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FinSA Q&A

(Version of May 30, 2022)

Considerations

This document provides answers to questions in relation to structured products governed by the Financial Services Act ("**FinSA**)" and the Financial Services Ordinance ("**FinSO**") and thereby aims to assist SSPA members with the interpretation and application of FinSA.

These "FinSA Q&A" will be amended and updated from time to time. The answers provided in this document have not been discussed with or reviewed or approved by the Swiss Financial Market Authority FINMA, any reviewing body or any other relevant authority. The answers provided in this document are therefore non-binding and do not replace a legal assessment in each individual case on the basis of the particular circumstances.

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1. GENERAL PROVISIONS

1.1 Definition of Debt Instrument
(Art. 3 lit. a No. 2 FinSA)

1 **Are structured products and leveraged products[1] to be qualified as debt securities within the meaning of Art. 3 lit. a no. 2 FinSA?**

2 Yes, according to Art. 3 lit. a no. 2 FinSA, debt securities are securities that do not qualify as equity securities according to Art. 3 lit. a no. 1 FinSA. Conversely, the term "debt security" includes all other types of securities, including structured products and leveraged products issued as securities.

3 The question is namely relevant in connection with Art. 45 FinSA (prospectus in the form of a base prospectus), Art. 55 para. 2 FinSA (validity of the prospectus), Art. 59 para. 1 FinSA (exemption from the obligation to prepare a KID).

1.2 Concept of Financial Service
(Art. 3 lit. c FinSA)

4 **Which activities qualify as financial services in the sense of "the acquisition and disposal of financial instruments" (given that the term "solicitation" is no longer mentioned in the final version of the FinSO)?**

5 The financial service "acquisition or disposal of financial instruments" is defined in the FinSO as any activity directed at specific clients and that is specifically aimed at the acquisition or disposal of a financial instrument (cf. Art. 3 para. 2 FinSO in conjunction with Art. 3 lit. c no. 1 FinSA). This broad description of the financial service "acquisition and disposal of financial instruments" in the FinSO is intended to close the gap left by the deletion of the distribution concept from the Collective Investment Schemes Act. It should be noted that a financial service must always be an activity for a client. This aspect is decisive for the differentiation between a financial service, advertising and an offer.

6 Further, the financial service differs from a mere offer (cf. immediately blow) in that it involves additional activities that go beyond the mere invitation to purchase or sell a financial instrument (e.g. providing advice to a client directly related to the acquisition of a financial instrument by such client).

7 **Does advertisement or the advertising of financial instruments constitute a financial service in the sense of the "acquisition and disposal of financial instruments?**

[1] Leverage products are defined as those financial instruments that fall under the corresponding category of the SSPA Swiss Derivatives Map.

8 No, a financial service presupposes that a service is provided *for a client* and that a contractual relationship is thus established between the financial service provider and the client. Advertising is performed in the advertiser's own interest. Advertising does not lead to a client relationship being established with the addressees of the advertisement (the public).

9 **Does the sale of a financial instrument by the issuer to a financial services provider constitute a financial service?**

10 No, the sale of financial instruments by the issuer to a financial service provider acting in its own name and for its own account or acting in its own name and for the account of a client does not constitute a financial service within the meaning of Art. 3 lit. c FinSA. The issuer acts in its own name and for its own account and therefore not on behalf of a client. The financial service provider that acquires the financial instrument from the issuer acting on behalf of his client, on the other hand, provides a financial service to his client.

11 **Is the placement of financial instruments considered a financial service?**

12 No, the placement of financial instruments with or without a fixed underwriting obligation and related services do not qualify as a financial service within the meaning of Art. 3 lit. c FinSA, insofar as these activities are not performed on behalf of clients, in constellations in which clients are the investors (cf. Art. 3 para. 3 lit. b FinSO). FinSA does not aim to protect issuers, but to protect investors.

13 **Is an offer pursuant to Art. 3 lit. g FinSA a financial service within the meaning of Art. 3 lit. c FinSA?**

14 No, the concept of financial services is exhaustively defined in Art. 3 lit. c FinSA. Thereunder five activities are listed which constitute a financial services within the meaning of FinSA. The offering of a financial instrument is not mentioned. Accordingly, offering a financial instrument in itself does not constitute a financial service.

15 In addition, a financial service must always be an activity provided to clients (cf. introduction to Art. 3 para. 1 lit. c FinSA). An offer is defined in Art. 3 lit. g FinSA as an invitation to purchase a financial instrument that contains sufficient information on the terms of the offer and the financial instrument itself. An offer is thus "merely" an invitation to purchase a financial instrument and does not in itself constitute an acquisition or sale of a financial instrument. The term offer mainly aims to trigger the requirement to establish and publish a prospectus and a key information document ("**KID**"; *Basisinformationsblatt*). In the absence of an activity for clients, an offer can therefore in itself not qualify as a financial service.

16 The same applies to advertisement and advertising of financial instruments (see above).

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1.3 Definition of the term "offer"

(Art. 3 lit. g FinSA)

17 **Is the publication of a structured product on an internet-based platform already considered an offer within the meaning of Art. 3 lit. g FinSA?**

18 Possibly. According to Art. 3 lit. g FinSA, an offer is any invitation to purchase a financial instrument if such invitation contains sufficient information on the terms of the offer and the financial instrument itself. An offer requires an invitation to acquire or dispose of a financial instrument or an invitation to make an offer (*invitatio ad offerendum*) within the meaning of the Code of Obligations (cf. Art. 3 OR). Only an activity directed at a decision to acquire or dispose of a financial instrument by an investor should be considered an offer.

19 The naming of financial instruments without or in connection with factual, general information such as ISIN and prices (cf. Art. 3 para. 6 lit. b FinSO) does not constitute an offer. Circumventions where the naming of financial instruments in connection with factual, general information such as ISIN and prices are aimed at the sale of the financial instrument or as such must be understood by the client as an offer, are exempt from the foregoing principle and therefore constitute an offer. This may be the case if clients can execute a transaction relating to a financial instrument with a single subsequent action.

20 Whether the provision of information relating to financial instruments on a platform is regarded as an offer or not, will have to be assessed based on the specific circumstances at hand, in particular the structure of the information and the platform. However, the mere publication of information relating to structured products on a platform alone should not per se be regarded as an offer. In particular, the manner in which access to the platform is granted will also be decisive.

21 **Exemplary description of internet-based platforms or relevant criteria for assessing whether an offer is made**

22 The following examples are presented to illustrate when the publication of financial instruments which are accessible via an internet-based platform should not be considered as an offer.

23 If information on the financial instrument can only be accessed by the interested investor on an internet platform via a search entry (e.g. when searching for ISIN/Valor or product name), no offer from the operator of the internet platform will be deemed to have been made (reverse solicitation). The result of the search should not have any other legal consequences than an (oral or written) information on a financial instrument at the request of an interested investor.

24 However, it should be noted that a reverse solicitation constellation will only be at hand if no advertising by the "provider" or one of its representatives in relation to the

specific financial instrument preceded the actions of the investor (cf. Art. 3 para. 6 lit. a FinSO).

25 If the client must first log in with his client password on an internet-based platform, it can be assumed, in accordance with the explanatory report to FinSO, that no public offer will be made because of the clearly restricted group of persons.

26 **Is an internet-based platform for financial instruments considered advertisement?**

27 An internet-based platform for financial instruments does not per se constitute advertisement. It is decisive which information is published. The description of the key figures of the financial instrument and the publication of the documents required by the applicable regulations generally do not qualify as advertising. If additional information on the financial instrument is made available in addition to the key figures, this could result in such presentation of the financial instrument qualifying as advertisement. Ultimately, it depends on the specific design of the internet-based platform in question.

28 **When does marketing of a financial instrument qualify as an offer?**

29 Pursuant to Art. 68 FinSA and Art. 95 FinSO, advertising is defined as any communication addressed to investors with the aim of drawing attention to certain financial instruments. Not every advertisement is also an offer. However, if an advertisement contains sufficient information on the terms and conditions of the offer and the financial instrument, it will also qualify as an offer. If a specific communication qualifies as an offer, it must not be mentioned that such communication may also be considered to be advertising.

30 In the case of advertising that does not also qualify as an offer, it must be noted that such communication must be labelled as advertising and it may be advisable to also specify that no offer is being made. In addition, when advertising a financial instrument, reference must be made to the corresponding prospectus (i.e. a prospectus in accordance with FinSA in terms of Art. 43 FinSO) and the KID (cf. Art. 68 FinSA).

31 **When does an offer constitute a financial service within the meaning of Art. 3 lit. c. No. 1 FinSA ("acquisition and disposal of financial instruments)?**

32 The acceptance of an offer (directly or indirectly) by investors becomes and constitutes an order to the financial services provider to buy or sell a financial instrument for the client (execution) or to transmit this order to a third party for execution (receipt and transmission of orders; RTO).

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1.4 Client Segmentation
(Art. 4 FinSA)

33 **Are there differences between the existing client segmentation under the Collective Investment Schemes Act (CISA) and the new client segmentation under FinSA?**

34 Yes. The definition of professional clients (incl. institutional clients) under FinSA essentially corresponds to the category of qualified investors under Art. 10 para. 3 CISA. The exceptions are investors who have concluded a long-term asset management or investment advisory agreement with a financial intermediary. Such investors are considered qualified investors pursuant to Art. 10 para. 3ter CISA in connection with such agreements, unless they have declared that they wish to be treated as non-qualified investors. These investors are considered as private clients under FinSA. Since structured products are no longer regulated by CISA, only the new client segmentation of the FinSA applies to structured products. In this context, asset management and investment advisory clients may only be treated as professional clients if they fulfil the necessary conditions for an opt-out in accordance with Art. 5 para. 2 FinSA and have declared such an opt-out.

35 Art. 4 para. 2 FinSO does however stipulate that clients acting through an authorised representative may agree with the financial services provider that their categorization be based on the knowledge and experience of such authorized representative. According to the explanatory report on FinSO, this refers in particular to clients who have appointed an independent asset manager as their authorised representative. However, if the private client does not have assets of at least CHF 500,000, his client classification may not be changed despite having an authorized person with the necessary knowledge and experience, i.e. he cannot declare an opting-out according to Art. 5 para. 2 FinSA. The knowledge and experience of the authorised representative are, however, taken into account under the suitability and appropriateness test (Art. 16 FinSO).

36 From the entry into force of FinSA on 1 January 2020, the category "qualified investors" under CISA is no longer relevant in relation to structured products, except in connection with indirect fund sales (see section 6 below). With regard to both the obligation to prepare a prospectus and the obligation to prepare a KID, only the FinSA-categories of "professional client" and "private client" are relevant.

37 **Can a client be assigned to more than one client segment?**

38 Yes, according to the explanatory report on FinSO, a client may have more than one client relationship with a financial services provider (each with one or more financial services) and may therefore be assigned to different client segments with the same financial services provider depending on the client relationship in question. This applies analogously to cases in which a client has declared an opting-out, i.e. a client

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with several client relationships can also declare an opting-out only for one client relationship and be assigned to different client segments accordingly.

2. Rules of Conduct

2.1 Information Duties
(Art. 8 FinSA)

39 **When is a KID deemed to exist within the meaning of Art. 8 para. 4 FinSA? Does the financial service provider have an obligation to investigate whether a KID has already been prepared?**

40 The information requirements set out under Art. 8 FinSA require, among other things, that financial service providers that personally recommend financial instruments to private clients must also provide the corresponding KID (where such KID must be prepared in accordance with Art. 58 et seq. FinSA). In the case of so-called execution-only transactions, i.e. if the service consists exclusively in the execution or transmission of client orders (without advice), this obligation does generally not apply, unless a KID is already available for the financial instrument in question.

41 According to Art. 11 para. 2 FinSO, a KID is deemed available if it can be found with a reasonable effort. The term "reasonable effort" cannot mean that the financial service provider has an obligation to conduct its own investigations and is required to conduct a manual internet search in every case. It is sufficient if the financial service provider has access to a document platform (repository) which makes KIDs available centrally and the financial service provider thus automatically has access to the KIDs available on the platform and then retrieves the KIDs there.

42 **Does the financial services provider need to obtain a confirmation from the client that he has read the KID if it is made available electronically?**

43 No, Art. 8 para. 3 FinSA requires that the KID be made available. A confirmation that the client has read the KID is not necessary.

44 **Is the classification (private client) of the client or his authorised representative of relevance with regard to the requirement to provide a KID? Example: Does a KID have to be made available if a private client is represented by a person who would be classified as a professional client?**

45 This depends on the classification of the client itself. The classification cannot be based on the status of the authorised representative, especially as the person authorised by the client is not himself a client of the financial services provider.

2.2 Time of Information
(Art. 9 para. 1 FinSA / Art. 13 FinSO)

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46 **What is meant by "sufficient time" in Art. 13 FinSO?**

47 Pursuant to Art. 9 para. 1 FinSA, financial service providers must inform their clients prior to concluding the contract or providing the financial service. Clients must be informed in such a manner that they have sufficient time to understand the information (Art. 13 FinSO).

48 The interpretation of the term "sufficient time" must be based on objective criteria and on the average client of the respective client category. It cannot depend on the individual client. Clients always have sufficient time if they can delay the execution of a contract or a transaction until they have taken note of the information. Whether or not they actually take note of the information is irrelevant.

49 **In the case of an execution-only transaction between absentees, can the KID, if available, be made available to the client at a later stage with the latter's consent?**

50 Yes, according to Art. 11 para. 3 FinSA this is permissible. The KID can be made available after the transaction has been concluded with the client's consent. The client's consent can be given generally and in advance and the consent may be revoked at any time (Art. 15 para. 3 FinSO). Giving consent generally means the consent does not cover only one transaction, but is valid for all future transactions until revoked.

2.3 Exceptions to the Adequacy and Suitability Test
(Art. 13 FinSA)

51 **In the case of an execution-only transaction, must the disclosure that neither a suitability nor an appropriateness test is being performed before each transaction or is it sufficient if such disclosure only occurs once?**[2]

52 Financial service providers do not have to perform an appropriateness- or suitability test (Art. 13 para. 1 FinSA) for the mere execution or transmission of client orders (execution-only transactions). Prior to providing such services, they are required to inform the client that no appropriateness or suitability test will be performed (Art. 13 para. 2 FinSA). This information does not have to be provided prior to each transaction or each time an execution-only transaction is concluded, but can also be provided once, e.g. in an information brochure. If the client is informed only once, the financial service provider must explicitly highlight this at the time of the initial information (see Art. 17 para. 5 FinSO). The information can be provided in a standardised form.

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2.4 Do the provisions on the involvement of third parties in Art. 23 FinSA and the chain of service providers in Art. 24 FinSA apply to the offering of structured products via distribution partners?

53 Pursuant to Art. 23 para. 1 FinSA, financial service providers may involve third parties for the provision of financial services. The applicability of this provision requires that a financial service within the meaning of the FinSA is being provided. Issuers who sell their structured products to their distribution partners (financial intermediaries such as, for example, banks) do not provide a financial service and are therefore not financial service providers within the meaning of FinSA (cf. also section 1.2 "Concept of financial service"). The FinSA does not aim to protect distribution partners or financial intermediaries who acquire financial instruments from issuers in order to offer or sell them to their own clients (investors). For this reason, Art. 23 FinSA does not apply to issuers unless they are themselves active as financial service providers.

54 The same applies to the provision of the chain of service providers in connection with distribution agreements. Pursuant to Art. 24 para. 1 FinSA, financial service providers that mandate another financial service provider to provide a financial service to clients remain liable for the completeness and accuracy of the client information and for compliance with the obligations under Art. 8 - 16 FinSA. The applicability of this provision (i.e., Art. 24 para. 1 FinSA) requires pursuant to the explanatory report to FinSO that the financial service providers involved are subject to the relevant obligations of the FinSA. Therefore, Art. 24 FinSA is therefore not applicable if the mandating or the mandated company is not a financial service provider within the meaning of Art. 3 lit. d FinSA or the mandate is not a financial service within the meaning of Art. 3 lit. c FinSA. For the same reasons given above, Art. 24 FinSA does not apply to the offering of structured products via distribution partners.

55 The above does, however, not address whether or not the distribution partner provides a financial service when purchasing structured products for or on behalf of its clients but merely addresses the arrangement between the issuer and the distributor.

3. PROSPECTUS FOR SECURITIES

3.1 Prospectus requirement and voluntary prospectus
(Art. 35 FinSA)

56 **The obligation to publish a prospectus is triggered by a public offer. An exemption to the obligation to publish a prospectus exists, inter alia, if the offer is directed at fewer than 500 investors (cf. Art. 36 para. 1 lit. b FinSA). Is there still a "non-public" offer beyond this?**

57 Yes, the criterion of "public" is relevant for the question whether a prospectus obligation applies, irrespective of the prospectus exemption in the case of an offer to less than 500 investors. In the case of an offer to a selected and clearly restricted circle of investors, no offer is being made to the public and thus no public offer is at hand.

Accordingly, there is no obligation to publish a prospectus due to the lack of publicity of the offer.

58 **May a prospectus be voluntarily prepared, submitted to the Review Body for approval and used in the context of an offer that is not subject to a prospectus requirement?**

59 Yes, the use of voluntary prospectuses is permitted. The Review Body does not assess whether a prospectus requirement applies or not. Prospectuses prepared on a voluntary basis are not subject to the obligation to review pursuant to Art. 51 FinSA, but may nevertheless be submitted to the Review Body for review and approval. If a voluntarily prepared prospectus is approved by the Review Body, it is deemed to be a "FinSA prospectus" within the meaning of Art. 43 para. 3 FinSO.

60 **Who is subject to the prospectus requirement?**

61 Any person making a public offer to purchase securities in Switzerland or applying for admission of securities to trading on a trading venue in Switzerland is required to publish a prospectus. The prospectus requirement is not limited to the issuer, but also applies to third parties.

3.2 CHF 8 mio. threshold

(Art. 36 para. 1 lit. e FinSA)

62 **Is this exemption available for all types of securities, including structured products and leveraged products?**

63 Yes, this exemption is available for all types of securities and thus, in principle, also for structured products and leveraged products which are offered to the public in the form of securities.

64 **Is the exceeding of the threshold of CHF 8 million to be determined in relation to a specific issuance or in relation to the total issuances of an issuer during one year?**

65 The threshold value applies to a specific issuance and thus to the securities offered in the context of the respective public offer in question. Ultimately, this means that it is the value of the individual issuance that is relevant and not the value of all the securities offered by a specific issuer

66 For issuances subject to this exemption, it should be noted that a prospectus is nevertheless required for an admission to trading of the securities issued under this exemption.

3.3 Information on issuance volume

(Art. 40 FinSA / Annex 3 FinSO)

67 **Must the issuance volume be included in the structured products prospectus?**

68 No, Art. 40 para. 4 FinSA, stipulates that the issuance volume must be stated in the prospectus (at least criteria and conditions on the basis of which the issue volume can be determined). Art. 46 lit. c FinSA, however, provides that the Federal Council may issue supplementary provisions to the minimum requirements of the prospectus. For structured products, supplementary provisions have been enacted under Appendix 3 FinSO. Thereunder, the issuance volume has deliberately not been included as the minimum content of the prospectus, as the issuance volume is - in contrast to bonds and shares - of no importance for the investor in structured products -.

69 Art. 40 para. 4 FinSA was enacted with a particular focus on capital market instruments such as shares and bonds. Accordingly, only Annexes 1 and 2 of the FinSO require information on the issuance volume as the minimum content of the prospectus.

3.4 Offer to professional clients
(Art. 36 para. 1 lit. a FinSA)

70 **What should I bear in mind if an offer is only aimed at professional clients?**

71 In the offer documentation it should be specified that the (public) offer was only made to professional clients and the offer documentation may only be made available to professional clients.

72 Art. 36 para. 1 lit. a FinSA does not, however, provide for a (civil) prohibition for private clients to acquire the financial instrument in question. For example, asset managers who per se qualify as professional clients may acquire (without a prospectus) financial instruments for their private clients, even if the offeror addresses his offer exclusively to professional clients. However, they must ensure that their activities do not themselves constitute a public offer and thus trigger a prospectus obligation.

3.5 Base Prospectus and Final Terms
(Art. 45 FinSA / Art. 55 f FinSO)

73 **Can the disclosure of the final terms at the time of the public offer just be "made" with indicative information in accordance with Art. 45 para. 3 FinSA or must the final terms also be published?**

74 The final terms with indicative information must be published but not deposited with the Review Body (see Art. 56 para. 1 FinSO).

75 **When must the final terms be published and filed with the Review Body?**

76 The final terms must be published and filed with the Review Body as soon as possible after the final data is available (Art. 56 para. 4 FinSO).

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77 **Does Article 55 para. 1lit. a FinSO mean that both the base prospectus and the final terms must contain a summary? What should the summary in the base prospectus look like and to what extent does it differ from the summary in the final terms?**

78 Yes. The summary in the base prospectus only contains information on the corporate name, legal form and registered office of the issuer and, in general terms, a description of the category of securities to be issued under the base prospectus (Art. 55 para. 3 FinSO). The summary relating to the specific public offering or the specific admission to trading (Art. 56 para. 2 FinSO) must be included in the final terms or added to the final terms. Appendix 3 FinSO, referring to the base prospectus for derivatives, stipulates which information the summary in the base prospectus and in the final terms must contain.

3.6 Obligation to provide a supplement to the prospectus
(Art. 56 FinSA / Art. 63 FinSO)

79 **Is a voluntary supplement also permissible and if so, what are the consequences?**

80 Yes, neither the FinSA nor the FinSO address voluntary supplements to prospectuses. Only Art. 55 para. 4 FinSA stipulates that the base prospectus must be supplemented if an issuance deviates from the securities or product categories described in the base prospectus. It can therefore be concluded that a voluntary supplement to the prospectus is possible.

81 A voluntary supplement to a prospectus must be reviewed and approved by the Review Body unless an exemption from the review obligation under Art. 64 lit. b FinSO is applicable.

82 **Is an extension of the offer period pursuant to Art. 56 para. 5 FinSA only provided for in the event of a supplement? Does this provision apply to any supplement?**

83 Yes, according to Art. 56 para. 5 FinSA, the offer period ends no later than two days after publication of the supplement if a new fact occurs or is established during a public offer which triggers the obligation to provide a supplement according to Art. 56 para. 1 FinSA. A "voluntary" supplement to the prospectus does, however, not in itself trigger an extension of the offer period.

84 **Is it permissible to use an approved base prospectus also for an offer that is exempt from the prospectus requirement?**

85 Yes, the FinSA does not restrict the use of an approved base prospectus and hence an approved base prospectus can be used in case of a prospectus exempt offer. If

an approved base prospectus is not used as a FinSA prospectus, a respective disclaimer could be included in the Final Terms.

3.7 Foreign Prospectus
(Art. 54 FinSA / Art. 70 FinSO)

86 **Must foreign prospectuses be approved by the competent foreign authority according to Art. 54 para. 2 FinSA or is it sufficient that the foreign prospectus contains all the information required by foreign law?**

87 Art. 54 para. 2 FinSA is based on prospectuses approved under certain legal regime and Art. 70 para. 2 FinSO stipulates that in its list of legal regimes pursuant to Art. 54 para. 3 FinSA, the Review Body may specify which foreign authority must grant the foreign approval for a prospectus to be deemed automatically recognised in Switzerland. Accordingly, it is to be assumed that the foreign prospectus must be reviewed and approved by an authority in order to be considered automatically recognised in Switzerland.

88 **In case of a foreign approved prospectus in accordance with Art. 54 para. 2 FinSA, must the final terms also be filed within the meaning of Art. 70 para. 4 lit. b FinSO?**

89 Yes, whilst Art. 70 para. 4 FinSO only mentions the submission of the approved foreign prospectus and not the base prospectus, when using a foreign prospectus approved in accordance with Art. 54 para. 2 FinSA, the provisions applicable to the filing of a Swiss base prospectus must be applied.

90 With reference to the Swiss base prospectus, Art. 45 para. 3 FinSA requires that the final terms be deposited with the Review Body. Art. 61 para. 4 FinSO further specifies that the base prospectus and the final terms (as well as supplements) must be filed with the same Review Body.

91 Accordingly, the final terms in case of the use of a foreign approved base prospectus in accordance with Art. 54 para. 2 FinSA must be filed with the Review Body with which the base prospectus was filed. The final terms to be filed are those which are to be established and deposited in accordance with the applicable foreign law, i.e. the foreign law is decisive for the assessment of which final terms must be submitted.

92 However, the final terms only need to be deposited if a public offer is made in Switzerland and such offer is not made under one of the exemptions from the prospectus requirement. Accordingly, in the case of an offer below the CHF 8 million issuance threshold provided for under Art. 36 para. 1 lit. e FinSA, for example, the final terms do not have to be deposited with the Review Body.

93 **In what form must final terms under a base prospectus pursuant to the EU Prospectus Regulation, which is deemed to be automatically approved in**

Switzerland under Art. 54 para. 2 FinSA, be filed with the Review Body in the case of a public offer in Switzerland?

94 If a base prospectus pursuant to the EU Prospectus Regulation, which is deemed to be automatically approved in Switzerland pursuant to Art. 54 para. 2 FinSA, is used, the final terms must be drawn up in accordance with the relevant provisions of the EU Prospectus Regulation and published and submitted to the Review Body in this form. The form and content of the final terms is governed exclusively by the EU Prospectus Regulation respectively the relevant provisions of the foreign regulations recognized as equivalent. Neither the FinSA nor the FinSO impose any additional requirements in respect of the form and content of the foreign approved prospectus or base prospectus, which is deemed to be automatically approved pursuant to Art. 54 para. 2 FinSA, except with regard to the language (see. Art. 70 para. 3 FinSO).

95 **May foreign prospectuses deemed to be approved under Art. 54 para. 2 FinSA be used in Switzerland in a manner which would not be permissible under the relevant foreign regulation? For example, can the final terms of an EU base prospectus be supplemented with further information in the case of an offer in Switzerland, although the EU regulations would not permit such supplementing of the final terms?**

96 No, the legislator's aim was that an equivalent foreign prospectus may be used in Switzerland, but only in accordance with the applicable foreign prospectus regulations. Accordingly, automatically recognised foreign base prospectuses may be amended or supplemented only to the extent permitted under the applicable foreign prospectus regulation. Otherwise, an "approved" foreign prospectus would no longer be at hand.

97 **Does the obligation to provide a supplement pursuant to Art. 56 para. 1 FinSA also apply to foreign prospectuses recognised as equivalent?**

98 No, the content of the foreign prospectus recognised as equivalent is determined solely by the applicable foreign prospectus provisions. Accordingly, it is a question of the applicable foreign regulation when a prospectus is to be supplemented.

99 **Does Art. 56 para. 5 FinSA, governing the extension of the offer period, also apply to foreign prospectuses recognised as equivalent if the prospectus must be supplemented by a supplement addendum pursuant to the applicable foreign regulation?**

100 Yes, the foreign regulation are solely decisive for the content of the foreign prospectus recognized as equivalent. However, the foreign regulation is not of relevance with regard to the consequences triggered by a supplement to the prospectus. These are determined directly and exclusively based on Swiss regulation and thus based on Art. 56 para. 5 FinSA.

4. KID

4.1 Art. 58 FinSA: Creator and Offeror

101 **Who must prepare and who must publish the KID?**

102 As a rule, the issuer of a financial instrument is also considered the manufacturer which is required to prepare the KID pursuant to Art. 58 para. 1 FinSA, if the financial instrument is offered to private clients in Switzerland. The offeror of a financial instrument, on the other hand, has no obligation to prepare a KID.

103 In case of a public offer, the KID must be published (Art. 66 FinSA), whereby the law does not specify who is obliged to publish the KID. Analogous to Art. 35 para. 1 FinSA, the obligation to publish applies to the offeror of the financial instruments in question.

4.2 Does the term 'offer' in Article 58 FinSA (and Article 80 and 91 FinSO) differ from the term 'offer' within the meaning of Article 3 lit. g FinSA?

104 No, contrary to a reference in the Federal Council's report on FinSA, the offer as the trigger for the obligation to prepare a prospectus and a KID is to be understood uniformly as an offer within the meaning of Art. 3 lit. g FinSA. Moreover, the term offer within the meaning of Art. 3 lit. g FinSA is relevant not only for the preparation (Art. 58 FinSA / Art. 80 FinSO) but also for periodic review and the amendment (Art. 62 FinSA / Art. 91 FinSO) of the KID.

4.3 Art. 59 para. 2 FinSA / Art. 87 i.c.w. Annex 10 FinSO

105 **Is it permissible in any case to prepare a PRIIPs KID instead of a KID?**

106 Yes, a PRIIPs KID can always be prepared instead of a KID according to FinSA, even for products that are offered exclusively in Switzerland and where there is no connection to the EU.

107 **Is it permissible to prepare both a PRIIPs KID and a KID for the same product?**

108 Yes, documents under foreign law that are equivalent to the KID can be used instead of a KID. According to Annex 10 FinSO, the Key Information Document (KID) under the PRIIPs Ordinance is equivalent to the KID within the meaning of FinSA. This means that no KID within the meaning of FinSA has to be prepared if a PRIIPs KID has been prepared. Since the two documents are equivalent, it cannot be prohibited to prepare a KID within the meaning of FinSA and a PRIIPs KID at the same time.

109 Under civil law, however, it could lead to uncertainties if both a PRIIPs KID and a KID within the meaning of FinSA exist for a product and the clients are served differently

with these documents. However, in this context it can also be argued that the legislator deems both documents to be equivalent and therefore no liability claims can be derived from the fact that the documents are not identical.

4.4 Exemptions

(Art. 59 FinSA / Art. 80 para. 2 FinSO)

110 **Must a KID also be prepared for bilateral derivatives?**

111 No. Pursuant to Art. 80 para. 2 FinSO, a KID does not have to be prepared for a financial instrument specifically created for a single counterparty. This provision applies to all bilateral derivatives, even if only currency swaps, currency forward contracts or interest rate swaps are mentioned in the explanatory report on FinSO.

4.5 Amendments

(Art. 62 FinSA)

112 **Does the KID have to be amended in case of "corporate actions" relating to the underlying asset?**

113 Yes, a "corporate action" regarding the underlying asset (e.g. share splits, merger, etc.) can be a significant change that requires an amendment of the KID.

114 **Must the KID be amended in the event of a barrier event?**

115 No, in the case of a barrier reverse convertible, for example, if the barrier is touched or breached and a barrier event occurs, this does not a priori trigger the obligation to amend the KID. Such changes are provided for in the issuance / product terms and conditions. It is not required that the KID specifies whether a barrier event has occurred or not. Depending on the structure of the KID, however, such a change could also lead to the requirement to amend the KID, for example if the KID includes the risk indicator of the PRIIPs regulation and this changes significantly as a result of the barrier event.

5. OFFERING OF STRUCTURED PRODUCTS

5.1 Offering of Structured Products

(Art. 70 FinSA / Art. 96 FinSO)

116 **When does the restriction pursuant to Art. 70 para. 1 FinSA apply?**

117 The restriction that the issuer, guarantor or provider of collateral of structured products must be a Swiss bank, insurance company, securities firm or an equivalent supervised foreign institution only applies to an offer in or from Switzerland to private clients without a long-term asset management or investment advisory relationship.

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Asset management and investment advisory clients may be offered structured products which are not issued, guaranteed or secured by a prudentially supervised institution, even if they are private clients. In this context, however, it should be noted that asset management and investment advisory clients are generally considered to be private clients and therefore the obligation to prepare a KID applies, if structured products are offered to investment advisory clients.

118 **When is a product offered "from Switzerland"?**

119 The mere fact that a structured product is issued by a Swiss entity does not mean that this product is deemed to be offered from Switzerland and is therefore subject to Art. 70 para. 1 FinSA.

6. Indirect Fund Sales

120 **Is the 33.3% rule set out in the FINMA FAQ "Structured Products" still relevant?**

121 Since the FINMA has archived and hence withdraw the FINMA FAQ "Structured Products" in connection with the entry into force of the FinSA, the FINMA seems to no longer be committed to its practice reflected in the FINMA FAQ "Structured Products". The FINMA has signaled that it sees more flexibility but that the assessment would ultimately depend on the individual case. However, absent any explicit indication by the FINMA to the contrary, it seems prudent to continue to generally apply the 33.3% rule.

122 **How can a structured product be offered where more than 33.3% of the performance of a structured product depends on a non-FINMA approved foreign collective investment scheme which has a Swiss paying agent and representative?**

123 Such structured products may be offered in Switzerland to all types of to qualified investors including high-net-worth individuals that have declared to be treated as professional clients (opting–out) pursuant to Art. 5 para 1 FinSA. However, if such qualified investors qualify as private clients under the FinSA, the prospectus and the KID requirement may apply.

124 **Are product specific reverse solicitation transactions still out of scope of the 33.3% rule?**

125 Yes, such transactions are, in principle, out of scope of the 33.3% rule.

7. PILLAR 3A LIFE INSURANCE PRODUCT

126 **Does the public offering of a structured product to which a so-called “pillar 3a life insurance product” is linked trigger a FinSA prospectus obligation?**

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127 No, the prospectus exemption of Art. 36 para. 1 lit. (a) FinSA is applicable if the product is only publicly offered to the life insurance company which qualifies as a professional client. As a consequence, such public offer does also not trigger the KID obligation under article 58 FinSA.

8. ADVERTISING

8.1 Requirements for Advertising of Financial Instruments
(Art. 68 FinSA / Art. 95 FinSO)

128 **Does advertisement of structured products have to include a statement that it is advertising?**

129 Yes, pursuant to Art. 8 para. 6 FinSA and Art. 68 para. 1 FinSA, advertising of financial instruments and financial services within the meaning of Art. 95 para. 1 FinSO must be labelled as such.

130 **In the advertising of financial instruments pursuant to Art. 68 para. 2 FinSA, must reference be made explicitly to the simplified prospectus used instead of a KID during the two-year transitional period?**

131 Yes, but it is sufficient to refer to the "Key Information Document" in generic terms. Even if a simplified prospectus or a PRIIPs KID is prepared and made available instead of a KID, it is not required to specifically refer to the document as a "simplified prospectus" or a "PRIIPs KID"; the aforementioned generic reference is sufficient.

132 **Does an offer also qualify as advertising and can KIDs or prospectuses also qualify as advertising within the meaning of Art. 68 FinSA or Art. 95 FinSO?**

133 No, an offer or the provision of legally required documents such as the KID and the prospectus do not constitute advertisement.

134 The publication and making available of documents prepared on a voluntary basis may be qualified as advertisement.

9. LABELLING OBLIGATION

9.1 Is there a general labelling obligation under the FinSA regime?

135 No, neither the FinSA nor the FinSO stipulates a general labelling obligation for structured products. The provision in the draft FinSO which provided for a general labelling obligation was deleted from the final version of FinSO.

136 However, according to Annex 3 of the FinSO, in case of a prospectus for derivatives (structured products), a "prominently placed bold highlighted text" must be inserted

on the front page of the prospectus stating that the securities are not a collective investment scheme and are not subject to authorisation by the FINMA and entail an issuer risk.

10. TRANSITIONAL PROVISIONS UNDER FINSO

10.1 Prospectus Requirement during the transitional period
(Art. 109 FinSO)

137 **Is it necessary to prepare a prospectus for structured products during the transitional period in accordance with the Swiss Code of Obligations?**

138 No, pursuant to Art. 109 FinSO, the obligation to publish a prospectus for a public offering of securities or their admission to trading on a trading venue only applies after six months from the approval of a Reviewing Body by FINMA. Until then, the provisions of the Swiss Code of Obligations ("CO") apply, namely Art. 652a and Art. 1156 CO. However, this does not mean that these provisions of the CO will apply to structured products during this period. Despite the deletion of the Art. 5 para. 4 CISA, no prospectus must be prepared for structured products. This also results from Art. 111 para. 1 FinSO, which exhaustively governs the documentation of structured products during the transitional period.

139 The above also applies to leverage products. Therefore, no CO prospectus is required for such products either.

10.2 Art. 111 FinSO Simplified Prospectus during the Transitional Period

140 **Can both a simplified prospectus and a KID be prepared and made available for a structured product during the transitional period?**

141 No, during the transitional period only either a simplified prospectus or a KID may be prepared and made available. However, this does not apply to the PRIIPs KID. A PRIIPs KID may (on a voluntary basis) always be prepared and made available in addition to a simplified prospectus or a KID. It is sufficient during the transitional period in each case that one of the referenced documents (simplified prospectus, KID or PRIIPs KID) is prepared and made available.

142 **Must the simplified prospectus be published?**

143 If a simplified prospectus is prepared instead of a KID during the transitional period, it must be published in accordance with the provisions of FinSA. However, the obligation to publish only applies if the structured product is offered publicly. In case of a public offer, for example, the simplified prospectus must either be made available free of charge at the registered office of the issuer or offeror or published on the issuer's or offeror's website.

11. Liability

144 **Does the liability in Art. 69 FinSA relate not only to "FinSA prospectuses" and "KIDs" but also to listing prospectuses and simplified prospectuses (Art. 5 CISA) which are prepared during the transitional period instead of a FinSA prospectus or KID?**

145 Yes, if a listing prospectus for an admission to trading was prepared on the basis of Art. 109 FinSO instead of a prospectus in accordance with FinSA, the prospectus liability pursuant to Art. 69 FinSA also applies to the listing prospectus. The same applies with regard to a simplified prospectus, which was prepared and published on the basis of Art. 111 FinSO instead of a KID. The prospectus liability under Art. 69 FinSA therefore also applies to the simplified prospectus.

146 Similarly, if a PRIIPs KID is used instead of a KID within the meaning of FinSA, the liability set out under Art. 69 FinSA applies to the PRIIPs KID.

12. Final Provisions

12.1 Transitional Provisions
(Art. 95 FinSA)

147 **How must the transitional provision pursuant to Art. 95 para. 4 FinSA be understood?**

148 Prospectus requirement: 2-year transitional period for (first) public offering of securities before 1 January 2020 (entry into force of FinSA): a prospectus in accordance with FinSA must be prepared if the offer was made before 1 January 2020 and the product is publicly offered after 31 December 2021.

149 Public offers of securities on or after 1 January 2020, are subject to the transitional provisions for the prospectus requirement pursuant to Art. 109 FinSO.

150 KID requirement: 2-year transitional period for (first-time) offer of financial instruments before 1 January 2020 (entry into force of FinSA): a KID within the meaning of FinSA must be prepared if the offer was made before 1 January 2020 and the product is publicly offered after 31 December 2021.

151 Offers of financial instruments on or after 1 January 2020, are subject to the transitional provisions for the KID pursuant to Art. 111 FinSO.