



Cross-border Financial Services into Switzerland – New Rules for Investment Products

How are foreign financial service providers affected by the new Swiss rules relating to investment products?

As part of the Financial Services Act of June 15, 2018 (FinSA), new rules relating to investment products are expected to be introduced on January 1, 2020. Hence, foreign financial service providers are well advised to examine the impact of these new rules on their activities rendered in or into Switzerland.

I. Introduction

Liberal Regime

Having access to a wide range of investment products has always played an important role for Switzerland's wealth management industry. Such access traditionally has been facilitated by a comparably liberal regulation of cross-border offerings of investment products under Swiss law. The new rules introduced by the FinSA continue with this liberal approach but introduces certain changes to the current regime. This bulletin highlights the key changes.

Financial Instruments

The FinSA introduces the new concept of "financial instruments". This marks a significant change, because in the future financial services are only considered to be a regulated activity if they are rendered in respect of financial instruments. The FinSA broadly defines what product types are to be considered financial instruments, but the definitions remain relatively vague. Generally, any type of security will be considered a financial instrument, including shares, bonds and similar equity or debt instruments. In addition, fund units, structured products, derivatives and certain structured deposits will also be considered financial instruments.

It is worth mentioning that neither the FinSA nor the draft implementing ordinance give any guidance on whether crypto tokens are to be considered financial instruments. Consequently, this has to be assessed separately for each different type of token.

II. Product Approval Requirements

Traditionally, Switzerland pursued a very liberal approval regime in relation to foreign investment products. Today, with the exception of units in foreign funds that are distributed into Switzerland to non-qualified investors, no product approval requirements exist under the current law. The FinSA will not change this, meaning that foreign shares, bonds, structured products etc. can still be offered in or into Switzerland, even to retail clients, without the need for a product approval in Switzerland (however, other regulatory requirements may apply, e.g. in relation to the entities acting as distributors). The only exception to this rule – similar to the current law – remains the offering of units in foreign funds to retail investors in Switzerland, which requires the foreign fund to be approved by the Swiss Financial Market Supervisory Authority FINMA (**FINMA**).

The offering of units in foreign funds to unregulated qualified investors in Switzerland, like pension schemes or certain corporates but also high net worth individuals does not trigger the need to have the relevant foreign fund approved in Switzerland today. However, a Swiss paying agent and a Swiss representative have to be appointed. This requirement was often found to be very peculiar, given that in particular the Swiss paying agent hardly ever played an active part even in relation to investors in Switzerland. The FinSA will liberalize the Swiss regime in this respect: With the exception of offerings directed at high net worth individuals, the offering of units in foreign funds to unregulated qualified investors in Switzerland will no longer require a Swiss paying agent and Swiss representative to be appointed, thereby reducing cost for such offerings. As a result, offerors of units in foreign funds, incl. REITs, may extend their distribution scope in Switzerland to unregulated qualified investors, e.g., pension funds and (large) corporates.

III. Duties for Distributors

As outlined in our [Bulletin of June 28, 2019](#), the FinSA introduces a variety of duties that have to be complied with when rendering financial services to clients based in Switzerland. These duties include rules of conduct at the point of sale, organizational duties, the requirement to register in a newly to be established client advisory register and the duty to register with an ombudsman's office. The applicability and scope of these duties depends on, among other things, whether the relevant activity qualifies as a financial service and on the type of client that is approached in Switzerland (institutional, professional or retail clients).

Whether these duties apply in relation to the offering of investment products depends on the individual case. In our opinion, the offering of investment products to clients in Switzerland by itself does not constitute a financial service as defined in the FinSA and therefore does not trigger these duties. However, if additional services besides the mere offering of investment products are rendered, the analysis may be different. In particular, giving investment advice in relation to financial instruments qualifies as a regulated financial service and triggers the point of sale duties under the FinSA.

IV. Documentation Requirements

No Product Governance Rules

Unlike MiFID II, the FinSA will not introduce a product governance regime, therefore manufacturers of investment products will not be obliged under the FinSA to define a target market in relation to investment products distributed by them.

Modernized Prospectus Regime

As outlined in our [Bulletin of June 15, 2018](#), the FinSA will introduce a comprehensive prospectus regime. As a matter of principle, a prospectus has to be prepared before securities may be publicly offered to retail investors in Switzerland. This also applies to secondary public offerings. In general,

prospectuses will have to be approved by a competent approval body prior to a public offering in Switzerland. However, there is an exemption from this *ex ante* approval requirements for bonds and structured products. In addition, the new prospectus regime provides for clear and comparably liberal safe harbor exemptions for certain types of offerings.

Basic Information Document

The FinSA will introduce a duty to prepare a basic information document (**BIB**) if financial instruments are offered to retail clients in Switzerland. The BIB is a document that is somewhat similar to, albeit not identical with, a PRIIPs KID. In case of material changes to the information contained in the BIB during the offering of the financial instrument, the BIB must be updated.

The duty to prepare a BIB does not apply to all investment products. The FinSA exempts shares and bonds without a derivative component from the scope of applicability. In addition, no BIB has to be prepared if there already is an equivalent document for the same instrument that was prepared under foreign law. The most prominent example for this is a PRIIPs KID. If such a document has been prepared for an investment product, no BIB is required.

V. Conclusion

The new FinSA will change the regulatory framework under Swiss law for investment products and introduces a comprehensive prospectus regime that provides for clear and liberal safe harbor exemptions. In view of the newly introduced documentation, point of sale, organization, registration and related duties under the FinSA, foreign financial service providers are well advised to carefully assess if their offering activities directed at Swiss investors fall into the scope of the FinSA and potentially trigger any of these duties.

If you have any queries related to this Bulletin, please refer to your contact person at Homburger or to:

René Bösch

Dr. iur., LL.M., Attorney-at-Law
rene.boesch@homburger.ch
T +41 (0)43 222 15 40

Daniel Haerberli

lic. iur., LL.M., Attorney-at-Law
daniel.haerberli@homburger.ch
T +41 (0)43 222 16 33

Andreas Josuran

lic. iur., LL.M., Attorney-at-Law
andreas.josuran@homburger.ch
T +41 (0)43 222 12 83

Homburger AG

**Prime Tower
Hardstrasse 201
CH-8005 Zurich**

T +41 43 222 10 00
F +41 43 222 15 00
www.homburger.ch

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