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Impact of the proposed Swiss Financial Services Act on the Swiss Insurance Supervision Act

In the not-too-distant future, the Swiss financial market is to be regulated by two additional laws: the Financial Services Act (**FinSA**) and the Financial Institutions Act (**FinIA**). Their aim is to streamline the cross-sector regulation of financial services, instruments and institutions, as well as to improve customer protection. Amongst the existing regulations that will be affected by the new laws is the Swiss Insurance Supervision Act (**ISA**), in particular its provisions on distribution of insurance products. Given its already implemented customer protection rules, the insurance industry is however not facing critical changes in this respect. Nevertheless, insurers and insurance intermediaries alike need to be aware of the proposed regulatory changes and to consider them in the context of their organisation.

The draft FinSA and FinIA have been adopted by the Federal Council together with the associated dispatch on 4 November 2015. They are expected to come into force in 2017 or 2018 at the earliest, following parliamentary debates to begin shortly. As a general rule, insurers and insurance intermediaries shall not fall within the scope of the FinSA or FinIA, their respective regulation still meant to be covered primarily by the ISA (and the Insurance Supervision Ordinance (**ISO**)). An exception applies to insurance-based investment products which shall be also within the scope of the FinSA. Furthermore, the future amended ISA and ISO shall comprise references to the FinSA, thereby making certain provisions of this new law applicable, albeit indirectly, to insurers and insurance intermediaries.

This newsletter sets out the main proposed changes to the ISA that would result from the implementation, in particular, of the draft FinSA (points 1 to 6 below), and furthermore outlines the differing regulation of insurance-based investment products thereunder (point 7 below):

1. REPLACEMENT OF THE REGISTER OF INSURANCE INTERMEDIARIES

The current register of insurance intermediaries shall be replaced by a general register of “customer advisors” pursuant to art. 30 to 36 FinSA, in which customer advisors of Swiss or foreign financial services providers that are not subject to prudential supervision in Switzerland will need to be registered. The ISA shall refer to these provisions of the FinSA and thus require that untied insurance intermediaries continue to be listed in a register (art. 42 ISA).

The registration requirements shall be broadly the same as for the current register of insurance intermediaries (see however the affiliation duty with an ombudsman office under point 6 below). Tied insurance intermediaries, i.e. agents acting in the interest of an insurer, would still not fall under the registration duty. This is justified by the fact that the insurance companies themselves are subject to supervision and shall ensure that their intermediaries have the necessary basic training and continued professional development for the provision of their services.

2. BASIC TRAINING AND CONTINUED PROFESSIONAL DEVELOPMENT

In line with the new training requirements for customer advisors under art. 6 FinSA, insurance intermediaries shall be required to have sufficient knowledge of the rules of conduct as set out in the ISA (cf. point 4 below) and dispose of the required expertise for their activity (art. 43 ISA). The purpose of this rule is to guarantee a minimum standard of know-how of the insurance intermediaries. Requirements for regular continued professional development shall furthermore apply.

The insurance companies shall as mentioned be responsible for ensuring that their (tied) intermediaries have the required know-how and, in particular, that they comply with the relevant minimum standards of the insurance industry (art. 44 ISA).

3. DUTY OF CARE AND DILIGENCE

The duty of care and diligence of insurance intermediaries - basically already applicable under the current civil law rules - shall become an explicitly stipulated regulatory rule. Consequently, the ISA shall spell out the obligation of insurance intermediaries to always act in the best interests of the insured and with the required level of skill, care and diligence. Furthermore, intermediaries shall need to ensure compliance with the provisions of the ISA, which will require the development and maintenance of an appropriate company organisation (art. 45b ISA and art. 8 FinSA).

4. RULES OF CONDUCT

The insurance intermediaries shall have to comply with the following rules of conduct that would be introduced based on the requirements as to appropriateness and suitability set out in art. 11 et seq. FinSA: prior to concluding an insurance contract, insurance intermediaries shall have to determine the objectives and needs of the insured and to assess the appropriateness of a product prior to issuing any recommendation; if an insurance contract is concluded at the insured’s request or if the information received do not suffice to assess the appropriateness of an insurance product, the insurance intermediaries shall inform the insured that the appropriateness test will not be performed; if insurance intermediaries are of the opinion that insurance policies are not appropriate for the insured, they shall advise them against taking out these policies. In any event, the existing duty of information of insurance intermediaries shall continue to apply and shall be broadened so as to reflect the corresponding duty of information rules under the FinSA (art. 45 ISA and art. 9 FinSA).

5. THIRD-PARTY COMPENSATION RULES

The disclosure of third-party compensation was so far not expressly regulated by statutory provisions, but this was bound to change following the landmark federal court decision of 2012. In line with art. 28 FinSA, art. 45d ISA shall stipulate a transparency rule pursuant to which untied insurance intermediaries may only accept compensation from third parties in connection with the provision of their service, if they: a) have expressly informed the insured of such compensation in advance, or b) pass the entire compensation on to the insured. This would not apply to tied intermediaries, who do not have a fiduciary duty to the insured, hence are not obliged to prioritise their interests.

Compensation shall be defined as a payment from third parties in connection with the provision of a service, such as brokerage fees, commissions, discounts or other financial benefits (art. 45d para. 3 ISA). The information provided to the insured would need to include the type and scope of compensation and be disclosed prior to the provision of the service or conclusion of the insurance contract. If the compensation amount cannot be determined in advance, the insured would have to be informed of the calculation parameters and range of remuneration.

6. OMBUDSMAN OFFICE

Consistent with the FinSA, art. 82 ISA would introduce a mandatory ombudsman-system pursuant to which all insurance companies and untied intermediaries shall be required to become affiliated with an ombudsman office. Whereas most Swiss insurance companies already fulfil this requirement on a voluntary basis, the insurance intermediaries would largely need to adjust to this new rule.

For the particulars of the ombudsman office, the ISA shall refer to section 5 of the FinSA (art. 77 to 89). In essence, the proceeding before the ombudsman would have to be free of charge (or at least at very low costs), straightforward ("non-bureaucratic, fair, fast and impartial") and confidential. The ombudsman offices would need to be recognised by the Federal Department of Finance and disclose their activity report on a yearly basis. The affiliated institutions shall pay a financial contribution to be defined by the ombudsman offices' contribution and fee rules.

It is noted, however, that the ombudsman shall have no decision-making powers.

7. DIFFERING REGULATION OF INSURANCE-BASED INVESTMENT PRODUCTS

Generally speaking, the offering of insurance products shall be outside the scope of the FinSA. Redeemable life insurance policies, however, whose savings portion is linked to the performance of financial instruments, assets or indices (i.e. where the investment risk is borne by the customer), shall be considered as "financial products" pursuant to art. 3 let. b FinSA, thus bringing the concerned insurers and insurance intermediaries within the scope of the FinSA with respect to these products.

As a consequence, insurers would need to prepare a (new) key information document according to art. 60 et seq. FinSA. Where the redeemable life insurance policy encompasses a further financial instrument, the key information document shall cover the financial instrument as a whole (art. 62 para. 1 FinSA). In the case of a unit-linked life insurance for instance, the document would need to take into account the elements of both the life insurance and the investment fund. To avoid duplications, the insurer's (already existing) pre-contractual duty of information under the current Insurance Contract Act shall be deemed fulfilled with the delivery of the key information document pursuant to the FinSA.

With respect to insurance-based investment products, insurers as well as insurance intermediaries that qualify as a financial services provider pursuant to art. 3 let. e FinSA would furthermore need to comply with the rules of conduct and organisation as set out in the FinSA. Nevertheless, insurance intermediaries shall continue to not be subject to prudential supervision, be it under the ISA or, as customer advisors or financial services providers, under the FinSA.

CONCLUSION

If implemented as proposed, the enhanced customer protection rules as set out in the draft FinSA will lead to some adjustments of the regulation of distribution of insurance products under the ISA. On the whole, however, the new law will not result in a change of regime for the insurance industry. Most of the "new" rules exist today already in a similar form or, if not yet expressly stipulated in the ISA, are followed based on principles of civil law or good business practice.

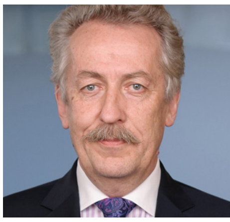
The ISA shall remain the relevant statute for the regulation of insurers and insurance intermediaries, and in a few specific cases only would insurance market participants and products fall directly under the scope of application of the FinSA (i.e. with respect to insurance-based investments) or would this new law be applicable to them indirectly (i.e. where the ISA expressly refers to the FinSA).

Nevertheless, a few adjustments shall be needed, as for instance in respect of the compliance by insurance intermediaries with the new rules of conduct and/or the basic training and continued professional development conditions. For this last point therefore a transitional period - as one may be granted by the Federal Council - could be welcome. As to the insurers, they will need to take into consideration in their organisation the fact that insurance intermediaries are subject to amended distribution rules.

CONTACT

The content of this newsletter is for information purposes only and does not constitute a legal advice or opinion. Should you require specific advice in this matter, please get in touch with your usual contact at Altenburger Ltd legal + tax or with the authors.

Melissa Gautschi
Partner, Zurich
gautschi@altenburger.ch
Seestrasse 39
8700 Küsnacht-Zürich



Leonard Toenz
Partner, Zurich
toenz@altenburger.ch
Seestrasse 39
8700 Küsnacht-Zürich

Sophie Winkler
Associate, Zurich
winkler@altenburger.ch
Seestrasse 39
8700 Küsnacht-Zürich

Karin Furrer
Associate, Zurich
furrer@altenburger.ch
Seestrasse 39
8700 Küsnacht-Zürich