

Client segmentation under FinSA

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Introduction

On 15 June 2018 Parliament adopted the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). FinSA contains code of conduct requirements with which financial service providers must comply regarding their clients. On the other hand, FinIA homogenises the authorisation rules for certain financial institutions.

This article provides a short overview of FinSA's new cross-sectoral client segmentation. The classification of clients under FinSA plays a significant role in the application of its rules of conduct, product documentation requirements and other provisions. Further, the article explains the main differences between client segmentation under the EU Markets in Financial Instruments Directive (2014/65/EU) (MiFID II) and FinSA.

Client segmentation

Professional clients, private clients and institutional clients

In line with MiFID II and the Collective Investment Schemes Act (CISA), FinSA stipulates that all financial service providers, including asset managers, must categorise the clients to whom they provide financial services (eg, investment advice or asset management) as:

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

The following institutions qualify as professional clients:

- financial intermediaries under the meaning of the Banking Act (BankA), CISA and FinIA (including portfolio managers and trustees);
- Swiss-regulated insurers;
- foreign financial intermediaries and insurance institutions subject to prudential supervision;
- central banks;
- public entities with professional treasury operations;
- pension funds with professional treasury operations;
- corporates with professional treasury operations;
- large corporates that exceed at least two of the following thresholds (a balance sheet of Sfr20 million, turnover of Sfr40 million or equity of Sfr2 million); or
- family offices or other private investment structures with professional treasury operations set up for high-net-worth individuals.

Institutional clients are a defined subset of professional clients and include:

- financial intermediaries under FinSA, BankA and CISA;
- insurers;
- foreign prudentially regulated financial institutions;
- central banks; and
- national and supranational institutions with a professional operations treasury.

All other clients (ie, any party that does not qualify as a professional client) will fall into the private client category. This group enjoys the highest level of protection.

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Opting-out and opting-in

In order to meet the specific needs of clients, FinSA provides the possibility to adapt the schematic client segmentation to a certain extent.

Therefore, wealthy private clients can waive certain client protection provisions (so-called 'opting-out') and, vice versa, professional clients can declare their intention to benefit from a higher level of protection (so-called 'opting-in').

However, a waiver or declaration to opt-out or opt-in must be documented in writing or in another manner verifiable by text.

Affluent private clients (opting-out)

Affluent private clients may opt-out from their status to that of a professional client if they can credibly declare that:

- they have the requisite education and professional experience and a net worth of at least Sfr500,000; or
- they hold assets with a net worth of more than Sfr2 million.

Private clients that hold assets together must opt-out jointly. If a private client acts through an asset manager, they may declare in writing that the knowledge and experience of such asset manager should be considered to classify the client. Nonetheless, by contrast with the classification of a qualified investor under the current regime, a portfolio management contract with a qualifying asset manager does not automatically lead to a default classification as a professional client.

Likewise, certain professional clients (eg, pension funds and corporates with professional treasury operations as well as Swiss and foreign collective investment funds and their management companies) can choose to be treated as institutional investors.

If a client opts-out, this applies to all transactions with the respective financial service provider. In addition, the client must notify the financial service provider immediately of any change in circumstances, so that the financial service provider may revisit and re-evaluate the acceptance of the opting-out.

Professional and institutional clients (opting-in)

Professional clients that do not qualify by law as institutional clients may opt-in to private client status. Similarly, institutional clients may declare that they wish to be treated as professional clients. However, before providing any financial services, financial service providers must inform their professional and institutional clients of the possibility to opt-in.

Importance of client segmentation

Client segmentation is relevant in several respects, particularly regarding the scope of information duties, including the documentation required for financial products, as well as documentation and accountability obligations under FinSA, with the maximum level of protection applying to private clients and the lowest to institutional clients. Concerning the appropriateness and suitability tests, FinSA stipulates that financial service providers can assume that professional and institutional clients have the required knowledge and experience and that the risks associated with financial services are financially suited to them.

Comparison of client segmentation under MiFID II and FinSA

MiFID II provides for a comparable client segmentation system; however, it varies in some instances. Both regulations distinguish the following types of client:

- retail and private clients;
- professional clients; and
- eligible counterparties and institutional clients.

Retail customers are referred to as 'private clients' in Switzerland, while MiFID II uses the term 'retail clients'.

Both regimes allow customer groups to change to a higher or lower level of protection if certain conditions are met. Therefore, under both regimes, private clients can request to be treated as professional clients. According to Annex II of MiFID II, an opting-out – or, in the terminology of MiFID II, an 'opting-up' – is possible if such retail clients:

- conduct an average of 10 trades a year;
- have at least €500,000 of bankable assets; or
- have professional financial knowledge and experience of more than one year.

In Switzerland, an opting-out, which corresponds to the opting-up as defined by MiFID II, is possible if the above requirements are met. Therefore, in contrast to MiFID II, the test under FinSA does not consider the number of investment transactions carried out or the client's knowledge and experience by itself. On the other hand, MiFID II provides for the qualification as a professional client based only on available assets.

Moreover, special attention should be given to the rules relating to the institutional client segment, where the reporting and investor protection requirements differ to some extent.

Comment

The classification of clients under FinSA plays a significant role in the application of its rules of conduct and other provisions. Regarding client segmentation, Swiss law takes a slightly more liberal approach than MiFID II where, at least in theory, more weight is given to the criterion of a particular client's actual knowledge and experience.

FinSA and FinIA are scheduled to enter into force together with the respective implementing second level ordinances on 1 January 2020. Additional implementing regulations from the Swiss Financial Markets Supervisory Authority are expected to be published in early 2020. Financial services providers will benefit from a transition period of two years to complete the client segmentation and ensure compliance with the new rules of conduct at the point of sale.

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