

FINSA / LSFIN / FIDLEG: REQUIREMENTS FOR FINANCIAL SERVICES PROVIDERS

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1. INTRODUCTION

Over two years after the first drafts have been published by the Swiss government, the Financial Services Act (FinSA, FIDLEG (German) and LSFIn (French)) and the Financial Institutions Act (FinIA, FINIG (German) and LEFin (French)) have been approved by the Swiss Parliament on 15 June 2018. These two new statutes will change the Swiss regulatory landscape for financial services providers.

On the occasion of their approval by the Swiss Parliament, we look at certain obligations of the code of conduct to which financial services providers will be subject under the FinSA.

In addition to improving client protection, the purpose of the FinSA is to impose similar requirements to financial services providers thereby creating a level playing field. Under the current system, there is no framework applicable to financial services and products in general, but different rules apply depending on the specific financial services providers or financial products.

The FinSA will impact both Swiss providers and providers based outside Switzerland which currently offer financial services or products to Swiss investors on a cross-border basis. The requirements of the FinSA should generally be aligned with the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (hereinafter "MiFID II") so that financial services providers who have both Swiss and European clients should be subject to similar systems. Nevertheless, differences will subsist.

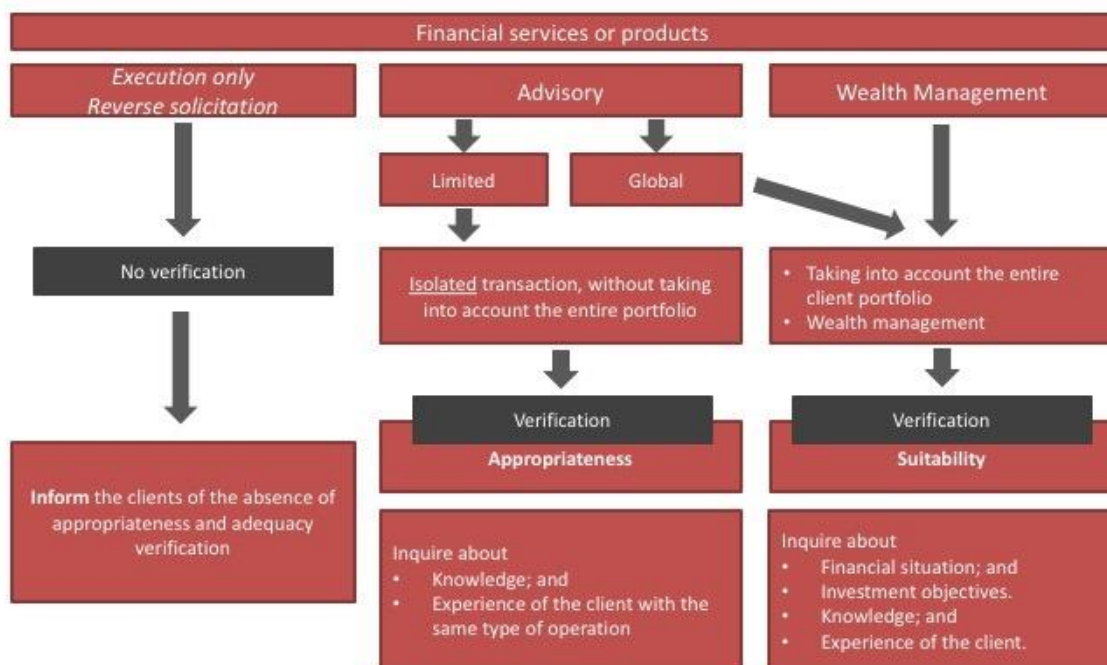
2. CLIENT CATEGORISATION

Financial services providers will need to categorise both their current and prospective clients into one of the following three categories: (i) private clients, (ii) professional clients or (iii) institutional clients.

A definition of the different categories can be found in a previous article ([FinSA / FinIA: A new Financial Services Regime for Switzerland – what will change?](#)).

3. SUITABILITY AND APPROPRIATENESS

As a general rule, financial services providers will have to verify beforehand whether a specific service or instrument is suitable or appropriate for a particular client. The extent of the verification will depend on the type of financial services offered, as illustrated below.



Where the providers offer wealth management services or global investment advisory services (i.e. taking into account the client's entire portfolio), they will have an obligation to verify the suitability of the service for such client. For investment advice limited to individual transactions, without taking into account the entire portfolio, providers will have to verify that the financial instruments are appropriate.

Unlike European Law, which imposes a verification of the suitability of financial services in any case, Swiss law will make a distinction between global and limited investment advice.

For investment services other than wealth management, limited and global investment advice, the FinSA should not impose a duty of verification, while European law does.

In particular, there is no obligation to verify the suitability and appropriateness regardless of the complexity of the financial instruments where the financial services providers only execute or transfer clients' orders. The FinSA does not require that the service be provided at the client's initiative but financial services providers shall inform their clients that they do not verify the suitability and appropriateness. Conversely, under MiFID II verifications are not required provided the following conditions are fulfilled: (i) the services relate to one of the non-complex financial instruments listed under art. 25 (4)(a) MiFID II; (ii) the service is provided at the client's initiative; (iii) a special warning was transmitted to the client; and (iv) the investment firm conforms to its obligations in relation to conflicts of interest.

Swiss law should also differ from the EU regime where a provider is unable to carry out the relevant verifications. If a provider is not able to assess the suitability or appropriateness for lack of information provided by the client, that provider should not be prevented from providing the services, but must inform the client that it was unable to verify the suitability or appropriateness for that client. Likewise a provider should not be prevented from providing services which it considers are not suitable or appropriate, provided that the provider informs the client that they are not suitable or appropriate and advises against such services.

4. TRANSPARENCY AND DUE CARE IN CLIENTS' TRANSACTIONS

The FinSA will also impose a requirement of best execution throughout the financial services industry. Financial services providers will have to ensure that they obtain the best possible results in terms of costs, speed and quality, considering both financial and non-financial criteria. Financial services providers will have to implement best execution policies in line with the number of employees and the structure of the firm. In addition, they will have a general duty of good faith and equal treatment of clients.

5. DISCLOSURE OBLIGATIONS

Financial services providers will have an inherent duty to inform their clients regarding all important matters concerning, in particular, themselves as well as the financial services and instruments offered. According to the FinSA, they must provide their clients with their name and address and inform them about the activities which they carry out, their supervision regime, the risks in general of transactions in financial instruments and the possibility to submit disputes to a mediation institution. Regarding the provision of information about financial services and instruments, the FinSA refers to the type, risks and costs of the proposed services, the relationships between the providers and the third parties in connection with the services, and the market information considered when selecting the financial instruments.

If financial services providers give a personal recommendation regarding financial instruments, they will have to provide their clients with a fact sheet and/or a prospectus if the issuance of a fact sheet and/or a prospectus is/are required under the FinSA. For execution only transactions, they will have to provide a fact sheet only if one already exists for the relevant financial instruments.

The information will have to be provided before entering into a contract or the provision of services. They can be provided in a standardised form in writing or via electronic means.

6. RECORD KEEPING

Financial services providers will have a record keeping duty regarding the services agreed with the clients and clients' information, information provided to clients where the providers were unable to assess the appropriateness or suitability of services or advised against certain services, and the services actually provided to their clients.

In addition, providers of investment advice services will need to keep records of their clients needs and underlying motives of each buy or sale recommendation.

Clients may request copies of these records.

7. INSTITUTIONAL AND PROFESSIONAL CLIENTS

The FinSA provides that transactions with institutional clients are not subject to the requirements mentioned above and that professional clients will be able to waive the disclosure and record keeping requirements.

8. ORGANISATIONAL OBLIGATIONS

The providers will need to make sure that they have implemented the necessary organisational and internal guidelines to comply with their obligations under the FinSA.

Organisational measures shall in particular aim at preventing conflict of interests in the provision of financial services. If disadvantages for the clients resulting from potential conflicts of interest cannot be excluded, clients will have to be informed.

9. CONCLUSION

Financial services providers will need to ensure that they classify their Swiss clients, implement the necessary organisational requirements and internal guidelines to comply with their obligations under the FinSA, and as the case may be revise their contractual arrangements with their clients.

The FinSA is expected to come into force in 2019. An ordinance of the Federal Council is expected in the meantime, which should shed more light on some of the topics of the FinSA.

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