

Third country rules under the new Swiss Financial Services Act ("FIDLEG")

1. Introduction

The Swiss Federal Council has opened the consultation period for the new Financial Services Act (commonly known as „FIDLEG“) and the new Financial Institute Act (commonly known as „FINIG“) at the end of June 2014. The consultation period will end on October 17, 2014 and the final version of FIDLEG is planned to enter into force in 2017. FIDLEG is the Swiss regulator's response to MiFID II. It copies to a large extent the rules foreseen in MiFID II although adding a Swiss finish. FIDLEG will change the business and regulatory landscape of the Swiss financial industry. There are many crucial topics and amendments to the current practice and legislation. One of the most interesting and important aspects for foreign Financial Services Providers¹ being active on Swiss soil is the fact that for the first time Switzerland has proposed third country rules applicable to foreign Financial Services Providers exporting Financial Services² into Switzerland. This memorandum will give a short overview about these proposed new third country rules and the related obligations and duties.

2. Main idea of the third country rules under FIDLEG

Swiss customers of foreign Financial Services Providers shall be protected to the same extent as if they were to receive the same Financial Services from a Swiss Financial Services Provider. The third country rules as foreseen in the FIDLEG shall apply whenever a Financial Services Provider domiciled abroad provides Financial Services to a customer domiciled in Switzerland without reaching the threshold of a license according to applicable Swiss financial market laws. Any foreign Financial Services Provider falling within the scope of FIDLEG must comply with the same behavioral rules like Swiss Financial Services Providers and has to register with a newly to be established register for foreign Financial Services Providers.

¹ According to art. 3 lit. e FIDLEG any person that provides Financial Services in Switzerland or for customers domiciled in Switzerland on a professional basis.

² According to art. 3 lit. d FIDLEG the following activities rendered for customers: (1.) purchase or sale of Financial Instruments, (2.) acceptance and transfer of orders related to Financial Instruments, (3.) administration of assets (asset management), (4.) giving personal recommendation related to the business with Financial Instruments (advisory), (5.) taking assets in custody on behalf of customers, (6.) keeping accounts, (7.) financing transactions related to Financial instruments.

According to art. 3 lit. b FIDLEG are Financial Instruments (1) equity securities: - securities in the form of shares including securities equivalent to shares allowing for participation and voting rights, such as non-voting shares and profit-sharing rights, – securities that on the occasion of the conversion and/or execution of the rights embedded in them allow for the purchase of equity securities, as set forth above, of the same issuer of the same group, (2) debt securities; securities that are not equity securities, (3) units in collective investment schemes according art. 7 Swiss Collective Investment Schemes Act, (4) structured products, in particular capital protected products, products with a cap, and certificates, (5) derivatives in the sense of art. 2 lit. b Swiss Financial Markets Infrastructure Act, (6) redeemable life insurance policies, (7) contributions whose redemption value or interest rate is linked to the risk embedded or the quote.

3. Executive Summary

FIDLEG foresees for the first time cross-border regulations for the import of Financial Services from foreign Financial Services Providers into Switzerland. The new third country rules under the FIDLEG are applicable to any foreign Financial Services Provider rendering Financial Services to Swiss domiciled customers. Any such cross-border provision of Financial Services by foreign Financial Services Providers will trigger a duty to register the foreign Financial Services Provider in the register for foreign Financial Services Providers, unless the foreign Financial Services Provider is in Switzerland already licensed and/or the provision of the Financial Services has been requested exclusively by the Swiss domiciled customer (“reverse solicitation principle”). The relevant Relationship Managers employed by the foreign Financial Services Provider must also be entered into the new register for Relationship Managers. The registered Relationship Managers will have to comply with FIDLEG’s behavioral rules, rules regarding assessment of suitability and appropriateness, and documentation and accountability as well as the other applicable behavioral rules under the applicable Swiss financial market legislation. There is also a duty to have sufficient expertise in the area of activity and to engage in continuing education. Both registers are public, but information about entries can only be requested based on individual requests.

4. Duty to register in the new register for Financial Services Providers

Any foreign Financial Services Provider intending to engage in activities for which a Financial Services Provider domiciled in Switzerland requires a license, has to be registered prior to any such engagement in the register for foreign Financial Services Providers according to art. 36 FIDLEG. There is no duty to register if the foreign Financial Services Provider provides Financial Services in Switzerland upon the sole and exclusive solicitation of Swiss domiciled customers. As outlined above, there is no duty to register if the activities of a foreign Financial Services Provider reach the threshold of a license under applicable Swiss regulatory laws. The register for foreign Financial Services Providers is public and information can be requested by means of individual requests.

Any foreign Financial Services Provider must meet according to art. 35 FIDLEG the following requirements to be met cumulatively in order to be entered into the register:

- A license issued by the supervisory authority that is equivalent to FINMA of the country of domicile or the country where the main office of the foreign Financial Services Provider is located permitting the performance of the activity that is subject to a license in Switzerland;
- Professional liability insurance or similar financial security;
- Written confirmation addressed to FINMA to inform comprehensively about the business activities in Switzerland and the business relationships entertained in Switzerland; and
- A memorandum of understanding concluded between FINMA and the relevant foreign supervisory authority about their mutual collaboration and information exchange.

The registration does not trigger a permanent supervision by a Swiss supervisory authority, but should allow for an overview which foreign Financial Services Providers are active on the Swiss financial market. Foreign Financial Services Providers may not render any services to Swiss customers any more if they either breach materially the behavioral rules applicable to it according to FIDLEG or the requirements for registration are no longer met. Any such foreign Financial Services Provider will be deregistered by FINMA. The forced deregistration is a means of ultima ratio. FINMA may not apply any additional measures.

³ According to art. 3 lit. f FIDLEG natural persons rendering Financial Services in the name of a Financial Services Provider or on their own behalf as Financial Services Provider.

5. Relationship Managers of foreign Financial Services Providers

a. Duty to register the relevant Relationship Managers of the foreign Financial Services Provider in the new register for Relationship Managers

The relevant Relationship Manager³ being employed by the foreign Financial Services Provider and being in contact with Swiss customers must according to Art. 29 FIDLEG be registered in the newly to be established register for Relationship Managers. This registration duty applies to all Relationship Managers active in Switzerland no matter whether they are domiciled and/ or located in Switzerland or abroad.

Relationship Managers have to provide the following evidence to be entered into the new register for Relationship Managers:

- Professional liability insurance or similar financial security;
- Participation in an ombudsman-organization;
- No existing entry in criminal records; and
- No occupational ban or activity ban according to applicable financial markets regulations.

Any Relationship Manager entered into the new register for Relationship Managers will be deregistered if the above mentioned requirements are no longer met. The register for Relationship Managers is public, but will not be published to ensure the protection of data related to the Relationship Manager affected. Any interested party has however the right to investigate whether his/her Relationship Manager is registered based on an individual request.

b. Duty to have sufficient knowledge and to engage in continuing education

Any Relationship Manager must according to Art. 28 FIDLEG have sufficient knowledge about the behavioral rules according to FIDLEG and sufficient expertise about the financial products they advise on. Any Relationship Manager has to comply with the behavioral rules according to FIDLEG consisting in particular of (i) the information obligations according to art. 7 et seq. FIDLEG, (ii) the assessment of suitability and appropriateness according to art. 10 et seq. FIDLEG, and (iii) the obligations related to documentation and accountability according to art. 15 et seq. FIDLEG, in addition to the knowledge of any industry specific behavioral rules related to Swiss financial market laws. The Relationship Managers must also have sufficient expertise to advise in his area of specialization (e.g. a Relationship Manager recommending the purchase of collective investment schemes must have sufficient expertise in the area of collective investment schemes). Art. 29 FIDLEG also requires the Relationship Manager to be engaged in continuing education on an on-going basis.

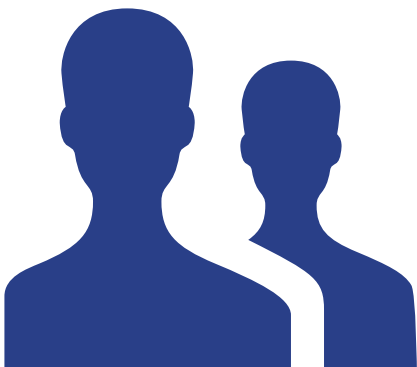
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