

Rules of conduct under FinSA

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Introduction

The rules of conduct under the Federal Act on Financial Services (FinSA) are based on the EU Markets in Financial Instruments Directive (2004/39/EC) (MiFID I) and the EU Markets in Financial Instruments Directive (2014/65/EU) (MiFID II) and simplify market entry to the European Union for Swiss financial services providers. Therefore, if financial service providers wish to publicly offer or distribute financial instruments on the Swiss market, they will need to follow new rules and regulations from 1 January 2020.

Rules of conduct are the cornerstone of the FinSA and will have a particular impact on financial service providers. This article examines the rules of conduct and the differences regarding the suitability and appropriateness duties under Swiss and EU legislation.

Rules of conduct with respect to three categories of client

With the FinSA's entry into force, financial service providers will be subject to a series of rules of conduct. The FinSA introduces a comprehensive set of rules of conduct, including:

- information and due diligence duties;
- a performance of suitability and appropriateness test;
- documentation and reporting duties; and
- a duty of best execution and transparency.

The FinSA also introduces a client segmentation regime, under which financial service providers must classify their clients as:

- professional clients;
- institutional clients; or
- private clients.

Depending on the client's classification, financial service providers must offer a different level of client protection under the FinSA's rules of conduct (for further details please see "[Client segmentation under FinSA](#)").

Private clients

Information and due diligence duties

In general, all financial services providers are subject to extensive disclosure duties regarding the products and services that they offer.

Prior to providing financial services to or soliciting financial products from a private client, financial service providers must offer their clients all key information (eg, their name and address, the scope of activities and status of supervision, the procedures for initiating a conciliation procedure before an ombudsman and overall information concerning risks with financial instruments).

Further, financial service providers must update their clients about:

- the financial services that they recommend to the client personally;
- their current economic ties with third parties regarding the financial service offered; and

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- the market offerings considered for the choice of financial instruments.

In addition, if a financial service provider personally recommends a financial instrument to a private client, they must provide them with a key information document and a prospectus if such a document is considered essential.

Suitability and appropriateness duties

The main objective of the MiFID II and FinSA is to increase customer protection, which is accomplished through the assessment of appropriateness and suitability. Financial service providers that offer investment advice or portfolio management services must verify whether a specific service or instrument is suitable or appropriate for a specific client.

Financial service providers that provide investment advice for isolated transactions without considering their entire client portfolio must ask about their client's knowledge and experience to use such services and must ensure that the recommendations are appropriate for the client (the so-called 'appropriateness test') before recommending financial instruments.

If investment advice considers a client's or asset management's entire portfolio, financial service providers must take into account the client's:

- financial situation and investment objectives; and
- knowledge and experience with respect to the proposed individual transactions prior to any recommendation (the so-called 'suitability test').

Unlike Swiss law, the MiFID II makes no distinction between transaction and portfolio-based advice, which obliges a suitability review in all cases where investment advice is given.

Conversely, Swiss law exempts execution only services from the suitability and appropriateness test where they are provided to a client which has entered into an investment advice or portfolio management agreement.

Further, the FinSA does not require that a service be provided at the client's initiative; however, financial services providers must notify their clients that they do not verify the suitability and appropriateness. On the other hand, under the MiFID II, verifications are not required if the following conditions are met:

- the service concerns one of the non-complex financial instruments listed under Article 25(4) (a) of the MiFID II;
- the service is provided at the client's initiative;
- a special warning was transmitted to the client; and
- the investment firm conforms to its conflict of interest obligations.

Documentation and reporting duties

To simplify the implementation of its rules of conduct, the FinSA backs the rules of conduct with an extensive documentation duty.

Financial service providers must document their services in a suitable manner. This means that they must document:

- the financial services agreed with and the information collected about clients; and
- any information and warnings given to their clients under the suitability and appropriateness rules.

Further, providers of investment advice must keep records of their clients' requests and the purpose of each buy or sale recommendation.

However, clients may request copies of these records. Financial service providers must provide a copy of such documentation to clients on request within three working days.

Duty of best execution and transparency

Under the FinSA, financial service providers must handle client instructions in good faith and equal treatment while processing client orders. Therefore, they must ensure that they get the highest outcomes in terms of costs, speed and quality, considering both financial and non-financial values.

Further, the rules on product transparency will affect issuers and the point of sale. As a result, issuers must comply with the new prospectus rules. On the other hand, at the point of sale, the basic information sheet must be handed out to private clients whenever an investment is offered.

Professional clients

Relations with professional clients will be subject to the FinSA's rules of conduct and financial

services providers may assume that professional clients have sufficient knowledge and experience as well as the capacity to bear the risks when assessing suitability or appropriateness. Therefore, these rules apply only on a case-by-case basis. The additional rules of conduct such as transparency and due diligence duties apply to professional clients without limitation; nonetheless, clients may waive them. However, such waivers must be in writing or in another form which allows the proof of waiver by text and must remain separate from the general terms and conditions.

Institutional clients

Swiss law provides for neither a suitability or appropriateness test for institutional clients nor any documentation obligations. In fact, none of the rules of conduct relate to interactions with institutional clients.

Comment

The business conduct rules under the FinSA are fundamentally based on the corresponding EU provisions. Without a doubt, the majority of provisions are almost identical, despite the fact that the EU legislative text is less reader friendly.

Financial service providers in Switzerland must comply with the information duty, the suitability and appropriateness duty and the documentation and accountability duty within two years of the FinSA's entry into force. The act is expected to enter into force, together with its implementing ordinance, on 1 January 2020. Although some of the new rules already exist in a similar form or are based on principles of civil law or good business practice, the implementation of the rules will require time and effort.

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