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The Proposed New Swiss Prospectus Regime – An Interim Report

Reference: CapLaw-2017-01

In December 2016, the Swiss Council of States as the first chamber of Swiss parliament discussed the proposed Financial Services Act. If enacted as currently drafted, the act will impose new requirements on financial services providers and 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. Compared to the draft proposed by the Swiss Federal Council, the Swiss Council of States made a few well-received amendments, but some important issues still remain that would warrant reconsideration.

By Christian Rehm / René Bösch

1) The Proposed Revision of the Swiss Prospectus Regime

On 4 November 2015 following a well-used public hearing, the Swiss Federal Council submitted the draft of the Financial Services Act (FinSA), 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 and a duty to publish a prospectus in the case of secondary public offerings. The Swiss Council of States did not change this basic layout of the new regulation.

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 but not for secondary 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, as approved by the Swiss Council of States, 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 and would be vested with administrative powers. It is 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, in Switzerland and, independently, 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, in each case 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 re-submission. However, if the approval authority does not react within the required period, this does not mean that the prospectus is automatically deemed approved.

However, 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 hand, 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, as now approved by the Swiss Council of States, 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 in the draft 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 current 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 are 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 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 as approved by the Swiss Council of States 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 as approved by the Swiss Council of States 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 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 as approved by the Swiss Council of States 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. Also, in the version adopted by the Swiss Council of States, the Swiss National Bank, the Bank for International Settlements (BIS) and regulated insurance companies are generally exempted from the FinSA. For insurance companies this exemption may make sense as far as their activities are separately regulated or they are offering regulated insurance products; however, own capital market activities of insurance companies should conceptually be subject to the primary capital market rules of the FinSA.

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, however, is currently under review. Therefore, it seems important that the legislator not only closely follow European developments (hearing participants proposed *e.g.* to increase the number of private clients in a private placement from 150 to 500 and to increase *de minimis* thresholds) to ensure that the Swiss regime when enacted does not go beyond what is required in Europe, but also delegates sufficient authority to the Swiss Federal Council to quickly react to a changing regulatory environment by amending the implementing ordinance.

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 (including in particular commercial paper). For employee offerings, the draft

FinSA as approved by the Swiss Council of States closely follows the wording of the European Prospectus Directive and also requires that "details of the offer" must be provided; however, this openly worded requirement is likely to create substantial legal uncertainty and should thus be revisited.

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 as approved by the Swiss Council of States 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 prospectus exemption for admission to trading on trading segments that are only open to professional clients.

By contrast to the European Prospectus Directive, which contains a number of exemptions for admission to trading verbatim mirroring the offering exemptions, this technical duplication is still missing in the draft FinSA. This potential gap should preferably be closed, be it by repeating the relevant exemptions as is the European Union or adding a general reference to the offering exemptions.

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 as approved by the Swiss Council of States requires that all material information must be given to all offerees in a private placement. This clause ensures equal access to information for all offerees and does not stipulate an affirmative duty to provide a certain level of information. *Preferably*, the clause should be slightly amended to clarify that the test whether the offeror provided sufficient information should be left to applicable contract law.

f) Carve-out of Privately Placed Debt in the Banking Act

While the FinSA as approved by the Swiss Council of States would allow non-regulated issuers to privately place debt to more than 20 offerees, such private placement would currently be considered deposit taking under the Banking Act triggering the requirement to obtain a banking license. This would effectively render private placements of debt instruments by non-regulated issuers impossible, putting the Swiss market at a stark disadvantage compared to foreign regimes, and should, therefore, be revisited. However, we strongly believe that the question of what constitutes deposit taking should not be addressed (also not indirectly) in the FinSA, but rather in the Banking Act itself.

5) Basic Information Document

The dispatch of the Federal Council required that whenever a financial instrument other than shares (or comparable equity securities) was offered to private clients, a so-called basic information document containing all information material for the client's investment decision, presented in an easily comprehensible way and designed to make financial instruments easier to compare, had to be prepared.

However, while such basic information document may be appropriate for short-term financial investment products, and in particular structured products, the document would not really be well-suited for debt offerings. Taking into account the wide criticism this proposal has drawn in the public hearing process, the Swiss Council of States has considerably limited this requirement; the FinSA as approved by the Swiss Council of States now excludes debt instruments without derivative elements from the requirement of having to prepare a basic information document.

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 as approved by the Swiss Council of States would require the drafters of the prospectus to prove that they did not act intentionally or negligently. This reversal of the burden of proof would constitute a novelty in Swiss law and in particular require that a defendant prove the non-existence of certain facts, a proof that may be extremely difficult to establish in practice. Should defendants not be able to prove that they did indeed not act intentionally or negligently, they would be held liable.

Still, an investor would have to 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 Council of States 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.

7) Criminal Liability

The FinSA as approved by the Swiss Council of States also introduces 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, this concept not only seems to be at odds with traditional Swiss law concepts, but also jeopardizes the overarching goal of introducing an attractive and competitive primary capital markets regime by ultimately discouraging issuers from using the Swiss markets for fear of criminal liability. Given that capital markets are extremely agile markets, adding criminal liability would put the Swiss market at a disadvantage, in particular as the European prospectus regulation does not provide for a similar criminal liability. Accordingly, issuers might avoid the Swiss market.

8) Appraisal

Aside from the change in the burden of proof in the case of prospectus liability and the introduction of criminal liability for intentional non-compliance with Swiss prospectus rules, the FinSA as approved by the Swiss Council of States 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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FinTech Regulation (2.0): An Overview on the Proposed Three Element Solution

Reference: CapLaw-2017-02

More regulation and digitization are two important trends that are currently reshaping the financial industry in Switzerland. In this context, the Swiss Federal Council has proposed the creation of a specific new FinTech regulation that shall be particularly relevant for business models in the overlapping areas of these two topics and has mandated the Federal Department of Finance (FDF) to develop a consultation draft that further specifies the "Three Element Approach" of the Swiss Federal Council. On 1 February 2017, the FDF published its related Explanatory Report on the Amendment of the BA and BO (FinTech). This article contains a short overview of the key parameters of the proposed new Swiss FinTech regulation and a first view on the Explanatory Report.

By Luca Bianchi

1) Introduction

Currently, there are two major action points of strategic importance on the agenda of every financial services or products provider in Switzerland: regulation and digitization. The topic FinTech lies at the very essence of these two trends. While regulation tends to be backwards looking, digitization represents a view in the future. The problem is that these two major trends may, sometimes, be incompatible with each other. In the past year, developments regarding FinTech regulation have happened very fast (see CapLaw-2016-31, 3). However, the most important milestones in terms of Swiss FinTech regulation are yet to come.

In particular, the next major step will, presumably, be the implementation of a proposed new and specific FinTech (de)regulation. The Federal Department of Finance (FDF) published its Explanatory Report on the Amendment of the BA and BO (FinTech) on the proposed new FinTech regulation on 1 February 2017. After completion of the consultation proceeding, there will likely be certain differences between the content of this article when compared with the result of the consultation (once available).

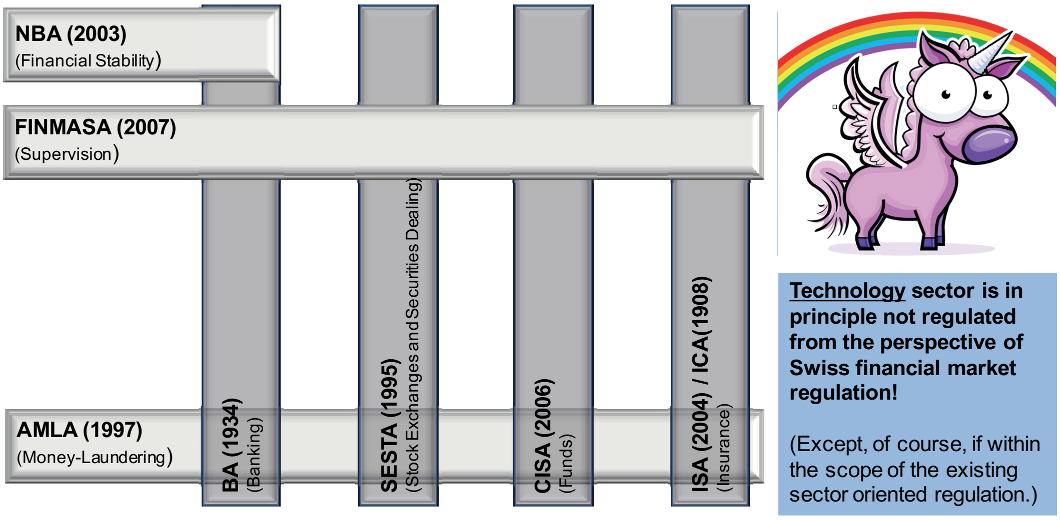
In the meantime, this article provides a brief overview on the ongoing structural regulatory changes as well as a summary of the expected FinTech specific regulatory developments.

2) Structural Regulatory Changes aim for FinTech Unicorns

a) The Old World: Financial Market Regulation vs. Tech Craze

i. Overview of the Regulatory Framework (1.0)

The following graph describes the "old" sector oriented Swiss financial market architecture and its relationship to technology companies.



(Source: Sandro Abegglen / François M. Bianchi / Luca Bianchi et al., Switzerland's New Financial Market Architecture, 2nd edition, Zurich 2016, p. 19, modified version)

ii. Explanation of Selected Aspects

In the "old world", financial services and technology companies where mostly allocated to separate industry sectors. During and after the tech bubble of the nineties (and the rise of the internet), new global technology companies such as Facebook, Uber, Airbnb or Apple, which were subject to a very strong growth, were founded or further developed.

From a Swiss financial market regulatory perspective, typical technology companies were generally not subject to financial market regulation unless they intended to operate within the scope of the traditional sector-oriented regulation, which was rarely the case.

By creating and exploring new markets free from or with less rigid jurisdiction specific regulations and restrictions, many tech companies were able to experience exponential growth and to establish a global presence. Such prosperous tech startup companies are frequently called "unicorns" and are shining examples of success stories in entrepreneurial circles.

In contrast thereto, financial services and products providers were traditionally subject to very rigid and fragmented local regulations, in particular, in Switzerland and in Europe (but also in many other countries).

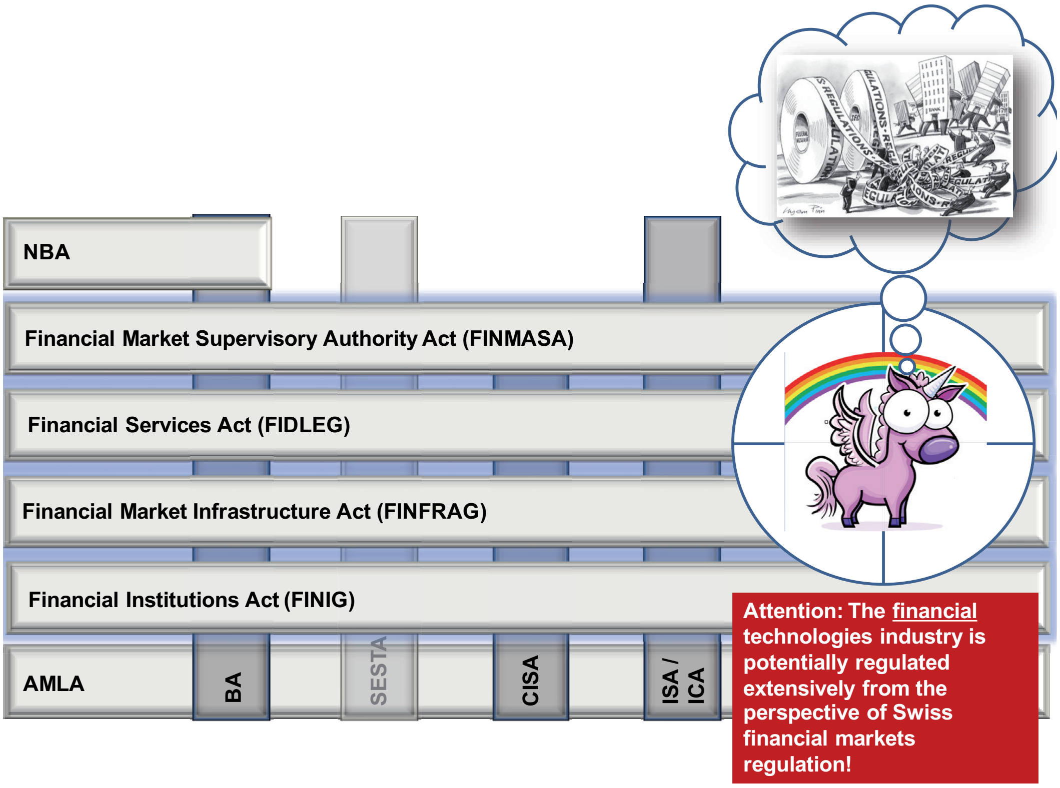
The "lean" startup approach suggests that overplanning, the generation of large expenses, or long product development periods are avoided for early stage digital products or startups. Thus, a typical tech startup frequently tries to enter the specific online target market very quickly with an already functioning but not completely "finished" Minimum Viable Product (MVP).

As of today, from a regulatory perspective it is not permitted to enter the FinTech market without fulfilling all the applicable regulatory requirements (if any) from the very beginning. In a worst case scenario, the going live of an MVP may not be in line with Swiss financial market regulation and can, potentially, be subject to regulatory or penal sanctions. Therefore, it is recommended to make an appropriate effort to evaluate each FinTech business model from a regulatory perspective *before* the launch of the MVP.

b) The New World or Unicorns in the Labyrinth

i. Overview of the Regulatory Framework (2.0)

The "new" topic oriented cross-sector Swiss financial market architecture that is in the process of being implemented in Switzerland has the (unintended) side effect of hindering innovative FinTech startups even more extensively as set out in below graph.



(Source: Abegglen / Bianchi / Bianchi, loc. cit., p. 22, modified version)

ii. Explanation of Selected Aspects

Unlike typical tech startups, a FinTech startup may be subject to the traditional financial market regulation that has historically been created for banks, stock exchanges, securities dealers or collective investment schemes, for the respective mature industries and based on experiences in the past (*e.g.*, cases of damages, losses, defaults, or fraud).

In particular, licensing requirements, minimum capital requirements, accounting requirements, substance requirements, KYC-duties or other regulatory requirements for traditional financial services providers can, potentially, put an end, slow down or significantly complicate the development, testing, launching and scaling of an MVP in the FinTech market.

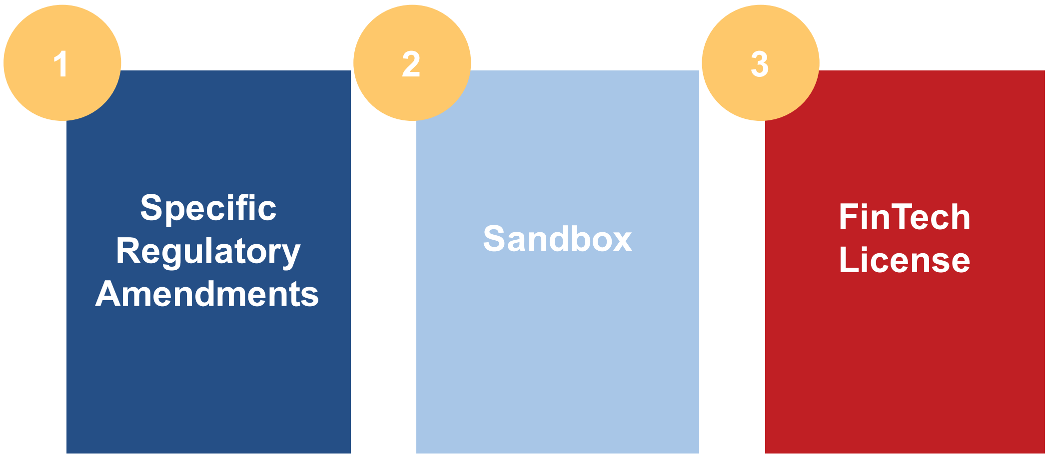
Against this background, FinTech startups seem to be caught and hindered by a labyrinth of existing and proposed new regulations that are frequently very hard to understand or even entirely incomprehensible for FinTech entrepreneurs.

Thus, financial market regulation can be a significant market entrance barrier for new market participants in the FinTech industry.

3) The Proposed Swiss FinTech Regulation (2.0)

a) A Three Element Solution

The Swiss Federal Council alongside the FDF is in the process of developing a model for a proposed FinTech (de)regulation that will, presumably, be based on its current "Three Element Approach" as described in the following graph.



(Source: FDF, Background documentation on the reduction of barriers to market entry for FinTech firms, 2 November 2016, free translation, available under <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64356.html> (last visited on 16 January 2017), p. 2)

The existing regulatory framework does frequently not "fit" or is not "adequate" for FinTech business models and the needs and expectations of new market participants in the FinTech space (*i.e.*, there exists a regulatory mismatch). In addition, the question of regulation or deregulation of FinTech represents a true regulator's dilemma.

The new Swiss Three Element Approach is a possible solution for such a regulator's dilemma. The three elements of this approach are described in further detail in the next paragraph.

b) The Three Elements

i. Specific Regulatory Amendments (Element 1)

With respect to specific regulatory amendments, a special focus lies on the extension of the timeframe for settlement accounts. Currently, credit balances on certain client settlement accounts (*e.g.*, with securities dealers, precious metal traders, asset managers or any similar firms) are not considered to be deposits (article 5 para. 3 lit. c of the Banking Ordinance (BO)).

These types of settlement accounts set forth that the accounts exclusive purpose is to serve the settlement of client transactions and that no interest is paid on the deposits. This exception shall also be applicable for accounts of FinTech companies. However, in this context, the requirement that a settlement account exist for a maximum period of seven days poses a problem. Fundraising for crowdfunding projects typically takes longer than that. Thus, a timeframe of 60 days shall newly be implemented for settlement accounts in the BO.

In addition, the Swiss Federal Council of States has attempted to make another specific regulatory amendment concerning the support of innovation in the proposed new Art. 1a^{bis} of the Banking Act (BA) in the process of dealing with the draft Financial Services Act (FIDLEG) and Financial Institutions Act (FINIG). However, the proposed wording seems to have been integrated in the Explanatory Report on the Amendment of the BA and BO (FinTech) of 1 February 2017 and the respective draft provisions (see Point 4 below). Thus, consistency between the legislative process concerning the FIDLEG and FINIG and the new FinTech regulation should be ensured.

In conclusion, particularly crowdfunding platforms could benefit from the proposed specific regulatory amendments. As long as crowdfunding platforms will accept client money only within the extended timeframe set out above, they should, presumably (and under the reservation of other potentially applicable regulatory restrictions), not be subject to the banking license requirement or the anticipated new FinTech license requirement.

ii. Regulatory "Sandbox" (Element 2)

The regulatory "sandbox" is essentially an expansion of activities that are exempt from a licensing requirement. At the moment, client deposits can be accepted from a maximum of 20 people without triggering regulatory licensing requirements.

Many FinTech business models aim to address the general public or at least more than 20 people. The element of a sandbox will enable a provider without a banking license to accept public funds within the quantitative threshold of a total amount of up to CHF 1 million, but without the application of a threshold that relates to the number of depositors.

The acceptance of public funds above this threshold would be subject to a separate approval by FINMA; either by granting a full-fledged banking license or, more likely, the new FinTech license (see below).

Thus, the sandbox has the purpose to permit the limited market testing of MVPs without the market entry barrier of a banking license (or even a FinTech license) to the extent that a FinTech provider operates within the defined limitations of this innovation space.

However, FinTech providers that are operating within the scope of the sandbox will have to inform clients that the company is not supervised by FINMA for transparency purposes. In addition, they must still comply with the potentially applicable anti-money laundering regulation.

iii. FinTech License (Element 3)

The actual breakthrough is certainly the proposed FinTech license that represents a new category of a regulatory status for FinTech providers that do not provide typical banking activities, but whose business includes only certain elements of banking (and, therefore, has a lower risk profile).

FinTech institutions that aim to perform a deposit-taking business and do not execute a credit business with maturity transformation may be subject to this new licensing requirement. Under the FinTech license, public deposits may not exceed the total amount of CHF 100 million. If client protection is ensured, FINMA may authorize a higher threshold.

The deposits must be held on one or more accounts and in the name of the license holder. No interest may be paid on such deposits. The minimum capital requirement for such regulated FinTech institutions shall be 5% of the accepted deposits and at least CHF 300,000.

Consequently, the proposed new FinTech license will, presumably, reduce regulatory (market entry) barriers for many FinTech providers, in particular, in the area of crowdfunding, blockchain, and digital payments.

4) A First View on the Explanatory Report on the Amendment of the BA and BO (FinTech) of 1 February 2017

a) Preliminary Remark

The FDF published its Explanatory Report on the Amendment of the BA and BO (FinTech) on 1 February 2017. It can be downloaded on <https://www.admin.ch/gov/ en/start/documentation/media-releases.msg-id-65476.html> (last visited on 1 February 2017).

The following section of the text represents a brief summary of a first review of the Explanatory Report.

Firstly, the Explanatory Report contains a general overview on the FinTech industry and explanations concerning the most important FinTech business models such as crowdfunding, digital payment systems, blockchain applications, robo advisers, and digital asset management.

Secondly, the Explanatory Report describes the currently applicable financial market regulation and the general need to adapt it to the digital age.

Thirdly, specific amendments to the BA as well as to the BO are suggested in line with the proposed Three Element Solution and as further described below.

b) Key Points

i. Proposed Amendments to the BA

A proposed new article 1a BA aims to introduce an amended definition of the term "banks". In addition, the proposed new article 1b para. 1 BA provides for a general application by analogy of the BA (which shall be subject to certain exceptions as described below) on financial services providers (**FinTech license**) that:

– accept deposits of up to CHF 100 million from the public or solicit such deposits publicly; and

– neither invest such public deposits nor pay interest on them.

In addition, the Swiss Federal Council may reduce this threshold based on certain considerations, including the competitiveness and innovative capacity of the Swiss financial center.

However, the following special provisions and exceptions to the general rule set out above shall apply:

– ***Reduction of accounting obligations***: Instead of the stricter accounting rules for banks, the general accounting rules of the Code of Obligations (CO) shall be applicable to FinTech providers that are in the scope of article 1b para. 1 and 3 BA.

– ***Reduction of audit requirements***: Rather than the stricter audit requirements for banks, the audit rules of the CO shall be applicable for FinTech providers that are subject to these rules.

– ***Examinations by licensed audit companies***: With respect to an examination under article 24 Financial Market Supervisory Authority Act (FINMASA), FinTech providers must mandate a licensed audit company.

– ***Reduction of rules for bank deposits***: With respect to explicitly permitted types of deposits with FinTech providers, the provisions regarding privileged deposits and immediate outpayments for banks shall not be applicable.

In special cases, FINMA may decide that the above provisions also apply for FinTech providers that: *(i)* exceed the threshold of CHF 100 million or solicit deposits publicly or *(ii)* do not accept deposits from the public and apply for a license.

Furthermore, the proposed new article 47 para. 1 lit. a BA introduces a professional secrecy for FinTech providers which is similar to the existing banking secrecy. Intentional or negligent breaches of the professional secrecy for FinTech providers can, presumably, be punished with imprisonment of up to three years or a financial penalty.

ii. Proposed Amendments to the BO

The proposed amendments to the BO comprise the following two carve outs:

– ***Carve out from the existing legal term "deposits"***: Credit balances on settlement accounts of clients with securities dealers, commodity traders, asset managers or similar companies (*i.e.*, FinTech providers) shall explicitly not qualify as deposits if no interest is paid thereon and the settlement is made within 60 days (**specific regulatory amendment**).

– ***Carve out from the term "commercial nature"***: Whoever is mainly active in the financial industry and accepts or publicly solicits deposits does not act with a commercial nature, if he accepts such public deposits within a maximum threshold of CHF 1 million and does not pay interest thereon (**sandbox**).

In addition, clients must be informed if the FinTech provider is not supervised by FINMA and the deposit is not subject to the legal deposit guarantee.

c) Initial Findings

In a nutshell, the Explanatory Report contains a specified proposal on how to implement the new FinTech regulation (Three Element Solution) described above in the existing Swiss banking regulation. It seems to overtake certain amendments that have already been suggested to the BA and BO during the legislative process regarding the FIDLEG and FINIG. Furthermore, it combines these elements with more detailed aspects of the proposed new FinTech regulation.

It is somehow surprising that the new FinTech regulation shall not be inserted into the FIDLEG and FINIG (including a general non-application of the BA and BO instead of an introduction of a number of exceptions thereof). This would seem to be a more liberal and, thus, better solution to introduce general rules on the regulation and supervision of FinTech providers.

Nevertheless, it cannot be excluded, that the reason for the selected approach may have been a question of timing and the decision was made under consideration of the earliest possible date of entering into force of the new FinTech regulation (which could, potentially, be subject to a delay if the new rules would be integrated in the FIDLEG and FINIG).

Against this background, the selected approach may be considered to be pragmatic and a very smart move by the legislator. However, it could certainly make sense to establish a more sophisticated Swiss FinTech regulation in the FIDLEG and FINIG (as well as in the Financial Market Infrastructure Act (FINFRAG)) at some point in the future.

5) Conclusion and Outlook

In a strictly regulated industry such as the financial industry the way out of the regulatory mismatch and the regulator's dilemma seems to be a punctual deregulation of financial services and products in the FinTech space. In particular, such liberalization should have the purpose to create adequate rules that are suitable for new business models, to ensure minimal professional standards, and to clarify the regulatory status as well as regulatory requirements and duties for market participants in the FinTech space. The current Three Element Approach represents a remarkable step in the right direction.

The consultation process with respect to the proposed FinTech regulation will last until 8 May 2017. The exact timeline with respect to the further implementation of the proposed new FinTech regulation is not clear at this point in time. Nevertheless, it is essential to implement the new rules as soon as possible in order to compete successfully with other leading FinTech locations that aim for a liberalization of the FinTech industry in their countries in the near future as well.

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Liberalization of the Point of Sale– Amendments to the FIDLEG Bill's Point of Sale Duties Proposed by the Council of States

Reference: CapLaw-2017-03

After having been discussed throughout 2016 in various sessions of the Economic Affairs and Taxation Committee of the Swiss Federal Council of States (WAK-S), on 14 December 2016 the new Federal Financial Services Act (*Finanzdienstleistungsgesetz*; FIDLEG) was finally resolved on by the Federal Council of States (SR). Compared to the bill of the Federal Council (the Swiss government), the SR resolved on a number of amendments that will, in certain areas, substantially liberalize the proposed regulatory regime to be complied with at the point of sale. Starting this year, the bill is now before the other chamber of Swiss parliament, the Swiss National Council (NR), and it will be interesting to see to what degree the NR will follow the SR's approach. The enactment of the bill is still anticipated at the earliest in 2018. The present article focuses on important amendments to the FIDLEG bill as suggested by the SR.

By Sandro Abegglen / Luca Bianchi / Edi Bollinger

1) Introduction

As expected, the SR followed its preparatory commission (WAK-S) when deliberating the FIDLEG bill and resolved on a number of important curtailments to point of sale duties of financial services providers when compared to the government's bill. Apart from a general position to only accept the new regulation if it is "liberal in approach and design" and relatively simple to implement, a certain more relaxed stance vis-à-vis the question of whether the new Swiss regulation will be equivalent with EU's MIFID II may have driven the decision making of the SR members. It remains to be seen whether the NR will approve such a liberal course in all respects, in particular, as there are certain amendments where the SR's bill (at least according to the letter of the law) provides for a very liberal regime.

Further, it is a clear message to the government that certain aspects of the legislation will be addressed at the level of the formal statute, the rationale being to prevent potentially too strict concretization of the act at the level of the ordinance to FIDLEG.

This article does not aim to give an overview of the FILDEG's point of sale duties (for such overview, see Sandro Abegglen and Luca Bianchi in CapLaw-2016-3) but focuses on important amendments to the FIDLEG bill as suggested by the SR in December 2016.

2) Amendments to the Federal Council's FIDLEG Draft concerning the Point of Sale

The SR resolved on the following important amendments to the Federal Council's draft of FIDLEG:

- ***Client segmentation:*** The SR proposed a few amendments to the contemplated client segmentation regime of the FIDLEG, including the sensible introduction of a new professional client category of "large undertakings" (with a concept and content very similar to the related category under MIFID) and, importantly for Switzerland as major private banking center, a concretization that private investment structures with a professional treasury unit (created for wealthy private clients) shall always be regarded as professional clients. Moreover, and also to be considered against the private banking needs, the SR now wishes to define the requirements for high-net-worth individuals (HNWI) within the FIDLEG statute itself. The respective proposal is that an HNWI may opt-out/up to professional investor status whenever it has a net worth of at least CHF 2 million, it being understood (and in stark contrast to MIFID) that no specific experience or know-how is required. This proposal is all the more remarkable when considering that the corresponding threshold under the Collective Investment Schemes Act (CISA) is currently CHF 5 million.

- ***No super-opting-in (down) / amended opting-out (up)***: The SR resolved to restrict the opting-in (opting-down) as well as to liberalize the opting-out (opting-up) possibilities. In particular, and indeed rather astonishingly, institutional clients shall not have the freedom to super-opt-down anymore to the level of private clients. The sensibility of such amendment is questionable given that an institutional client, based on the freedom of contract principles, may continue to request to be treated as a private client under civil law. Whether or not a financial services provider will agree to such request mainly seems to be a commercial question and a matter for the financial services firm and not for the law to decide. Further, retirement benefits institutions with a professional treasury shall, in turn, be able to opt-up, *i.e.*, to choose to be classified as institutional client, which is the equivalent of MIFID's eligible counterparty.

- ***General exclusion of code of conduct duties vis-à-vis institutional clients***: Furthermore, and quite remarkably, the SR resolved that the entire set of code of conduct duties under the FIDLEG shall not apply in relation to institutional clients (or eligible counterparties as per MIFID's terminology). Such a general carve out of the code of conduct duties seems to be questionable to the extent it concerns fundamental rules, such as best execution. It is not conceivable how the management of an institutional client may accept (*e.g.*, a broker-relationship) a relationship where the broker does not promise best execution, not to speak of institutional clients, such as fund management companies and pension plans that, by virtue of their own regulation and fiduciary duties, must insist on their counterparty complying with certain elementary code of conduct principles. It may be that the SR did not fully appreciate the impact of its pertinent deviation from the Federal Council's draft that, in line with MIFID II, had provided for a differentiated carve out. Such a critical assessment seems justified by the contradiction that, according to the SR's bill, the entire conflict of interest regulation, which is a concept interlinked with the duty of loyalty, shall *not* be carved out. Finally, and certainly less likely to cause differences with the NR, the SR resolved that professional clients, in addition to the possibility to opt-up to the institutional investor status subject to certain conditions, shall be entitled to waive the application of certain code of conduct duties.

– ***Appropriateness / suitability***: While the Federal Council had proposed that a financial services provider must advise against the purchase of certain financial instruments where they are considered not appropriate or suitable for such client, the SR now decided on a mere warning requirement instead. It remains, however, unclear whether a financial services provider may still proactively offer respective financial instruments. The SR further clarified with regards to the appropriateness test that the requested experience and know-how shall refer to the financial service as such, and not to the individual transaction or instrument, an amendment that seems to make a lot of sense for discretionary mandates, but less so for investment advisory situations where it remains the client who has to take the (informed) investment decision.

– ***Duties of due diligence and loyalty***: Driven by the safe harbor concept described in the next paragraph, and likely also by a misunderstanding with regards to the true scope of the duty of loyalty (it had always been clear and would not have changed under the Federal Council's bill that the duty of loyalty does not apply in true counterparty situations), the SR decided to delete altogether the (regulatory) duties to act with due care and in the interest of the principal (duty of loyalty). Under civil law, however, compliance with those duties will, of course, still be required.

– ***Safe harbor***: The SR resolved that the compliance with the FIDLEG's (regulatory) point of sale duties should ensure automatic compliance with corresponding civil law duties, and based on a statement of a member of the SR, non-compliance with FIDLEG will not automatically result in a violation of civil law duties. This concept is welcome as it ensures a sensible coordination of civil and regulatory laws (and was the likely reason to exclude the arguably too general duty of loyalty from the FIDLEG as otherwise the "frontier" of the safe harbor would remain unclear). However, the SR's wording contains room for improvement by the NR (*e.g.,* with regards to an explicit exclusion of the *e contrario* argument that non-compliance with regulatory duties will automatically be a civil law violation). Furthermore, the question of how the safe harbors will be applied or handled where regulatory duties do not apply should be addressed (*e.g.*, for client segmentation reasons).

- ***Limitation of the duty of information***: While the Federal Council's bill had provided for a duty of (specific) information about the risks and costs of an offered financial service, the SR decided that such an information duty shall only apply in case of "personally recommended services". A potential reading of such a qualification would seem to suggest certain "personal recommendations". This seems all the more astonishing as in such situations *investment advice* is pertinent that will anyway exceed the pure information duties. And also here, civil law may not follow such limitation of the duty to ensure that the investor may take his decision on an informed basis.

- ***Basic information sheet (Basisinformationsblatt; BIB):*** The BIB will have to be made available to private clients whenever financial instruments other than shares, straight bonds, or plain-vanilla notes (*i.e.*, bonds or notes without a derivative character) are offered. The SR decided that with respect to multi-underlying products a single BIB shall be sufficient (and no additional BIBs for all the underlyings of such product are required). Furthermore, the SR held that in case of investment advice provided – on the client's initiative – amongst absentees, the client may agree that it is sufficient for the financial services firm to hand out the BIB only after completion of the transaction (*i.e., ex post*).

- ***Inducements – broader scope of application***: In deviation from the Federal Council's bill that followed more closely the transparency approach of MIFID II, the SR resolved that any payments in connection with any financial services, and not only in connection with investment advice etc., are to be made transparent as inducements. Also, the SR amended the bill by introducing the duty to obtain an informed, valid waiver in case the inducements are to be kept by the recipient, a duty that traditionally has been regarded as pure civil law in character. This leads to a stricter inducement regulation when compared to the current situation under Swiss law and (with regard to the scope of application) also when compared to MIFID II.

- ***Exclusion from FIDLEG of insurance policies with investment character***: In deviation from the "same business, same rules" concept, the SR decided that FIDLEG shall not apply to financial services in respect of life insurance policies with (also) investment character; *i.e.,* such policies and their distribution will remain governed solely by the insurance regulation, which is expected to be further bolstered in the coming years.

- ***No explicit professional education standards***: In rather surprising contrast to the Federal Council's draft, the SR resolved to dispense with any and all explicit regulation (at the statute-level) on standards of adequate qualification and education of client advisors, and of the corresponding responsibility of the firms. Such a seemingly lax attitude with regard to professional qualification and education may warrant reconsideration by the NR, taking into account the importance of the (international) private banking and the increasing importance of the asset management industry for Switzerland. This seems all the more true as the industry will not have problems to cope with reasonably high standards, given that the relevant educational level in Switzerland is very high.

– ***Criminal offences***: Besides the regulatory duties at the point of sale (and respective regulatory measures), financial services providers and their employees may, potentially, also be penalized with criminal sanctions in case of non-compliance with certain regulatory duties. In this respect, according to the SR, financial services providers being supervised and licensed within the meaning of the Financial Market Supervision Act (FINMASA) as well as their employees shall be explicitly carved-out from being subject to the criminal offences stipulated under the FIDLEG, meaning that FIDLEG's duties will only be enforced criminally vis-à-vis the non-FINMASA licensed investment advisors. The underlying rationale is that the latter are not within the reach of regulatory measures that in fact often prove more effective than criminal sanctions. It remains to be seen, however, how the NR will deal with the SR's proposal of a so-to-speak "preferential" criminal law treatment of FINMASA-regulated versus non-regulated players.

3) Excursus: Regulation of the Digital (FinTech) Point of Sale

The digitization of the point of sale for financial services and products is a current reality and continuously becoming more important. As such, the (conduct) duties that must be fulfilled at the point of sale under the FIDLEG or the other Swiss financial market regulation, including, but not limited to the rules for digital onboarding under the Swiss anti-money laundering (AML)-regulations (see CapLaw-2016-21), will, naturally, also apply to such digital point of sale.

However, the appropriateness or suitability assessments, the information or documentation duties, or the registration duties as foreseen in the FIDLEG will represent challenges for many FinTech companies and their products and services. Thus, an appropriate specific regulation of the digital point of sale and for innovative FinTech business models is welcomed (see CapLaw-2017-02 and CapLaw-2016-31). For such, the traditional pragmatism of the Swiss legislator and regulator will be helpful.

4) Conclusion and Outlook

The SR has proposed substantial amendments to the regulation of the point of sale, many of which are welcome as they are liberal in approach and design (putting aside issues of equivalency). Some of the changes, however, and as discussed, deserve to be annotated with, mainly technical, question marks. Also for this reason, the law-making process of FIDLEG will remain exciting now that the bill is about to be treated by the NR.

As regards FinTech, there is reason to believe that the Swiss regulatory landscape will be adapted to enable the provision of innovative digital financial services and products.

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Update on the Key Information Document Requirement

Reference: CapLaw-2017-04

In CapLaw-2016-5, Enrico Friz outlined in detail the new duty of manufacturers of financial instruments to produce a key information document (KID, *Basisinformationsblatt*) for all financial instruments. This duty shall be implemented by the Financial Services Act (FinSA) which will likely be set into force during the course of 2018 and is currently being debated in the Swiss Parliament. The Council of States has, with rather minor amendments, approved the draft FinSA produced by the Federal Council in December 2016. The National Council will discuss the FinSA in one of its upcoming sessions. This contribution summarizes the changes to the FinSA in respect to the KID proposed by the Council of States compared to the Federal Council's draft FinSA outlined in CapLaw-2016-5.

By Thomas Müller

1) Partially revised Framework

Generally speaking, but with some important exception, the Council of States has not amended the duty to produce a KID and the content of the KID. A KID will have to be produced for all types of financial instruments offered to retail clients. Given that insurance companies shall now be excluded from the scope of the FinSA, the definition of financial instruments has been partly revised. Redeemable life insurance policies with price-dependent benefits and settlement values as well as capital redemption operations and tontines are no longer deemed as financial instruments under the FinSA.

Accordingly, no KID will have to be produced for life insurance policies. In addition, the Swiss Council of States has amended the list of financial products exempt from the KID requirement. Under the previous draft FinSA, no KID would be required for the offering of equity instruments, such as shares, participation certificates and dividend rights certificates. The new draft FinSA now also excludes debt instruments without derivate elements from the requirement to produce a KID. The amendment of the exemption list will considerably limit the application of the KID.

According to article 10 (2) FinSA, the financial service provider shall make the KID available to its retail clients free of charge prior to subscription or conclusion of the contract. The Council of States, however, proposed an easement in this respect. Specifically, in the event the client is requesting advice from the financial service provider via telephone or electronic means (*i.e.*, not in a physical meeting), the financial service provider may forward the KID to the client only following the conclusion of the contract. The financial service provider shall record the consent of the client to this subsequent delivery of the KID. Furthermore, the Council of States proposed the deletion of the duty to provide the client with the KID for the underlying of the financial instrument, but clarifies that the KID (and other information) may be delivered to the client in a standardized form either physically or electronically.

Under the prospectus liability provision of article 72 FinSA, any person involved will be liable to the acquirer of a financial instrument for losses resulting from inaccurate or misleading information or from information which was given or spread in violation of statutory requirements in a prospectus or a KID. Defendants will be liable unless they are able to prove that they were not at fault. It has been expected that the Council of States would revise this reversal of the burden of proof while considering the current prospectus liability under Swiss law. According to today's provisions, claimants would have to prove that a person who has prepared the prospectus or has participated in such production or the distribution of the prospectus was acting wilfully or negligently. The Council of States, however, followed the Federal Council's proposal and has not amended article 72 FinSA. Thus, it would be preferable if the National Council were to correct this extremely comprehensive prospectus liability provision.

On the other hand, the Council of States wanted to exclude financial intermediaries and its employees who are supervised by the Swiss Financial Market Supervisory Authority FINMA from criminal sanctions for the provision of false information or withholding of material facts in the prospectus or the KID, the failure to publish a prospectus or a KID in a public offering or the willful failure to make a prospectus or a KID available prior to the subscription of conclusion of a contract. The Council of States argued that criminal sanctions in addition to the already existing potential administrative measures (and civil law liability) would not be required. This approach is pragmatic as administrative measures may usually be imposed in parallel to criminal sanctions.

2) Conclusion

The project of a new unified legal framework for financial service providers and their services by implementation of the FinSA and the related Financial Institutions Act (FinIA) made great progress by the approval of both acts by the Council of States while proposing marginal changes to the Federal Council's drafts only. The duty of manufacturers of financial instruments to produce a KID and the required content of such KID has not been revised by the Council of States. The approval of the Counsel of States gives reason to hope that both drafts of the FinSA and the FinIA will be passed by the National Council in the near future as well.

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The Enforcement of Clients' Rights in the Draft Financial Services Act (FinSA) – Update

Reference: CapLaw-2017-05

By Thomas Werlen / Matthias Portmann / Jonas Hertner

This article is an update of CapLaw-2016-4 in which the Dispatch on the draft Financial Services Act (FinSA) was discussed with a focus on Title 5 aimed to facilitate the enforcement of the rights of clients vis-à-vis Financial Services Providers (FSP). On 4 November 2015, the Swiss Federal Council adopted the Dispatch on the draft FinSA, sending it to parliament for consideration. With regard to the enforcement of rights, the draft proposed three elements: (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. In comparison with the original bill proposed by the Federal Council, the proposed provisions on the enforcement of rights in the draft FinSA were significantly curtailed after an overwhelmingly negative response from the financial services industry in the consultation proceeding. On 14 December 2016 the draft FinSA was discussed in the Council of States. The Council of States largely followed the draft as proposed by the Federal Council. Most recently, on 25 January 2017, the National Council's Economic Affairs and Taxation Committee has entered into the debate on the draft FinSA. The Committee will discuss the draft in detail at its meeting on 20/21 February 2017. This will be followed by a debate in the National Council which will likely take place in Spring 2017. The proposed changes by the Council of States related to the enforcement of clients' rights are discussed below.

a) Providers' Obligation to Produce Documents and Clients' Right to Information only upon Client's Request

Article 17 draft FinSA requires FSP to keep documentation on a specific set of facts and events; article 18 contains a duty to disclose and produce this information to the client. Both provisions essentially remain unchanged with only a minor amendment of article 18 to the effect that the obligation to produce information only applies *upon client's request*. Further, articles 75 and 76 draft FinSA which allow the client directly to request documentation and information, shall remain unchanged as well. A minority in the Council of States proposed to introduce a provision limiting the obligation to keep records to a period of 10 years. The proposal was rejected with the argument that when a relationship between the FSP and the client exceeds the 10-year period, the development of the relationship can only be understood and reconstructed if records are kept for the whole duration of the relationship.

b) Confidentiality of the Ombuds Proceeding

Essentially, the proposed rules governing the ombuds system (articles 77-89) remain unchanged. The only amendment decided by the Council of States has the effect of introducing a confidentially provision governing the *entirety* of the ombuds proceeding.

c) Advance on Court Costs and Allocation of Litigation Costs to be discussed in a broader context

The cost exposure in the litigation of financial disputes is one of the key obstacles for clients of FSP to enforce their rights after incurring damages. With its draft FinSA, the Federal Council proposed to amend the Civil Procedure Code (CPC) to the effect that clients are exempt from paying advanced of court costs and security for party costs, and that under certain circumstances a client who lost in a proceeding against an FSP would not be required to pay the FSP's costs of the proceeding. The Council of States decided against these proposed changes (intended to be introduced as a new article 114a CPC).

As a consequence of this decision, the clause of purpose in article 1 para. 2 draft FinSA has been amended and now does not include the phrase that *FinSA seeks to facilitate the enforcement of civil claims of clients*. A majority of the Council of States did not see any reason to implement a separate civil procedure provision that would apply exclusively to the financial industry. Rather, the Council of States decided that the proposal shall be evaluated and discussed in a broader context and within the revision of the CPC.

d) Notes and Outlook

As was to be expected, the Council of States did not reverse the decision of the Federal Council to significantly curtail the original proposals to strengthen the rights of clients of financial service providers. Rather, it decided to strike the idea that the bill was to facilitate the enforcement of rights from the clause of purpose. It did so with the argument that any procedural amendment that would ultimately benefit clients seeking to litigate claims against providers would need to be considered in the context of a revision of the CPC. Such revision – the central piece of which would be the introduction of means of collective redress –, however, is not immediate, and the Federal Council does not appear very eager to put a revision to parliament.

Yet, from a consumer perspective it was not all bleak after the debate in the Council of States. The Council decided to follow the Federal Council's proposal, against the majority of the Council of States' committee that pre-discussed the draft, to introduce a reversal of the burden of proof with respect to prospectus liability. As a consequence, an FSP shall carry the burden of proof for a false, misleading or unlawful prospectus or basis information document (article 72 draft FinSA) an amendment which would introduce a more strict liability as compared to the current provisions in articles 752 and 1152 Code of Obligations.

As mentioned above, the National Council's Economic Affairs and Taxation Committee has entered into the debate and will discuss the draft at its meeting on 20/21 February 2017. It remains interesting to pursue whether Council of States proposals will endure or not.

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Something old, something new and some things change – FinIA Update

Reference: CapLaw-2017-06

After a long wait in the Committee on Economic Affairs and Taxation, the Council of States, the upper chamber of the Swiss parliament, approved in its 2016 winter session the bill for a Federal Act on Financial Institutions (FinIA) as well as amendments of other statutes, such as the Federal Act on Banks and Saving Banks of 8 November 1934 and the Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007. This approval allows this bill to move forward to the National Council, the lower chamber of the Swiss parliament.

Overall, the bill on the FinIA and its schedules, as approved by the Council of States, remains close to the draft bill presented by the Federal Council (see CapLaw-2016-7 http://www.caplaw.ch/tag/caplaw-2016-7/). Most changes seek to clarify the project rather than challenge fundamentally the initial proposal. Two exceptions deserve, however, further attention: first, the Council of States refused to create a framework for a new supervisory authority solely responsible for supervising portfolio managers. Instead, it opted to draw a line between day-to-day supervision, which is due to be entrusted to a new supervisory authority, who in turn can rely on the work of audit firms or carry out their own reviews, and more supervisory actions such as licensing and enforcement action, which will remain with FINMA.

By Rashid Bahar

1) Dual Supervision of Asset Managers and Trustees

The most important change to the FinIA relates to the supervision of asset managers and trustees. Instead of entrusting the supervision of asset managers and trustees to newly created supervisory organizations, the bill approved by the Council of States proposes to share supervisory powers between FINMA and supervisory organizations.

Under this model, FINMA will license and supervise asset managers and trustees (article 43*b* (1) draft FINMASA and article 57 (1) draft FinIA). However, asset managers and trustees will be required to join a supervisory organization which will be responsible for the day-to-day supervision (article 57 (1) and (1^{bis}) draft FinIA). The supervisory organizations will be entitled to rely on audit firms to inspect asset managers and trustees following the dual-supervisory model applied by FINMA or carry out the inspection themselves, as some self-regulatory organizations already do in the realm of anti-money laundering regulations (article 58 (1) draft FinIA and article 43*n* (1) draft FINMASA). Furthermore, the supervisory organization will also be responsible to act as a self-regulatory organization under the Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 provided it was recognized as such (article 43*a* draft FINMASA).

Under normal circumstances, the supervisory organization will be responsible for the day-to-day supervision (article 43*b* (1) draft FINMASA), while FINMA will stay in the background. Asset managers and trustees will be required to respond to any request for information that the supervisory organization requires to carry out its statutory duties and to inform the supervisory organization of the occurrence of any event that is of material importance for the supervision (article 43*p* draft FINMASA).

The supervisory organization will not have formal administrative powers, however. This role will remain with FINMA, who will be in charge of licensing and taking formal enforcement action against asset managers and trustees. If, in the course of their supervision, a supervisory organization finds that an asset manager or a trustee breached its obligation, it will be required to set a deadline to the regulated entity to remedy the situation and if it fails to act within the deadline, it will be required to report the matter to FINMA (article 43*b* (1*bis*) draft FINMASA). FINMA will then take over the case and will be empowered to use the full palette of administrative measures available to it, including issuing a declaratory ruling (article 32 FINMASA), ordering remedial measures (article 31 FINMASA), prohibiting a person from exercising a controlling function within a supervised entity (article 33 FINMASA), naming and shaming (article 34 FINMASA), confiscating undue profits (article 35 FINMASA), appointing an investigating agent to clarify the facts or manage the institution (article 36 FINMASA) or even withdraw the license (article 37 FINMASA).

The split between supervisory organizations and FINMA will, however, need to be clarified in practice. Indeed, the line between supervision and enforcement is not clear. It is, therefore, likely that FINMA will create a halfway house to deal with entities that need to be monitored closely although their actions would not justify taking formal enforcement proceedings, as it already does in connection with banks and securities dealers that are subject to so-called intensive supervision.

Similarly, there will also be needed some clarity to define the threshold for FINMA to take enforcement actions. Although the bill suggests that FINMA will be required to take enforcement action only against characterized offenders who failed to remedy breaches after the deadline set forth by the supervisory authority (see article 43*b* (1*bis*) draft FINMASA), it seems unlikely that FINMA can turn a blind eye to serious breaches. In such cases, it is likely to need to take action, and issue blame or take other enforcement action, *.e.g.* confiscate undue profits, without giving the entity the chance to clean up.

2) FinTech Exemptions

The second series of changes relate to the broader initiative to create a suitable regulatory for FinTechs, which is spearheaded by the Federal Council and FINMA. In line with the reforms announced by the government, the Council of States proposes to introduce two exemptions which seek to remove undue hurdles for technological innovation in the *financial* industry. The driving force of this regulation is that financial institutions that accept deposit without engaging in traditional commercial banking should not bear the full brunt of complying with banking regulations. This new regime should allow 'FinTechs', *e.g.,* crowdfunding platforms and payment service providers broadly speaking, to carry out their business without being fully regulated as a bank.

First, the bill limits the scope of banking regulations to institutions that accept or publicly solicit deposits in excess of CHF 100 million or entities which accept deposits below this threshold, but either invest the deposits or pay interest on them (article 1*a* (1) draft Banking Act). Instead, entities that do not pay interest or invest deposits will be subject to a dedicated 'FinTech' licensing regime that will be analogous to the one applicable to banks (article 1*a*^{bis} (1) draft Banking Act). These entities will be required instead to prepare audited financial statements in accordance with the Swiss Code of Obligations and engage an auditor to carry out a regulatory audit (article 1*a*^{bis} (3) draft Banking Act). Although the answer to the *questions* to what extent the analogy holds and what are the exemptions that these entities will enjoy is uncertain, the Federal Council and FINMA suggested that such institutions would be subject to a simplified capital adequacy regime, thus removing one of the more burdensome requirements.

Second, the bill also allows FINMA to grant a similar exemption to entities that accept deposits in excess of the CHF 100 million threshold provided they do not invest or pay interest on the deposits and take additional measures to protect their clients (article 1*a*^{bis} (1) draft Banking Act) or to financial institutions that do not accept deposits, but nevertheless apply for a license (article 1*a*^{bis} (1) draft Banking Act).

The substance of this lighter regulatory regime remains, however, fairly uncertain at this stage and further details can be expected at a later stage, when the Federal Council will commence hearings on the implementing ordinance, which are likely to include further exemptions for *FinTechs*.

3) Other Changes

a) More Differentiated Regulatory Regimes for Asset Managers and Trustees

Further clarifications relate to capital adequacy and organizational requirements applicable to portfolio managers and trustees. Overall, these amendments seek to allow the regulation to account for the wide disparity in terms of size within the asset management industry, which range from relatively small owner-operated institutions to large institutional players. Therefore, a number of amendments seek to ensure that the new regulations do not create market entry barriers for smaller players (see, *e.g.*, article 10 (7) draft FinIA allowing qualified shareholders to exercise an executive role in asset managers and trustees, article 18*b* (2) on requirements applicable to risk management and internal controls, article 19 and *19a* draft FinIA on equity and capital requirements) and emphasize the need to account for the size and complexity of the business when implementing and applying the regulations (see, e.g., articles 8 (3), 18 (2) draft FinIA, article 43*b* (2) Draft FINMASA).

Moreover, the bill that was approved by the Council of States struck out all provisions on consolidated supervision of asset managers for collective assets, and merely enabled the Federal Council to enact such rules should they be required by international standards, as is currently the case.

b) Status Quo on Banking Regulations

The most important resistance to the FinIA concerned banking regulation, where the Council of States refused a number of amendments to the Banking Act proposed by the Federal Council in areas such as the definition of banking business (article 1*a* (2) draft Banking Act as presented by the Federal Council) and the definition of deposit taking activity (article 1*b* draft Banking Act as presented by the Federal Council), the legal form of banks (article 1*c* draft Banking Act as presented by the Federal Council), the regulatory status of branches and representative offices (article 2 draft Banking Act as presented by the Federal Council), licensing requirements (article 3 draft Banking Act as presented by the Federal Council), reporting obligations for cross-border business (article 3*b*bis draft Banking Act as presented by the Federal Council), and supervision of financial groups and bank controlled financial conglomerates (article 3*c ff.* draft Banking Act as presented by the Federal Council). Overall, this decision reflects the intent to maintain the current regulatory framework that applies to banks fundamentally unchanged by the FinIA, which had already been voiced in the consultation proceedings preceding the publication of the draft bill.

The Council of States also refused the amendments to bank insolvency that were added to the project of the Federal Council on the basis that they should have been be subject to full consultation proceedings.

c) Limitation of the Scope of the Collective Investment Schemes Act and Voluntary Licensing Process

Finally, the draft bill made some small changes that may have far reaching consequences for financial markets regulation:

The Council of States removed offerings from Switzerland from the scope of the investments on collective schemes (articles 120 (1) and 123 (1) draft CISA). Doing so, the Council of States lifted pure outbound offerings of collective investment schemes from the scope of the Collective Investment Schemes Act, which is likely to significantly decrease the regulatory burden of collective investment schemes that are managed or administered in Switzerland without being offered locally.

Furthermore, the Council of States also amended the FINMASA to allow persons to obtain a license on a voluntary basis, even if they do not intend to exercise a regulated activity and need a license (article 3 (a) draft FINMASA), which should facilitate the licensing of persons who need to be regulated in Switzerland to be able to carry out their activity in other jurisdictions.

4) Next Steps and Phasing-in

Overall, the draft FinIA seems to have been well received by the Council of States. The next step for this project is the National Council. The project is scheduled to be examined by the Committee on Economic Affairs and Taxation of the National Council in its spring 2017 session. Considering that the political brokering required to overcome the deadlock already took place to a large extent, it is well possible that the FinIA may be accepted without too much resistance by the National Council and, after the 90 day deadline for a referendum will expire, become law in the course of 2017. This legislative package will, however, require the adoption of implementing ordinances. Therefore, it is not likely to be enacted before mid-2018 or even 2019.

Even then, the bill provides for a generous phasing in process, which was further expanded by the Council of States: trustees and asset managers will then need to report themselves with the FINMA within six months of the entry in force of the FinIA and will have three years to submit their licensing application, provided they are already member of a self-regulatory organization under the AMLA (article 70 (2) draft FinIA). Furthermore, during the first year following the entry in force of the FinIA, new asset managers and trustees will be entitled to commence their operations provided that they immediately announce themselves to FINMA and comply with all requirements under the FinIA, with the exception of joining a supervisory organization. They will then have a year counting from the first licensing of a supervisory authority by FINMA to file their own application to be licensed and join a supervisory authority, provided they joined a self-regulatory organization under the AMLA (article 70 (3^{bis}) draft FinIA).

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Supervision of Portfolio Managers and Trustees – Update

Reference: CapLaw-2017-07

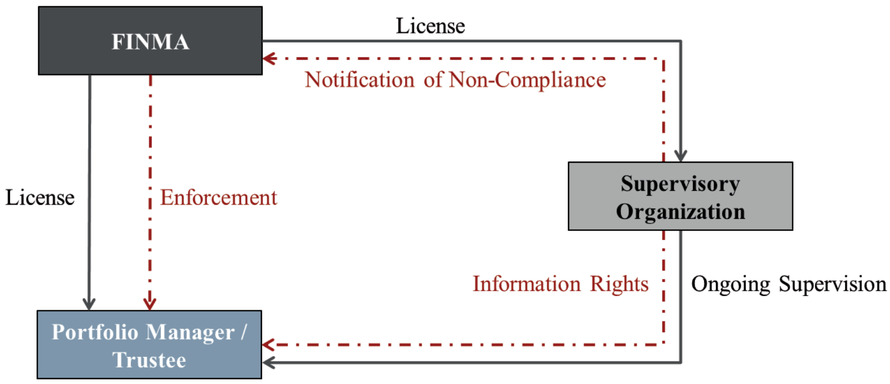
Under current Swiss law, portfolio managers, unless they are acting as asset managers for collective investment schemes, and trustees are not subject to a comprehensive prudential supervision, a situation that will change under the proposed new Financial Institutions Act ("**FinIA**"). On 14 December 2016, this proposed new act took the first parliamentary hurdle when the Swiss Council of States deliberated and passed the new act. Compared to the draft bill published by the Swiss government in November 2015 (*see* CapLaw 2016-8), the draft FinIA now passed by the Swiss Council of States includes a number of significant changes to the new supervisory framework applicable to portfolio managers and trustees. Most notably, portfolio managers and trustees will have to apply for a license with the Swiss Financial Market Supervisory Authority (FINMA), while the ongoing (day-to-day) prudential supervision of these financial institutions will fall within the responsibility of new private supervisory organizations.

By Patrick Schleiffer / Patrick Schärli

1) Portfolio Managers and Trustees will be FINMA-licensed Entities

Unlike as originally suggested by the Swiss Federal Council in its draft bill of November 2015 (*see* CapLaw 2016-8), the Swiss Council of States now proposes in its draft of the FinIA that portfolio managers and trustees will be required to obtain their license from FINMA and not from the relevant supervisory organizations. The supervisory organizations will, however, be responsible for the ongoing (day-to-day) prudential supervision of portfolio managers and trustees.

Overview of the new supervisory regime as proposed by the Swiss Council of States:



a) Scope of the New Rules

The FinIA will, for the first time, subject portfolio managers and trustees to license requirements and an ongoing prudential supervision. Under current law, these types of financial intermediaries were only required to register themselves with a self-regulatory organization ("**SRO**") for purposes of compliance with the Swiss anti-money laundering laws and, if acting as portfolio manager in relation to funds, also with an industry organization for independent portfolio managers recognized by FINMA. The draft FinIA defines portfolio managers as someone that, based on a mandate agreement, can dispose of a client's asset by way of the following activities: (i) purchase or sale of financial instruments, (ii) acceptance and transmission of client orders relating to financial instruments, (iii) management of financial instruments, or (iv) advice relating to financial instruments. A trustee is defined as someone that based on a trust deed can dispose of the assets of a trust within the meaning of the Hague Trust Convention.

b) License Requirements

The draft FinIA (as passed by the Swiss Council of States) also provides for detailed list of prerequisites that need to be met by applicants for a trustee or portfolio manager license. In particular, the Swiss Council of State added the following additional licensing prerequisites to the draft FinIA:

– The management of a portfolio manager or a trustee must be composed of at least two qualified individuals. An individual is qualified within the meaning of the draft FinIA if such individual has an adequate education and sufficient professional experience when taking over the management of a portfolio manager or a trustee. The details will be set out in the Federal Council's ordinance to the FinIA.

– A portfolio manager or a trustee will have to implement an adequate risk management and effective internal controls, including a compliance function. Risk management and compliance functions have to be independent from the business side. These functions may, however, be delegated to qualified third parties.

– Portfolio managers and trustees will be required to have a minimum capital of CHF 100,000. In addition, they need to maintain additional equity in an amount equal to one quarter of their fixed costs, but no more than CHF 10,000,000.

c) Ongoing Supervision and Audit of Portfolio Managers and Trustees

As mentioned above, the ongoing prudential supervision of portfolio managers and trustees will be the responsibility of the new privately organized supervisory organizations. These supervisory organizations may conduct audits of portfolio managers and trustees themselves or they can require the portfolio managers and trustees to appoint an external auditor for purposes of the regulatory audit. This rule will allow the existing industry organizations and/or SROs with their own audit organization to continue to conduct their own audits (should such organization decide to apply for a license as supervisory organization).

The supervisory organization will have the possibility to reduce the audit frequency of the portfolio managers and trustees supervised by them. This risk-based approach allows smaller entities to benefit from a reduced supervisory burden. In years where there is no audit, the supervised entities will have to prepare and file a (standardized) report on their compliance with the relevant laws and regulations.

2) Supervisory Organizations

Under the FinIA, the privately organized supervisory organizations which must have their registered seat in Switzerland will be responsible for the ongoing (day-to-day) supervision of portfolio managers and trustees. The draft FinIA which will amend the existing Financial Markets Supervisory Act (FINMASA) explicitly provides that there may be more than one supervisory organization.

The already existing industry organizations for independent portfolio managers are the most 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 portfolio management services). It is to be expected that a number of these industry organizations and/or the existing SROs will try to obtain an authorization as a supervisory organization.

In addition to the supervision of portfolio managers and trustees, a supervisory organization may also act (or continue to act) as a SRO for the purpose of anti-money laundering supervision of financial intermediaries that themselves are not required to obtain a license under the FinIA.

a) FINMA Authorization

Acting as a supervisory organization requires authorization from FINMA. FINMA will have to decide on an authorization application within one year of the entry into force of the FinIA, provided, however, the application was submitted to FINMA within six months of the entry into force of the amended FINMASA.

b) Powers

As mentioned above, the supervisory organizations will be responsible for the ongoing (day-to-day) prudential supervision of portfolio managers and trustee. Should a supervisory organization learn that a portfolio manager or a trustee does not comply with its obligations, it can set a deadline within which the respective portfolio manager or trustee has to remedy the situation. Other than that and a general right to obtain information from the supervised entities, the supervisory organizations do not have any other supervisory or enforcement tools at their disposal. In particular, the supervisory organizations will not be able to open their own enforcement action. Accordingly, if a supervised entity does not comply with its duties, the supervisory organizations will have to notify FINMA who will then take up appropriate enforcement actions.

3) Transitional periods

In addition to significantly changing the future regulatory framework applicable to portfolio managers and trustees, the Swiss Council of States also extended the transitional periods with respect to financial institutions that will be newly subject to licensing and prudential supervision under the FinIA. While these financial institutions still have to notify FINMA within six months of the entry into force, they now have up to three years to reorganize and meet the new requirements of the FinIA; provided, however, they already are and remain a member of a SRO.

The draft FinIA now also provides for transitional periods with respect to portfolio managers and trustees that will start their business after the entry into force of the FinIA, but before a supervisory organization has been authorized by FINMA. While these new portfolio managers and trustees will have to notify FINMA and meet the licensing requirements (with the exception of the membership in a supervisory organization) right away, they will only have to file a licensing application once a supervisory organization has been authorized. Until then, they may be acting as a portfolio manager or trustee, provided they are a member of a SRO.

4) Conclusion

The draft FinIA as passed by the Swiss Council of States provides for a number of significant changes to the regulatory regime that will be applicable to portfolio managers and trustees in the future. By amending the draft and transferring powers from the supervisory organizations to FINMA, the Swiss Council of States has created a coherent licensing and enforcement regime applicable to all types of financial intermediaries. Further, the regulatory regime as passed by the Swiss Council of States allows the currently existing industry organizations for independent portfolio managers and/or SROs to more easily transform into supervisory organizations and it provides for significantly more flexibility in terms of how audits of portfolio managers and trustees will be carried out.

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Swiss Prime Investment Foundation

Reference: CapLaw-2017-08

On 7 December 2016, Swiss Prime Investment Foundation successfully completed an offering of claims of the investment group "SPA Immobilien Schweiz" with a volume of CHF 470 million. The total equity capital of the investment group is now above CHF 1 billion.

Issue of Mortgage-backed securities by Crédit Agricole

Reference: CapLaw-2017-09

In December 2016, Crédit Agricole Financements (Suisse) SA issued one of the first securitizations of mortgage-backed loans in Switzerland in recent years. The mortgage-backed securities were issued by a special purpose vehicle in Switzerland and placed with Swiss institutional investors. These senior debt tranches have been rated AAA by two international rating agencies.

Baloise Submits Public Tender Offer for Shares of Pax Anlage

Reference: CapLaw-2017-10

Baloise Life Ltd (Baloise) and real-estate company Pax Anlage AG, both listed on SIX Swiss Exchange, have entered into a transaction agreement pursuant to which Baloise will launch a public tender offer for approximately 30 per cent of shares in free float, subject to customary conditions. The pre-announcement of the offer was published on 6 January 2017. Concurrently, Baloise entered into agreements with majority shareholders Pax Holding (Genossenschaft), Pax, Schweizerische Lebensversicherungs-Gesellschaft AG and Nürnberger Lebensversicherung AG to acquire the remaining approximately 70 per cent of the share capital and voting rights in Pax Anlage AG.

AEVIS VICTORIA Submits Public Tender Offer for all Shares of LifeWatch

Reference: CapLaw-2017-11

On 24 January 2017, AEVIS VICTORIA SA (AEVIS) published the pre-announcement of the public takeover offer on all publicly held registered shares of LifeWatch Ltd. (LifeWatch). LifeWatch shareholders can opt for an exchange offer or a cash alternative. For each registered share of LifeWatch, it is foreseen that AEVIS will offer 0.1818 registered share of AEVIS with a nominal value of CHF 5.00. Alternatively, AEVIS offers CHF 10.00 in cash per registered share of LifeWatch.

Possible IPO of Galenica Santé

Reference: CapLaw-2017-12

Galenica announced on 19 January 2017 that in the course of the preparations for the division of the Galenica Group announced in 2016, it has put a focus on the flotation of Galenica Santé by means of an initial public offering (IPO). Galenica anticipates that the division will be completed by no later than the end of 2017.

Seminar: Share Rights Revision – New Start, New Luck? (Aktienrechtsrevision – neuer Anlauf, neues Glück?)

Friday, 10 February 2017, CS Forum St. Peter

http://www.eiz.uzh.ch/weiterbildung/vortragsreihe-am-mittag/

Seminar: FinTech 2.0

Thursday, 30 March 2017, Metropol, Fraumünsterstrasse 12, 8001 Zürich

http://www.eiz.uzh.ch/weiterbildung/seminare/