochemical and seeds company Syngenta AG (SIX: SYNN) (Syngenta) by way of a public tender offer. The offer price is USD 465 per share in cash. In addition, the offer allows pay-out of a special dividend of CHF 5 per share. The offer values Syngenta's total outstanding share capital at over USD 43 billion. The board of directors of Syngenta recommends the offer.

The offer is intended to comprise a public tender offer for 100% of Syngenta's shares in accordance with Swiss law and an offer to holders of Syngenta's American Deposi-

tary Shares (ADSs) and to holders of Syngenta shares who are residents in the United States in accordance with U.S. law. The offer will be subject to certain regulatory and other conditions.

The transaction will be the largest overseas acquisition by a Chinese company, one of the largest all-cash transactions worldwide and the largest public tender offer for a Swiss company in history. Syngenta, which is headquartered in Basel, Switzerland, is a world leader in agrochemicals and a leading global player in seeds. ChemChina, which is based in Beijing, China, is the largest chemical company in China. ChemChina has announced that Syngenta will remain intact in its operations, management and employees and will keep its headquarters in Basel, Switzerland.

Public Tender Offer by EQT for All Listed Shares in Kuoni Travel Holding Ltd

Reference: CapLaw-2016-10

On 2 February 2016, EQT VII, a fund of the private equity group EQT, acting through Kiwi Holding IV S.à r.l., announced an all-cash public tender offer for all listed shares in Kuoni Travel Holding Ltd (SIX: KUNN), a leading service provider to the global travel industry, for a price of CHF 370 per share. Kuoni's Board of Directors unanimously recommends its shareholders to accept the offer.

With a view to the launch of the offer, Kiwi has entered into a transaction agreement with Kuoni. In addition, EQT has entered into an arrangement with the Kuoni and Hugentobler Foundation, that holds all non-listed voting shares in Kuoni, regarding Kuoni's governance and future development.

Swiss Banking Law Day 2016 – Automatic Exchange of Information (Schweizerische Bankrechtstagung 2016 – Automatischer Informationsaustausch)

Friday, 11 March 2016, 9.15 h–16.15 h, Hotel Bellevue Palace, Berne

http://www.ibr.unibe.ch/unibe/portal/fak_rechtwis/c_dep_private/inst_bankrecht/content/e7711/e328021/e328029/files335529/prospectus_2016_def.pdf

Recent Regulatory Developments in the Insurance Sector

Friday, 11 March 2016, 12.00 h – 13.45 h, CS Forum St. Peter

http://www.eiz.uzh.ch/uploads/tx_seminars/Flyer_Yannick_Hausmann_11.03.16.pdf

13th Stock Corporation Law Conference of Zurich (13. Zürcher Aktienrechtstagung)

Tuesday, 15 March 2016, 9.20 h – 17.00 h, Park Hyatt Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_Aktienrecht_15.03.2016_.pdf

FinSA Special – Insurances (FIDLEG spezial – Versicherungen)

Thursday, 17 March 2016, 13.30 h – 17.30 h, Kongresshaus Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_FIDLEG_17.03.2016.pdf

FinSA and its deviations from MiFID II (Das FIDLEG und seine punktuellen Abweichungen zu MiFID II)

Friday, 8 April 2016, 12.00 h – 13.45 h, CS Forum St. Peter

http://www.eiz.uzh.ch/uploads/tx_seminars/Flyer_Stephan_Geiger_08.04.16.2016.pdf

Update on Collective Investment Schemes Laws III (Aktuelles zum Kollektivanlagenrecht III)

Wednesday, 25 May 2016, 13.30 h – 17.30 h, Kongresshaus, Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_Kollektivanlagenrecht_25.05.2016.pdf

13th Financial Markets Law Conference of Zurich (13. Zürcher Tagung zum Finanzmarktrecht)

Tuesday, 31 May 2016, 9.15 h – 16.30 h, Lake Side Casino Zürichhorn, Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_Finanzmarktrecht_31.05.2016_01.pdf