

Update on the Key Information Document Requirement

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In CapLaw-2016-5, Enrico Friz outlined in detail the new duty of manufacturers of financial instruments to produce a key information document (KID, *Basisinformationsblatt*) for all financial instruments. This duty shall be implemented by the Financial Services Act (FinSA) which will likely be set into force during the course of 2018 and is currently being debated in the Swiss Parliament. The Council of States has, with rather minor amendments, approved the draft FinSA produced by the Federal Council in December 2016. The National Council will discuss the FinSA in one of its upcoming sessions. This contribution summarizes the changes to the FinSA in respect to the KID proposed by the Council of States compared to the Federal Council's draft FinSA outlined in CapLaw-2016-5.

By Thomas Müller (*Reference: CapLaw-2017-04*)

1) Partially revised Framework

Generally speaking, but with some important exception, the Council of States has not amended the duty to produce a KID and the content of the KID. A KID will have to be produced for all types of financial instruments offered to retail clients. Given that insurance companies shall now be excluded from the scope of the FinSA, the definition of financial instruments has been partly revised. Redeemable life insurance policies with price-dependent benefits and settlement values as well as capital redemption operations and tontines are no longer deemed as financial instruments under the FinSA.

Accordingly, no KID will have to be produced for life insurance policies. In addition, the Swiss Council of States has amended the list of financial products exempt from the KID requirement. Under the previous draft FinSA, no KID would be required for the offering of equity instruments, such as shares, participation certificates and dividend rights certificates. The new draft FinSA now also excludes debt instruments without derivative elements from the requirement to produce a KID. The amendment of the exemption list will considerably limit the application of the KID.

According to article 10 (2) FinSA, the financial service provider shall make the KID available to its retail clients free of charge prior to subscription or conclusion of the contract. The Council of States, however, proposed an easement in this respect. Specifically, in the event the client is requesting advice from the financial service provider via telephone or electronic means (*i.e.*, not in a physical meeting), the financial service provider may forward the KID to the client only following the conclusion of the contract. The financial service provider shall record the consent of the client to this subsequent delivery of the KID. Furthermore, the Council of States proposed the deletion of the duty to provide the client with the KID for the underlying of the financial instrument, but clarifies that the KID (and other information) may be delivered to the client in a standardized form either physically or electronically.

Under the prospectus liability provision of article 72 FinSA, any person involved will be liable to the acquirer of a financial instrument for losses resulting from inaccurate or misleading information or from information which was given or spread in violation of statutory requirements in a prospectus or a KID. Defendants will be liable unless they are able to prove that they were not at fault. It has been expected that the Council of States would revise this reversal of the burden of proof while considering the current prospectus liability under Swiss law. According to today's provisions, claimants would have to prove that a person who has prepared the prospectus or has participated in such production or the distribution of the prospectus was acting wilfully or negligently. The Council of States, however, followed the Federal Council's proposal and has not amended article 72 FinSA. Thus, it would be preferable if the National Council were to correct this extremely comprehensive prospectus liability provision.

On the other hand, the Council of States wanted to exclude financial intermediaries and its employees who are

supervised by the Swiss Financial Market Supervisory Authority FINMA from criminal sanctions for the provision of false information or withholding of material facts in the prospectus or the KID, the failure to publish a prospectus or a KID in a public offering or the willful failure to make a prospectus or a KID available prior to the subscription of conclusion of a contract. The Council of States argued that criminal sanctions in addition to the already existing potential administrative measures (and civil law liability) would not be required. This approach is pragmatic as administrative measures may usually be imposed in parallel to criminal sanctions.

2) Conclusion

The project of a new unified legal framework for financial service providers and their services by implementation of the FinSA and the related Financial Institutions Act (FinIA) made great progress by the approval of both acts by the Council of States while proposing marginal changes to the Federal Council's drafts only. The duty of manufacturers of financial instruments to produce a KID and the required content of such KID has not been revised by the Council of States. The approval of the Council of States gives reason to hope that both drafts of the FinSA and the FinIA will be passed by the National Council in the near future as well.

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